

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 11472

Hearing Date: February 6, 2020
Decision Issued: February 13, 2020

PROCEDURAL HISTORY

Grievant filed a grievance on June 28, 2019, alleging that Facility A, after the Grievant moved to Facility B, had “falsified [her] timesheets” and was retaliating against her for her past grievance activity. On December 9, 2019, EDR qualified the grievance on the issue of whether the agency properly and accurately completed the Grievant’s timesheets. (Ruling No. 2020-4990.)

On December 16, 2019, EDR appointed the Hearing Officer to hear the grievance. During the pre-hearing conference, the grievance hearing was scheduled for February 6, 2020, the first date available for the parties, on which date the grievance hearing was held, at the Agency’s designated location.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency’s exhibits as numbered. The grievant submitted no additional documents for the record. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Agency Representative
Counsel for Agency
Witnesses

ISSUES

1. Whether the Agency misapplied policy?

2. Whether the Agency's application of policy discriminated or retaliated against the Grievant?
3. Whether any relief may be granted?

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. *In this grievance, the burden of proof is on the Grievant. 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.

APPLICABLE LAW 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 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).

Code § 2.2-3000 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 the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (*quoting Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy ...

“the hearing officer reviews the facts *de novo* ... as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action.”

This matter is not a disciplinary grievance, but the principles from *Tatum* governing the hearing officer’s authority apply.

Agency policy, Operating Procedure (“OP”) 110.1, establishes the requirements for documenting hours of work and leaves of absences. The procedure requires that weekly timesheets, signed and dated, must be submitted no later than six calendar days following the end of the scheduled workweek. OP 110.1 § II(A)(1). Agency Exh. 2. OP 110.1 § I(G)(1)(c) and (2)(a) provides that time for entering and exiting the facility does not count as work time, and that work begins when the employee arrives at the actual workstation. *Id.*

The Grievant testified that she believed the agency inappropriately created timesheets and entered her time improperly, causing prejudice to her work and leave record and balances. The Grievant testified that the agency never contacted her about missing timesheets, and she was surprised by the time record and adjustments to her leave balances and pay. This led to financial strains on her. The Grievant also stated her belief that the agency retaliated against her for use of FMLA benefits.

The facility human resources officer testified that in the weeks before the Grievant transferred from Facility A to Facility B, the Grievant did not submit her timesheets to human resources. The human resources officer ultimately entered time in the system from timesheets given to her by warden of Facility A. When entered, leave balances were adjusted appropriately, and in some instances, time off was not covered by available leave, rendering some docking of pay.

The Facility A warden testified that, in the absence of timesheets from the Grievant, she reviewed the security camera footage for the times of the Grievant’s daily ingress and egress. She completed the timesheets, accordingly, so that human resources could properly account for worked time and leave in the agency’s system. Although paid work time should only begin when an employee reaches her workstation, the warden gave the Grievant the time she was entering and exiting the facility, which is a benefit to the Grievant because it provides more work time than would otherwise be properly recordable. The warden did not contact the Grievant about the missing timesheets because the Grievant was no longer under her supervision. The warden also testified that the Grievant was a good, valued employee, that she had no reason to retaliate against the Grievant, and her work on the missing timesheets was in no way motivated by retaliation against the Grievant.

The Grievant was aggrieved over docked time because it was unexpected and caused her financial hardship. The Grievant did not present any evidence that the warden’s recreated time record was inaccurate to the prejudice of the Grievant. The Grievant testified that she submitted her own timesheets and had no explanation for why they were missing.

Analysis

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988). As previously stated, the Grievant's burden is to show upon a preponderance of evidence that the agency discriminated against him through misapplication or unfair application of policy.

As long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules for Conducting Grievance Hearings (Rules)* 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." *Rules* § VI(A).

Although the agency could have contacted the Grievant at her new work facility for missing timesheets, I find that the agency was within its management prerogative to enter time for the Grievant, when it had factual bases (i.e., the security video) to establish the Grievant's coming and going from the facility. The Agency has a responsibility to keep its records in proper order and, based on the evidence, entered accurate time for the Grievant. Because the time was entered using ingress and egress times, any inaccuracy was in the claimant's favor. Leave balances and pay were adjusted, accordingly. I find insufficient evidence on the Grievant's behalf to find error in recorded time or any retaliation against her. Accordingly, I lack authority to sustain her grievance.

Summary and Conclusion

The Agency's application of policy was proper and did not discriminate or retaliate against the Grievant.

DECISION

For the reasons stated herein, I deny the grievance seeking benefits and related relief.

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].

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

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