

Issue: Group III Written Notice with suspension (falsifying records and working after hours without authorization); Hearing Date: 09/15/14; Decision Issued: 09/22/14; Agency: VEC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10416; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10416

Hearing Date: September 15, 2014

Decision Issued: September 22, 2014

PROCEDURAL HISTORY

On April 21, 2014, Grievant was issued a Group III Written Notice of disciplinary action with a fifteen workday suspension for falsification of records and for working without authorization after work hours.

On May 30, 2014, 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 she requested a hearing. On July 28, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 15, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Counsel
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 Virginia Employment Commission employs Grievant as a Hearings Officer at one of its locations. She has been employed by the Agency for approximately 22 years. Grievant is a non-exempt employee meaning that she is subject to the overtime provisions under the Fair Labor Standards Act. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency assigns claims to be adjudicated by Hearings Officers on a rotating basis. The Agency uses scheduling software to track the status of pending claims. Hearings Officers are expected to resolve claims within 21 days. Once a Hearings Officer resolves a claim, the Hearings Officer "closes" the case in the Agency's computer system. Agency managers report the information in the Agency's scheduling software to the U.S. Department of Labor which monitors the Agency's performance.

Grievant had been instructed not to work outside of the Agency's regular business hours without approval from her supervisor. Her regular work hours ended at 5 p.m. but she had been authorized to work over time until 6 p.m. on March 26, 2014.

Grievant's Supervisor had been sending Grievant emails informing her that she was behind in her case load and that she had the highest backlog of any Hearings Officer.

On March 26, 2014, Grievant left the office at approximately 5 p.m. to attend to a matter of personal interest. She returned to the office at 10 p.m. and worked until

midnight. She had not been authorized to work during that time period and for additional overtime that day. Grievant worked on one of her assigned claims and then decided to close several of her case files. She closed 69 claims assigned to her for adjudication even though she was not in a position to issue a determination on any of the claims. In other words, Grievant closed files that remained open with respect to the work she needed to perform. Grievant's objective was to make the scheduling software appear as though her back log was smaller by 69 cases so that the Supervisor would stop "bullying" her about having a large backlog of cases.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."¹ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[F]alsification of records" is a Group III offense.² Falsification is not defined by the 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*.

The Agency's scheduling software contained electronic records showing the number of cases assigned to a particular Hearings Officer and whether those cases had been closed and resolved. Grievant knew that the Agency expected a claim to be "closed" only after a decision had been issued specifying an outcome for the claim. On March 26, 2014, Grievant closed 69 claims without having first issue decisions to resolve the claims. Those claims remained active even though Grievant made the

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

claims appear in the scheduling software as if she had issued decisions resolving the claims. Her objective was to falsely portray her case backlog in order to mislead the Supervisor into thinking her work backlog was smaller than it had been in the past. Her objective was to stop him from “bullying” her about her unresolved cases. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying records. Upon the issuance of a Group III Written Notice, an agency may remove and employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that she did not intend to falsify any records. She asserted that she did “something internally” to make her Supervisor feel more comfortable and enable her to finish her caseload. The Agency, however, presented sufficient evidence to show that Grievant altered 69 of the Agency’s records to falsely report that the claims were closed when in fact they remained open. Grievant’s objective was to mislead her supervisor.

DHRM Policy 1.25 governs Hours of Work. This policy provides:

A non-exempt employee under the Fair Labor Standards Act may work overtime hours only as authorized in advance by his or her supervisor or manager.

Overtime hours normally shall not be authorized except where required by exceptional circumstances of an emergency or temporary nature.

Failure to follow policy is a Group II offense.³ On March 26, 2014, Grievant worked from 10 p.m. until midnight. She worked outside of the Agency’s regular business hours. Her additional hours worked were overtime hours for which she had not been authorized to work. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency elected to combine Grievant’s falsification of records and failure to comply with the Hours of Work policy into one disciplinary action.

Grievant argued that she returned to her office to turn off her computer which she believed she had left running. This task would not have taken two hours. By working an additional two hours on March 26, 2014, Grievant acted contrary to DHRM Policy 1.25 and contrary to the Agency’s expectations.

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”⁴ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any

³ See, Attachment A, DHRM Policy 1.60.

⁴ *Va. Code § 2.2-3005.*

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 the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with with a fifteen workday suspension is **upheld**.

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.⁵

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.