Issue: Group III Written Notice with Suspension (falsifying records); Hearing Date: 10/24/13; Decision Issued: 10/28/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10187; Outcome: Partial Relief; **Judicial Review: Appealed to Chesapeake Circuit Court; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10187

Hearing Date: October 24, 2013
Decision Issued: October 28, 2013

PROCEDURAL HISTORY

On June 7, 2013, Grievant was issued a Group III Written Notice of disciplinary action with a five workday suspension for falsifying records.

On July 1, 2013, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On October 2, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 24, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employs Grievant as a Plumber/Steamfitter Supervisor at one of its facilities. He has been employed by the Agency for approximately ten years. The purpose of his position is:

> Serves as general Plumber Foreman, performing repairs and general preventative maintenance of all piping systems, plumbing fixtures and related systems. Supervises inmate work crew(s) assigned as plumber's helpers.[1]

No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was scheduled to work five days per week from 7:30 a.m. until 4 p.m. with a 30 hour lunch break.

Grievant worked in a Building outside of the secured perimeter. Grievant had a desk and computer located inside the Building. He would often check his computer in the morning to identify work orders and prioritize his work. The Agency had a key storage unit located outside of the Building. In order to obtain keys to enter locked doors at the Facility, Grievant had to enter his unique identification and passcode into the unit. An electronic record was created showing the date and time Grievant removed

[1] Agency Exhibit 3.

and returned his keys. Grievant's practice was to obtain his keys prior to beginning his shift which was scheduled to begin at 7:30 a.m. Sometimes Grievant would begin working several minutes before 7:30 a.m.

Grievant was prohibited from working more than 40 hours per week because he was a nonexempt employee under the Fair Labor Standards Act. The Agency expected Grievant to report his time worked on a weekly time sheet.

On February 22, 2013, Grievant was expected to work from 7:30 a.m. until 4 p.m. He obtained his keys at 7:13 a.m., 17 minutes before his shift began. At 3:09 p.m., he returned his keys and got into his truck. He drove from the behind the Facility to the front parking lot and onto the public road. He left the Agency's workplace at approximately 3:15 p.m., 45 minutes before the end of his shift.

Grievant accessed his computer and opened a pre-printed electronic form called "FLSA Work Period Time Sheet." He entered the date of February 20, 2013 as the beginning of his work week. The electronic form printed the date of February 26, 2013 to show the end of his work week. It is unclear whether Grievant accessed the timesheet every day to record his time for that day or if he accessed it after several days or at the end of the week. Grievant's practice varied. For February 20, 2013, February 21, 2013, February 22, 2013, February 25, 2013, and February 26, 2013, Grievant wrote that he was "In" at 7:30 a.m., "Out" at 11:30 a.m., "In" at 12:00 p.m., and "Out" 4:00 p.m.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."[2] Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."[3] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[4]

"[F]alsification of records, including but not limited to all work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports, insurance claims, time records, leave records, or other official state documents" is a Group III offense.[5] Falsification is not defined by the

[2] Virginia Department of Corrections Operating Procedure 135.1(V)(B).

[3] Virginia Department of Corrections Operating Procedure 135.1(V)(C).

[4] Virginia Department of Corrections Operating Procedure 135.1(V)(D).

[5] See, DOC Operating Procedure 135.1(V)(D)(2)(b).

Standards of Conduct but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

> Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

> to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice.*

To establish a Group III offense for falsification, the Agency must show (1) Grievant failed to record his time accurately and (2) Grievant knew or should have known on March 1, 2013 that he was reporting his time inaccurately.

Grievant denied leaving the workplace early on February 22, 2013 and denied being the owner of the vehicle identified by the Agency as the one on a public road next to the Facility at approximately 3:15 p.m. on February 22, 2013. The Agency has presented sufficient evidence to show that Grievant left the Facility early on February 22, 2013. Grievant returned his keys at 3:09 p.m. The Agency showed that once Grievant returned his keys, he was no longer able to pass through locked doors at the Facility. The Agency showed that Grievant typically retuned his keys at the end of his shift. The truck depicted in the picture taken from the Agency's video recording system was consistent with Grievant's truck. The Supervisor viewed the video recording system from 3 p.m. until 4:10 p.m. but did not observe any other vehicle similar to the one leaving at 3:15 p.m. It is reasonable to conclude that Grievant departed the Building at approximately 3:09 p.m. and departed the Facility grounds at approximately 3:15 p.m.

The Agency has presented sufficient evidence to show that Grievant made an error when reporting the amount of hours he worked on February 22, 2013. Grievant obtained his keys at 7:13 a.m. and left work at 3:15 p.m. This means Grievant worked approximately a half hour to 45 minutes less than the 8 hours he reported working.[6]

The Agency did not establish that on March 1, 2013, Grievant knew that he was falsifying his timesheet when he wrote that he was "Out" at 4 p.m. Grievant consistently

[6] The Hearing Officer is assuming Grievant did not work through his lunch break of 30 minutes. No evidence was presented regarding how long Grievant took for lunch on February 22, 2013. If he began working at 7:13 a.m. and worked through lunch on February 22, 2013, it is possible he worked nearly 8 hours on February 22, 2013.

denied that he left early. He did not make any statements to the Agency acknowledging that he knew he falsely reported his time on the timesheet.

The Agency has not established that Grievant should have known that the timesheet he completed was false. It is difficult for the Hearing Officer to believe that Grievant waited until precisely 7:30 a.m. to begin his work duties every day; that he took his lunch at precisely 11:30 a.m. each day; and that he ended his shift at precisely 4 p.m. each day. The times Grievant reported on his time sheet reflected his best estimate of when he began and ended his shift. It is likely Grievant had been following this practice for a lengthy period of time with his Supervisor's knowledge. One of the functions of the timesheet was to verify that Grievant did not work overtime hours. The Agency did not have a time clock or other method of recording the precise time its employees worked. The timesheet best represents Grievant's assertion that he worked approximately 8 hours per day and approximately 40 hours per week. Grievant left work approximately 45 minutes early on February 22, 2013. Forty-five minutes is not such a lengthy period of time[7] that Grievant must have known he worked fewer than eight hours. This is especially true given that Grievant obtained his keys 17 minutes prior to the beginning of his shift and may have begun working early on February 22, 2013.

Although the Agency has not presented sufficient evidence to support the issuance of a Group III Written Notice for falsification of records, the Agency has presented sufficient evidence to support the issuance of a Group I offense for inadequate or unsatisfactory job performance. The Group I offense is a lesser included offense of the Group III offense.[8]

"[I]nadequate or unsatisfactory job performance" is a Group I offense.[9] In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was expected to work eight hours in a day. On February 22, 2013, Grievant failed to work his complete shift. He failed to accurately report his hours worked on February 22, 2013. Grievant's work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

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[7] For example, an employee who begins working an eight hour shift at 7:30 a.m. but leaves work at 8:30 a.m. should realize that he or she did not complete an eight hour shift. It would be unlikely that the employee simply "lost track of time."

[8] The Supervisor testified that he could have initiated disciplinary action against Grievant for both falsification of records and leaving the workplace without permission. He elected not to refer Grievant to the Warden for leaving the workplace without permission. Accordingly, the Hearing Officer will not consider whether Grievant should be disciplined for leaving the workplace without permission.

[9] Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management …."[10] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[11] (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[12]

Grievant engaged in protected activity when he filed a grievance on April 18, 2012 to address his concerns about the Supervisor's actions. Grievant suffered an adverse employment action because he received disciplinary action. Grievant has not established a causal link between his protected activity and the adverse employment action. The decision to issue a Group III Written Notice was made by the Warden. The Warden began working at the Facility in May 2013 after the grievance was filed and was not aware of the grievance at the time he issued the Group III Written Notice. The Agency has not taken disciplinary action against Grievant as a pretext for retaliation.

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[10] Va. Code § 2.2-3005.

[11] See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[12] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is reduced to a Group I Written Notice. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

   Office of Employment Dispute Resolution
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

   or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-

calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[13]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

[13] Agencies must request and receive prior approval from EDR before filing a notice of appeal.