

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 09/21/15; Decision Issued: 10/09/15; Agency: VPI&SU; AHO: Thomas P. Walk, Esq.; Case No.10672; Outcome: Partial Relief; **Administrative Review**: **EDR Ruling Request received 10/23/15; EDR Ruling No. 2016-4258 issued 11/06/15; Outcome: Remanded to AHO; Remand Decision issued 11/10/15; Outcome: Original decision reversed; Administrative Review: DHRM Ruling Request received 10/23/15; DHRM Ruling issued 11/23/15; Outcome: AHO's Remand Decision affirmed.**

**IN THE COMMONWEALTH OF VIRGINIA, DEPARTMENT OF HUMAN
RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: CASE NO.: 10672

DECISION OF HEARING OFFICER

HEARING DATE: SEPTEMBER 21, 2015

DECISION DATE: OCTOBER 9, 2015

I. PROCEDURAL MATTERS

The school issued a Group III Written Notice to the grievant on July 21, 2015, terminating him from employment. He filed his Form A on July 30. I was appointed as Hearing Officer on August 20. I conducted a pre-hearing conference by telephone on August 24. The Office of Employment Dispute Resolution, by ruling issued on August 25, consolidated this matter for hearing with Case No. 10679. I conducted the hearing on September 21. The hearing lasted approximately one hour and fifteen minutes. The grievant stipulated the underlying facts. I kept open the record to allow post-hearing written argument on the Motion by the school for a dismissal of the grievance. On September 23 I requested additional information from the school on a limited issue, which I received on September 28. The school filed its memorandum regarding grievability on October 5, 2015.

II. APPEARANCES

The school presented two witnesses and nine exhibits. Legal counsel represented the school. A representative from the school was present throughout the hearing. The grievant represented himself and testified on his own behalf. He presented no exhibits.

III. ISSUE

Whether the school properly issued to the grievant a Group III Written Notice and terminated him from employment for fraudulently claiming hours that were not worked resulting in significant over-compensation during 2013, 2014, and 2015?

IV. FINDINGS OF FACT

During the years 2013 through the remainder of his employment, the Defendant worked as a roofer/sheet metal worker in the Facilities and Buildings and Grounds Department of a State University. He, and other employees in the Department, had been encouraged by a Supervisor to “look out for themselves.” He interpreted this statement as being an invitation to fraudulently overstate his number of hours worked. The Supervisor approved the hours as submitted.

In March 2015 an informant made a tip to an Abuse and Fraud Hotline, alerting school officials to overstatement of hours in the Facilities Department. The school initiated an investigation and interviewed the grievant on two occasions. The investigation revealed that he had overstated his hours in a significant amount, totaling over 200 hours. Before offsets the school is making, the amount owed by the grievant for fraudulently claimed overtime is \$8,364.63. The broader investigation further revealed that the padding of time worked was a department-wide problem.

On July 6 the grievant was placed on pre-disciplinary leave. A follow-up meeting was set for the following day. The school issued him a Group III Written Notice and terminated him from employment on July 28 for the substantial overstatement of hours worked.

The school continued investigating the situation in the Department. Because of the

widespread practice of fraud, the school decided to implement a policy of limited amnesty for offenders. It issued a memorandum to all Facilities Department employees on July 28. The memorandum described the ongoing investigation and announced that it was “providing anyone in Facilities an opportunity to correct any overtime and/or leave reporting records. Anyone who self-reports will be expected to make restitution and will be subject to the University’s disciplinary process—but if they self-report by Tuesday, August 11, 2015, they will not be terminated from employment. A form for self-reporting was attached to the memorandum and directions given as to its submission.

V. DISCUSSION AND ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedural Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolutions, Rules for Conducting Grievances. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and

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

I will discuss these considerations in the order presented.

The grievant admits that he overstated his hours on numerous occasions. Department of Human Resource Management Policy 1.60 (Standards of Conduct) sets forth three levels of offenses. A Group III offense is one for which termination is usually justified. The grievant has been terminated for falsifying an official record. His actions clearly qualify as such an offense. The grievant has not alleged, nor do I find, any reason to find that the disciplinary action is contrary to established law or policy. The issuance of a Group III Written Notice was clearly justified.

The grievant argues that his discipline should be mitigated because of the July 28 memorandum issued by the Department. Virginia Code Section 2.2-3005 (C) (6) requires me to consider evidence in mitigation of an offense. Section VI (B) (2) of the Rules for Conducting Grievance Hearings states that “the hearing officer must give due weight to the agency’s discretion in managing and maintaining employee discipline and efficiency, recognizing that the hearing officer’s function is not to displace management’s responsibility but to assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness...a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness.” The grievant must establish the appropriate mitigating circumstances.

Reasonableness is something that must be determined a case-by-case basis. Although I have found that no discrimination occurred on a legally prohibited basis, I believe that the

appropriate approach to determining reasonableness is to borrow from that body of law the concept of comparing “similarly situated” employees. The termination from employment occurred while an active investigation was ongoing. The preliminary investigation results determined that at least three other employees in the Department had engaged in similar conduct. The July 28 memorandum was an indication that the number of guilty employees was suspected to be substantial. How the total amount of unearned compensation paid to the grievant compared to that of other employees revealed by the investigation, or still employed in the Department and not yet suspected by the school as of July 28, is unclear from the record. The fact that the memorandum was issued a mere week after the termination of the grievant supports the argument of the grievant for a finding of unreasonableness. If his involvement in this pattern of misconduct had remained unknown until after July 28, then he would not have been subject to termination. The school expressly reserved the right to discipline employees, but provided immunity from termination for any employee who self-reported. I find this distinction under these specific circumstances, to be unreasonable.

The school argues that consideration of the July 28 memorandum is inappropriate. The argument is that the grievant was no longer an employee on that date and not covered by the new policy. It cites as Code of Virginia § 2.2-3004 (c) (iii) and GPM § 4.1 (c) (2). Those sections exempt from a grievance hearing the “contents of established personnel policies, procedures, and rules. The argument has superficial appeal. What it misses, however, is the distinction between the content of a policy and the unreasonable application of it. I am not establishing or revising a policy in contravention of GPM § 5.9 (a) (3). I am merely finding that its protections should have been applied to the Grievant as though it had been implemented prior to his termination.

The adoption of the policy prevented the grievant from arguing that he was similarly situated to those employees who were similarly guilty yet protected from termination merely because their acts had not yet been discovered. The policy covers past acts and it is unreasonable, under these specific facts, to apply it to favor certain employees over a terminated one.

Section VI (D) (2) of the Rules allows, but does not require, an award of back pay to an employee who is restored to employment. Such an award must be considered by the hearing officer. I decline to award any back pay to the grievant, except to the extent that his absence from employment exceeds 30 work days. The Standards of Conduct allow an agency to suspend a recipient of a Group III Written Notice for a maximum of 30 work days in lieu of termination. To be clear, my intent is to treat the grievant as though he had been given the Written Notice and suspended for a term of 30 work days. He is entitled to a restoration of any lost benefits for the same period of time for which he is entitled to back pay.

VI. DECISION

For the reasons stated above, I find as follows:

- A. The issuance of the Group III Written Notice to the grievant is affirmed;
- B. The grievant shall be reinstated to employment and the termination from employment reduced to a 30 workday suspension. He shall be subject to the provisions of the July 28, 2015 memorandum from the Department head. I express no opinion on whether any failure by the grievant to comply with any subsequent directive from the school to make restitution may be subject to further disciplinary action;
- C. The school shall pay to the grievant his lost wages for a standard work-week and restore his benefits for all lost workdays except subsequent to July 21, 2015. The back pay shall be subject to offset for wages actually earned by the grievant subsequent to July 21, 2015.

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.^a

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[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].

ORDERED this 9th day of October, 2015.

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer

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DECISION DATE: OCTOBER 9, 2015

SUPPLEMENTAL DECISION DATE: NOVEMBER 10, 2015

SUPPLEMENTAL DECISION OF HEARING OFFICER

I rendered my decision in this matter on October 9, 2015, issuing my written decision on that date. The agency appealed my decision to the Director of the Office of Human Resource Management as well as the Director of the Office of Employment Dispute Resolution. On November 6, the Director of the Office of Employment Dispute Resolution issued his decision in this matter. He remanded the case to me for reconsideration.

I have reviewed the ruling by the Director and the findings therein. I find that, in light of the findings made by the Director, insufficient grounds for mitigation of the discipline imposed on the grievant are present in the record. Therefore, I uphold the issuance of the Group III Written Notice to the grievant and his termination from employment.

The grievant is referred to the written ruling by the Director for his appeal rights.

RENDERED this November 10, 2015.

/s/Thomas P. Walk

Thomas P. Walk, Hearing Officer