



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11443

Hearing Date: January 22, 2020 and
February 28, 2020
Decision Issued: March 26, 2020

PROCEDURAL HISTORY

On September 19, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On October 10, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 28, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 22, 2020, a hearing began at the Agency's office. A second day was held on February 28, 2020.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Department of Taxation employed Grievant as a Systems Analyst. The purpose of his position was:

To provide analysis, design, and program development activities which will create computer applications that: allow for timely processing of tax information, provide accurate information to taxpayers and tax employees, and allow for the timely deposit of tax collections.¹

Except for the facts giving rise to this grievance, Grievant's work performance was satisfactory to the Agency.

Grievant reported to the Supervisor who reported to Manager C. Grievant's typical work shift began at 6:30 a.m. or 7 a.m. and ended at 3:30 p.m. or 4 p.m. Grievant teleworked on Wednesdays.

¹ Agency Exhibit 3.

Grievant was responsible for updating electronic tax forms to reflect changes in tax law, regulation, and policy. Grievant received assignments through his Team Leader. Grievant used Powerbuilder programming software to write code to implement the changes. The Agency provided Grievant with an Agency-owned laptop computer to use at work and allowed him to take the laptop to his home to work. He would work at home when he was authorized to telecommute and when he performed overtime duties.

When Grievant was at work, he placed his laptop in a docking station and opened the computer screen. He had a second monitor connected to the left of his laptop and a third monitor connected to the right of his laptop. Grievant would place different information on each screen and view all three screens as he worked. Grievant had a similar computer set up for his home office.

Grievant performed most of his work tasks using his computer.

At the beginning of each project, Grievant was asked to estimate the amount of overtime necessary to complete his assigned projects by a specific date. He considered the nature of the project and the amount of time necessary to complete the project on time to generate the number of hours of overtime he would need to work. By March 2019, Grievant had received overtime pay of \$16,508.97.

Grievant typically performed overtime work when he was at his home. Grievant would log into the Agency's computer network and perform his work duties. He would sometimes leave his computer logged into the Agency's network overnight so that the Agency could back up files and perform software maintenance.

Agency analysts would write General Systems Design (GSD) documents to specify the rules relating to legislative changes. For example, the GSD described how the Agency would handle information submitted by taxpayers. Grievant was responsible for ensuring that the code he had written reflected the expectations and rules specified in the GSD. Grievant would put the GSD on one of his computer screens and compare the GSD to the code he had written on another computer screen. Sometimes Grievant would print off the GSD and then compare the paper GSD with the code he had written on his computer screen.

In June 2019, Manager C began to question why Grievant was submitting overtime request of approximately three hours nearly every day. The pattern "looked off" to Manager C. She compared Grievant's overtime to the overtime of other Agency developers and concluded Grievant did not need so much overtime. She also noticed that Grievant sought overtime pay on August 8, 2019 even though he had been "running a high temp most of yesterday, and all of last night."²

² Agency Exhibit 5.

On July 19, 2019, Mr. R sent Grievant an email stating, “another friendly reminder to keep adequate documentation for the overtime you have been putting in just in case we get audited.”³

On July 26, 2019, Manager C informed Grievant, “your overtime again needs to be pre-approved on a regular basis. No more than 2 weeks in advance.”⁴

On August 16, 2019, the Agency uploaded Veriato software onto Grievant’s Agency-owned laptop without Grievant’s knowledge.⁵ This software took screen shots of Grievant’s computer every thirty seconds. It included images from each of Grievant’s three screens. Using this software, the Agency could see what Grievant could view on his computer monitors at a particular point in time. The software took screenshots every 30 seconds as long as the computer was active. When the computer was active, information would appear on the computer screens. After approximately five to seven minutes of inactivity, the computer should shut down. If the computer shut down, no information would appear on the computer screens and the software would not show screen shots. No credible evidence was presented to show that the Veriato software failed to work as expected.

On Saturday August 17, 2019, Grievant reported working three hours of overtime. Grievant logged on his computer at 7:05 a.m. His computer was active until 8 a.m. and logged off at 8:01 a.m. Grievant logged on to his computer at 9:51 a.m. and logged off at 9:57 a.m. His computer activity showed Grievant worked approximately 1:04 hours of overtime.

On Sunday, August 18, 2019, Grievant reported working three hours of overtime. Grievant logged on his computer at 7:18 a.m. He worked until 9:04 a.m. His computer activity showed Grievant worked approximately 1:46 hours of overtime.

On Monday, August 19, 2019, Grievant reported working five hours of compensatory time from 4 p.m. until 9 p.m. He described his work as “2019 Legislative Changes.” Grievant’s computer was inactive from 4:02 p.m. until 5:13 p.m. His computer was inactive from 5:23 p.m. until 6:25 p.m. His computer was inactive from 6:28 p.m. until 7:16 p.m. His computer was inactive from 8:05 p.m. until 8:40 p.m. His last activity was at 8:50 p.m. His computer activity showed he worked approximately 1:12 hours during that time.

On Tuesday, August 20, 2019, Grievant reported working five hours of compensatory time from 4 p.m. until 9 p.m. He described his work as “2019 Legislative Changes.” Grievant’s computer was inactive from 3:50 p.m. to 4:15 p.m. His computer

³ Agency Exhibit 5.

⁴ Agency Exhibit 5.

⁵ The Agency notified Grievant the computer was its property and he had no expectation of privacy with regard to using the computer.

was inactive from 4:18 p.m. to 6:04 p.m. His computer was inactive from 6:18 p.m. to 7:02 p.m. His last activity was at 7:32 p.m. His computer activity showed he worked approximately 47 minutes during that time.

On Wednesday August 21, 2019, Grievant teleworked for 8 hours and reported an additional 5 hours of compensatory time from 4 p.m. to 9 p.m. He described his work as "2019 Legislative Changes." Grievant's first activity was at 6:09 a.m. His computer was inactive from 6:36 a.m. to 9:04 a.m. His computer was inactive or had no changes in activity on his screen from 11:21 a.m. to 1:32 p.m. His computer was inactive from 1:34 p.m. to 3:19 p.m. His computer was inactive from 3:21 p.m. to 4:16 p.m. His computer was inactive from 4:45 p.m. to 8:52 p.m. His last activity was 8:53 p.m. His computer activity showed he worked approximately 3:15 hours between 6 a.m. and 9 p.m.

Grievant was mentoring two new developers who began working for the Agency in July, 2019. He would often send them emails if they needed assistance.

On September 9, 2019, the Supervisor sent the Internal Audit Director an email:

I talked to [Manager C] and we both are in agreement that the explanation [Grievant] provided for the 8/17 thru 8/23 time period is not credible. First of all, if [Grievant] was truly reviewing a printed version of the rules and printed versions of the designs and then comparing that to the generated Powerbuilder code, he would have required the ability to view the Powerbuilder code. When reviewing the Powerbuilder code he would have needed to do so via his laptop. There is no evidence that we have that supports a review of the Powerbuilder code via his laptop. Neither the amount of time he was active on his PC nor the screenshots of the monitors he was viewing provide evidence that he was reviewing the Powerbuilder code. Secondly, [Grievant] was at the very end of the project [and] we would have expected that more time would have been spent running test cases thru his code instead of performing a visual inspection of the rules and a visual inspection of the generated code.⁶

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."⁷ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include

⁶ Agency Exhibit 5.

⁷ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.⁸ On August 17, 2019, Grievant claimed to have worked three hours of overtime but actually only worked approximately 1:04 hours. On August 18, 2019, Grievant claimed to have worked three hours of overtime but actually only worked approximately 1:46 hours. On August 19, 2019, Grievant claimed to have worked five hours of overtime but actually only worked approximately 1:12 hours. On August 20, 2019, Grievant claimed to have worked five hours of compensatory time but actually only worked approximately 45 minutes. On August 21, 2019, Grievant claimed to have worked his regular eight hours and additionally five hours of compensatory time but actually only worked approximately 3:15 hours. The difference between the number of hours claimed as work and the actual work time is so significant that it is reasonable to conclude Grievant knew or should have known that the amount of time he claimed as overtime was false. It is not likely that Grievant simply incorrectly approximated his time or made rounding errors. Grievant’s behavior shows a pattern of materially inaccurate claims which supports the Agency’s assertion that Grievant knew he was falsely claiming compensatory time.

Grievant argued he had been instructed how to report his time and was complying with that instruction.⁹ Grievant was not instructed to report and bill for more time than he actually worked. Indeed, he was instructed on July 19, 2019 to keep adequate documentation of the time worked in the event of an audit.

Grievant argued that he was working during the times the Agency claimed he was not working. Grievant had the burden of proving this defense. Grievant asserted that he printed off a copy of the GSD and compared the paper GSD to his Powerbuilder code to ensure that his code was accurate. He wanted to make sure his code was “bullet proof” and this would take many hours of detailed review and “double checking”. Grievant might have 48 rules to check in 353 lines of code. He might spend five to ten minutes verifying each rule. To complete this process, he would not need to touch his keyboard. He could use his mouse and view documents on his computer screens while reading a printout of the GSD.

Grievant’s argument is not persuasive for two reasons. First, a printed paper copy of the GSD Grievant claimed he used was not presented or otherwise substantiated as evidence.¹⁰ Grievant initially testified that on August 15, 2019 he used a printer at his

⁸ See, Attachment A, DHRM Policy 1.60.

⁹ Grievant testified he was told by Ms. S that if he worked five hours he was to write down five hours and show the times worked as from 4 p.m. to 9 p.m. The matter in dispute was not whether Grievant worked from 4 p.m. to 9 p.m., but rather whether he worked five hours if he claimed to have worked five hours regardless of the start and stop times of his afterhours shift.

¹⁰ Grievant asserted he did not have compete access to the documents in his office once the was removed from the workplace.

Agency office to print a GSD document that he used during the week of August 17, 2019. The Agency presented Grievant's print log from June 16, 2019 to August 29, 2019. Grievant did not print out a GSD during that time period. His last print out before the week of August 17, 2019 was on August 6, 2019.¹¹ Grievant also testified that he must have printed out the GSD on his computer at home. Grievant did not present a copy of a GSD printed from his home computer.¹² Second, if Grievant were to use a printed GSD and compare it to his Powerbuilder code on his computer, the computer would have to be activated. In other words, the Powerbuilder code would have to be on the computer screen in order to be viewed. If the Powerbuilder code was on the computer screen, the Veriato software would have taken a screen shot. During the hearing, Grievant reenacted how he compared his GSD document to the Powerbuilder code. His computer screen was active during that reenactment. If Grievant's computer screen was active, the Veriato software would have taken a screen shot of his activity.

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"¹³ 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. Grievant was a highly skilled employee. The Agency could have addressed his behavior by means other than removal. The Agency presented sufficient evidence to support the issuance of a Group III Written Notice and, thus, the Agency was authorized by policy to remove Grievant from employment. In light of the standard set forth in the Rules, 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 removal is **upheld**.

¹¹ See, Agency Exhibit 15.

¹² In Grievant's response to the Agency seeking mitigation, Grievant cited GSD documents he used. The latest date among those documents was July 22, 2019.

¹³ *Va. Code § 2.2-3005*.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.