

Issue: Group III Written Notice with Termination (falsifying records, abusive language, coercive behavior); Hearing Date: 08/06/12; Decision: 08/22/12; Agency: ODU; AHO: Ternon Galloway Lee, Esq.; Case No. 9863; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 9863

Hearing Date: August 6, 2012

Decision Issued: August 22, 2012

SUMMARY OF DECISION

The Agency had found Grievant directed employees to falsify time reports; used abusive/obscene language; and used intimidating and coercive behavior toward employees that he supervised. The Agency then issued Grievant a Group III Written Notice and terminated his employment. The Hearing Officer has found Grievant directed his subordinates to falsify time reports and employed conduct that was coercive/intimidating toward employees he supervised. The Hearing Officer therefore upheld the Agency's issuance of a Group III Written Notice with termination.

HISTORY

On May 21, 2012, the Agency terminated Grievant for the reasons noted above. On June 18, 2012, Grievant filed a timely grievance to challenge the Agency's action. The Grievant was dissatisfied with the second resolution step outcome and on July 2, 2012, he requested a hearing. On July 18, 2012, the office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A pre-hearing conference ("PHC") was held on August 1, 2012, and subsequently a scheduling order was issued.

I scheduled the hearing for August 6, 2012, the first date available between the parties. Prior to commencing the hearing, the parties were given an opportunity to present matters of concern to the Hearing Officer. The Grievant represented that a necessary witness for his case was not able to attend the hearing. He then requested a continuance to which the Agency had no objection. The request was granted. I then admitted all exhibits offered at the hearing. Thus, those admitted were Hearing Officer's exhibits one through three and the Agency's exhibits one through three. Although provided the opportunity, Grievant offered no exhibits as evidence.

At the hearing both parties were given the opportunity to make opening and closing statements, to call witnesses disclosed pursuant to the scheduling order. Each party was also given the opportunity to cross-examine any witnesses presented by the opposing party. After Grievant presented his witnesses that were present, Grievant acknowledged he did not need testimony from his absent witness. He noted it would be duplicative. Grievant then withdrew his request for the continuance and I cancelled the

second day for the hearing. The parties also stipulated to the absent witness' testimony. That stipulation is set forth below in the "Findings of Fact."

Also during, the proceeding, the Grievant represented himself and the Agency was represented by its attorney advocate.

APPEARANCES

Attorney Advocate for Agency
Witnesses for the Agency (4 witnesses, including the Agency's representative)
Grievant (4 witnesses, including Grievant)

ISSUE

Was the termination warranted and appropriate under the circumstances?

BURDEN OF PROOF

In termination actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8.¹ 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 all the evidence presented and observing the demeanor of each witness, I make the following findings of fact:

1. The Agency employed Grievant in the housekeeping department for about 15 years. Prior to Grievant's termination he was a housekeeping supervisor. (Testimony of Agency Witness 3; A Exh. 2, p. 4).
2. Grievant had a history of borrowing money from some of the employees he supervised. (Testimony of Agency witnesses 1 and 2; Testimony of Grievant).
3. A student worked under Grievant's supervision for about two years during the 2010-2011 and 2011-2012 school years. The student was under the "work-study" program and she was in her freshmen and sophomore years at the Agency during the time

¹ The GPM in effect for this grievance is the one effective as of August 30, 2004. This is so because the Grievance was filed prior to July 1, 2012, the effective date of the most recent GPM.

she was supervised by Grievant. During this time, on several occasions, Grievant asked to borrow money from the student. Usually, Grievant asked to borrow \$20.00 at a time. Some telephone calls placed by Grievant to the student where Grievant asked to borrow money were made as late as 11:00 p.m. The student loaned Grievant the money because she either felt forced to do so or feared she would lose her job if she did not. Sometimes, Grievant would pick up the borrowed money from the student after 11:00 p.m. at night. (A Exh. 2, p. 9; Testimony of Agency Witness 1). Grievant paid the student back all the money he borrowed from her. (Testimony of Grievant).

4. Also, on several occasions when the student worked for Grievant, he permitted the student to leave work early under the condition that she misrepresent the time she had actually worked. Specifically, Grievant instructed the student to report her time as if she had worked her full shift. Further she was instructed to pay Grievant the compensation she had received for the hours she did not work, but was paid for. (Testimony of Agency Witness 1; A Exh. 2, p. 9).

5. Agency Witness 2 is a 10 year employee with the Agency. She and her family have been friends with Grievant for 20 years. (Testimony of Agency Witness 2).

6. On at least two separate occasions, Agency Witness 2 worked under the direct supervision of Grievant. During the first occasion, Grievant borrowed money from Agency Witness 2 and subsequently was informed by another employee of the Agency that Grievant's borrowing money from Agency Witness 2 bothered Agency Witness 2. (A Exh. 2, pp. 9-10) On the second occasion when Agency Witness 2 worked under the supervision of Grievant, Grievant began to ask Agency Witness 2 to loan him money again. (A Exh. 2, pp. 9-10).

7. Usually when Grievant asked to borrow money from Agency Witness 2 it was for increments of \$20.00, \$30.00, or \$50.00. (Testimony of Agency Witness 2).

8. Agency Witness 2 received several telephone calls from Grievant asking to borrow money as late as 11:00 p.m., midnight, and/or 1:00 a.m. (Testimony of Agency Witness 2).

9. Agency Witness 2 did loan Grievant money because she was afraid of losing her job and she likes to help people. (Testimony of Agency Witness 2). She has not been repaid all the money Grievant borrowed from her. (Testimonies of Grievant and Agency Witness 2; A Exh. 2, p. 10).

10. Also, sometimes when Agency Witness 2 was supervised by Grievant and she asked to leave early, Grievant would inform her she had to pay a fee to leave early. Grievant allowed Agency Witness 2 to leave early and told this witness to enter the time she had worked as if she had completed her entire shift. (Testimony of Agency Witness

2; A Exh. 2, p. 9).

11. Grievant's history of borrowing from his subordinates and instructing them to report more time than actually worked was revealed to management when the student worker (Agency Witness 1) voluntarily informed management that Grievant had demonstrated this conduct to her. An investigation ensued and uncovered Grievant's conduct had not been confined to the student employee, but to at least one other subordinate, Agency Witness 2. (A Exh. 2).

12. Management issued Grievant a Group III Written Notice with termination on May 22, 2012, for the conduct reported by agency witnesses 1 and 2.

13. Employees under Grievant's supervision report the time they work by entering it in the "Web Time Entry." The Web Time Entry is the computer based system used to track the time an employee works. Agency Witness 4 was Grievant's immediate supervisor. Agency Witness 4 was responsible for approving a worker's time that had been entered in the computer based system for payment. Grievant maintained timesheets on the amount of time an employee he supervised work. Grievant was responsible for validating with his immediate supervisor the time that the employees Grievant supervised reported for payment in the Web Time Entry. (Testimony of Agency Witness 4; A Exh. 2, pp. 8-9).

14. Grievant was described as a good worker by management. (Testimony of Agency Witness 3).

15. Grievant's human resource record indicates that in 2007 a temporary worker reported that Grievant informed this temporary worker that this temporary worker could leave early and mark down that she worked a full shift if she paid Grievant \$20.00. (A Exh. 2,p. 10).

16. Grievant's absent witness would have testified that she worked for Grievant from about spring 2011 to spring 2012. And during that time, to her knowledge Grievant has not required any employees under Grievant's supervision to report more time then they worked. (Stipulation of parties). Grievant's witnesses at the hearing testified that they had no knowledge of Grievant falsifying time sheets. (Testimony of Grievant's witnesses 1, 2, and 3).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900

et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.²

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

On May 22, 2012, Agency management issued Grievant a Group III Written Notice for the reasons previously noted here. At the beginning of the hearing, the Agency withdrew its allegation that Grievant used obscene or abusive language. Accordingly, I examine the evidence to determine if the Agency has met its burden in showing Grievant directed employees to falsify time reports and used intimidating and coercive behavior toward employees he supervised.

I. Analysis of Issue before the Hearing Officer

² Grievance Procedural Manual § 5.8

A. Was the discipline warranted or appropriate under the circumstances?

The evidence shows Grievant supervised Agency Witness 1 (a work-study student) and Agency Witness 2. At the hearing, Agency Witnesses 1 and 2 testified that Grievant asked to borrow money from them. Some requests were made during the late hours, between the hours of 11:00 p.m. to 1:00 a.m. Both witnesses reported fearing losing their jobs if they did not comply with the requests. The parties do not dispute that these witnesses loaned Grievant money. Neither do they dispute that Grievant failed to pay back Agency Witness 2 all the money he borrowed from her.

Both agency witnesses that Grievant borrowed funds from testified that they feared losing their jobs if they failed to loan Grievant money. The evidence demonstrates this fear was reasonable considering, as their supervisor, Grievant could fire them or influence management's decision to retain them as employees. Moreover, one of the employees subjected to Grievant's request for money was only a freshman/sophomore in college and still a teenager or barely out of her teenage years. The other employee had previously stated she was uncomfortable with Grievant requesting money from her. Yet, Grievant continued to ask her for money. What is more, Grievant made requests to borrow money on several occasions during late hours at night between 11:00 p.m. to 1:00 a.m. He further arrived at the residence of at least one of the employees late at night to pick up the loaned money. Considering this evidence, I find the Agency has met its burden and shown Grievant's behavior was intimidating/coercive toward the subordinates affected.

The evidence also reflects by Agency exhibit 2 and the testimony of Agency Witness 1 that on several occasions when Agency Witness 1 requested to leave early, Grievant permitted her to do so, but he instructed Agency Witness 1 to report her work hours as if she worked her entire shift. The evidence also shows that Grievant instructed this worker to give him the money she was paid for the hours she did not work but reported as working. Agency Witness 1 did as told. Similarly, Agency Witness 2 testified that there were times she requested to leave early and was told she had to pay a fee. The evidence also shows that when Agency Witness 2 was interviewed by the Agency about Grievant's conduct, Agency witness 2 stated that Grievant had allowed Agency Witness 2 to leave early on an occasion and told her to report she had worked the entire shift.

Grievant denies that he instructed subordinates to report more time than they actually worked. In support of his position, Grievant presented several witnesses – Grievant's Witnesses 1, 2, and 3 - who testified that they had no knowledge of Grievant falsifying time cards. The stipulation regarding the testimony of Grievant's absent witness also corroborated Grievant's denial of falsifying time sheets.

Of note, I had an opportunity to observe the witnesses who testified at the hearing and their demeanors. Further, I observe that the evidence shows Agency Witness 1 voluntarily reported to Agency management that Grievant had borrowed money from her and instructed her to report more time than worked. The evidence reflects that this witness followed Grievant's instructions in misrepresenting her hours even though it was wrong. The evidence also shows that Agency witness 2 was a friend of Grievant and Grievant has known this witness' family for 20 years. Yet she, too, reported Grievant had requested she misrepresent her hours worked.

Considering (i) Agency Witness 1 was aware that she had engaged in wrongdoing by misrepresenting the number of hours she worked and that even with that awareness she voluntarily reported it to Agency management and (ii) the long term friendship of Agency Witness 2 and Grievant, I give great weight to the above-mentioned testimonies of Agency Witnesses 1 and 2. I do not confer the same deference to the previously mentioned testimony of Grievant's witnesses as the evidence does not show they were in a position to know what instructions Grievant provided to Agency's witnesses 1 and 2 regarding reporting erroneous time.

I therefore find Grievant instructed subordinates to falsify the time they actually worked on several occasions. Grievant's conduct was unethical and dishonest. Moreover, it either did or had the potential of cheating the Agency employer. Further, Grievant's conduct may have caused the Agency to report erroneous information to the Social Security Administration/ the Internal Revenue Service regarding the earnings and paid taxes of the involved employees, including Grievant.

Accordingly, I find Grievant engaged in the conduct alleged, and the conduct was serious misconduct. The issuance of the Group III Written Notice with termination was therefore appropriate.

B. Was the discipline consistent with policy and law?

The Agency disciplined Grievant under the Standards of Conduct, Policy 1.60. Under the Standards of Conduct, Group III Offenses include conduct that is unethical and illegal. Conduct in this category includes acts of misconduct that are so severe that a first occurrence normally warrants a termination. In this case, Grievant's conduct was unethical and as noted above may have cheated the Agency out of money. Further, it demonstrated a pattern. In addition, employees Grievant supervised were so fearful of losing their jobs they loaned Grievant money when he asked to borrow it. Although Grievant paid one of the employees all her money back, he continues to be indebted to the other employee. Considering the above, I find the Agency's discipline was consistent with policy and law.

II. Mitigation.

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”³ EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”⁴ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁵

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

I have found that Grievant engaged in the behavior described in the Written Notice, that behavior constituted misconduct, and the Agency's discipline was consistent with law and policy.

Next, I consider whether the discipline exceeded reasonableness., I am cognizant of the fact that Grievant was employed with the agency for 15 years. Further, management has described Grievant as a good worker. Having considered this evidence and the agency's discipline. I find the discipline was reasonable.

DECISION

The Hearing Officer has considered all the evidence of record whether specifically mentioned or not here. For the reasons stated above, the Hearing Officer

³ Va. Code § 2.2-3005 and (c)(6)

⁴ *Rules for Conducting Grievance Hearings* VI(A)

⁵ *Rules for Conducting Grievance Hearings* VI(B)

finds the Agency has met its burden and shown that the termination was warranted and appropriate. Accordingly, the Agency's discipline is upheld.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This review is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision.

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decisions is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Request should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th floor Richmond, VA 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Office of Employment Dispute Resolution at the Department of Human Resource Management. This request must state the specific requirement of the grievance procedure that the decision is not in compliance. The authority of the Office of Employment Dispute Resolution is limited to ordering the hearing officer to revise the decisions so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute at the Department of Human Resources Management, 101 N. 14th Street, 12th floor Richmond, VA 23219 or faxed to (804) 786-1606, or emailed to EDR@dhrm.virginia.gov.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR at DHRM or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of final decisions, a party may appeal on the ground that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Directory before filing a notice of appeal.

Entered this 22nd day of August, 2012

Ternon Galloway Lee, Hearing Officer

cc: Agency Attorney Advocate
Grievant
Senior Consultant, Office of EDR