

Issues: Group II Written Notice (failure to follow policy), and Group III Written Notice (falsifying official State document); Hearing Date: 10/18/07; Decision Issued: 11/02/07; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 8687/8688; Outcome: No Relief, Agency Upheld in Full.

**COMMONWEALTH OF VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

In the matter of: Case Nos. 8687, 8688

Hearing Officer Appointment: September 27, 2007

Hearing Date: October 18, 2007

Decision Issued: November 2, 2007

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group II Written Notice: failure to follow applicable established written policy, issued on May 25, 2007 by Management of the Department of Corrections (the “Department” or “Agency”), as described in the Grievance Form A of June 18, 2007.

The Grievant also requested a hearing to challenge a Group III Written Notice: falsifying official state documents, also issued on May 25, 2007 by Management of the Department, as described in the Grievance Form A of June 18, 2007.

The Director of the Department of Employment Dispute Resolution issued a Consolidation Ruling dated September 7, 2007, consolidating both of the Grievant’s June 18, 2007 grievances. Accordingly, both of the above grievances will be decided pursuant to the hearing of October 18, 2007 and this decision. EDR Ruling Numbers 2008-1766 and 2008-1767 are incorporated herein by this reference.

The hearing officer was appointed on September 27, 2007. The hearing officer scheduled a pre-hearing telephone conference call at 10:00 a.m. on October 2, 2007. The Grievant, the legal advocate for the Agency (the “Advocate”) and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant confirmed that he is challenging the issuance of the above referenced Group II and Group III Written Notices for the reasons provided in his Grievance Form A’s and is seeking the relief requested in his Grievance Form A’s, including removal of the disciplinary action. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on October 3, 2007, which is incorporated herein by this reference.

The parties and the hearing officer also participated in a second pre-hearing conference call at 3:00 p.m. on October 10, 2007, to discuss several pre-hearing and hearing issues which had arisen. The Grievant, the Advocate and the hearing officer participated in the call. The

hearing officer made several decisions and issued a Status Report reflecting such decisions on October 11, 2007. The Status Report is incorporated herein by this reference.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the Agency was represented the Advocate. The Grievant represented himself and was assisted at the hearing by his spouse. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely all exhibits in the Agency's binder (A through Q) and all of the exhibits in the Grievant's binder excepting Tabs J, P and the Pay Plan dated July 19, 2007 under Tab U.<sup>1</sup>

At the request of the Grievant, the hearing officer issued an order for production of documents and several orders for witnesses. No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing. After the hearing, both parties submitted their respective post-hearing briefs to the hearing officer.

#### APPEARANCES

Representative for Agency  
Grievant  
Witnesses

#### FINDINGS OF FACT

1. The grievant is a Probation Manager Senior, employed by the agency as the Chief of 14 agency employees at one of the districts in the Western Region (the "District"). AE C.
2. The grievant was so employed during the Tier III review period relevant to this proceeding, namely June – October 2006 (the "Period").
3. The Agency has afforded the Chiefs of its various districts the latitude to establish their districts as either a "specialist" or "generalist" district.

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<sup>1</sup> References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

4. Probation Officers (“PO”) perform one or both of two primary job duties, namely case supervision or the preparation of presentencing investigation reports (“PSI’s”).
5. Essentially, in a “specialist” or “specialized” district, the PO’s typically perform only one of the two functions as their primary job duty whereas in a “generalist” or “generalized” district, the PO’s would typically perform both functions as their primary job duties.
6. Historically, the District has been and was during the Period, a “specialist” or “specialized” district where the PO’s performed only one of the two functions of case supervision or preparing PSI’s as their primary job duty.
7. The Commonwealth established the Tier Review system for PO’s, which is administered by the Department, assisted by its compensation consultant/analyst, to compensate PO’s for critical tasks being performed as primary job duties in a very skillful or highly proficient manner over a specified review period. The Tier Review System is knowledge and skill-based not merit pay (which is covered by other compensation mechanisms such as the spot bonus payment).
8. To qualify for the Tier III compensation at issue in this proceeding, during the Period a PO must have been performing as part of his current, primary job duties, both functions of a PSI Writer and a Case Supervision Officer. Additionally, a PO must demonstrate in each Critical Task delineated by the Department a skill level of advanced knowledge of all work procedures and exceptional self-checking behavior. AE D and G.
9. The District during the Period operated as a “specialist” or “specialized” district. The Grievant has acknowledged this in certain performance evaluations which he signed during the Period. See, e.g., AE Q which states: “Our office specializes . . .”
10. The Grievant received significant education and training concerning the Tier Review System for his unit. The Grievant understood at the relevant time when he signed and delivered the Tier Review Forms at issue in this proceeding, that the subject PO’s were not performing both functions during the Period as their primary job duties. Despite an opportunity presented by the compensation consultant/analyst to potentially rectify his misrepresentation when she questioned his Tier III classifications, the Grievant persisted in his course.
11. Both a compensation consultant/analyst and a Compensation Manager in the Human Resources Division of the Department were available as a resource to the Grievant if he had any doubts or questions concerning the Tier Review forms or instructions. Indeed, the official instructions for the PO Tier Review conspicuously invited each unit head, including the Grievant: “If you have any

questions please contact [the compensation consultant/analyst] at [phone number]. You may also e-mail [the compensation consultant/analyst] at [e-mail address].” AE F. The Grievant did not at any time call either of these two persons or anyone else concerning his alleged confusion relating to the subject forms and instructions.

12. Despite the Grievant’s protestations to the contrary, AE D, F and G clearly constitute applicable established written policy.
13. When in October 2006 the Grievant signed and submitted to the Compensation Section of the Department each of subject six PO Tier Review Forms, he intentionally misrepresented to the Department that the subject six PO’s were performing both tasks – supervising cases and writing PSI’s – as their primary job duties during the Period.
14. The Grievant falsified the subject Tier Review Forms, which constitute records, reports and official state documents.
15. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.
16. The Department’s actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
17. The Department’s actions concerning this grievance were reasonable and consistent with law and policy.
18. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright. By contrast, positions taken by the Grievant conflict with documents he has signed and defy logic and common sense. The Grievant’s testimony at the hearing was inconsistent and he was evasive during cross-examination. Furthermore, the witnesses called by the Grievant supported major assertions made by the Department in its case. Elements of this finding are discussed further below.

#### APPLICABLE LAW, ANALYSIS AND DECISION

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).

*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 the 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. *Grievance Procedure Manual*, § 5.8.

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 Department's Standards of Conduct (the "SOC") are contained in the Operating Procedure Number 135.1 (AE N). 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.

Pursuant to the SOC, the Grievant's infractions can clearly constitute Group II and Group III offenses, respectively, as asserted by the Department.

#### SECOND GROUP OFFENSES (GROUP II).

- A. These include acts and behavior that are more severe in nature and are such that an accumulation of two *Group II* offenses normally should warrant removal.
- B. *Group II* offenses include, but are not limited to:
  - 1. failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy; . . .

### THIRD GROUP OFFENSES (GROUP III).

- A. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.
- B. *Group III* offenses include, but are not limited to:
  - 1. [intentionally omitted];
  - 2. falsifying any records, including but not limited to vouchers, reports, insurance claims, time records, leave records, or other official state documents;

Department Operating Procedure Number 135.1.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

"Falsifying" is not defined by Virginia Department of Corrections Operating Procedure 135.1, but for purposes of this proceeding, the hearing officer interprets this provision to require proof of an intent to falsify by the employee. This interpretation is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6<sup>th</sup> Edition) which provides in part 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." At the hearing, both the Agency and the Grievant conceded that if the Grievant put down on any report information which he knew to be incorrect, that would constitute falsifying a report. Accordingly, the word "falsify" means being intentionally or knowingly untrue.

"Primary" is defined in Webster's Ninth New Collegiate Dictionary, amongst other things, as follows: ". . . of first rank, importance, or value . . ."; and in Chambers Twentieth Century Dictionary, amongst other things, as follows: ". . . that which is highest in rank or importance . . ." The Grievant asserts that he did not understand what constitutes a "generalist" and that a percentage breakdown is necessary in order for him to understand what constitutes "primary". The Regional Director and the Grievant's boss was credible and consistent in his testimony. The Regional Director convincingly testified that the Grievant (whom the Regional Director promoted to his current position and whom the Regional Director has promoted once before that promotion), knows what "primary" means and knowingly placed the PO's in inappropriate Tier Groups, thereby causing his staff to be qualified for and paid money to which they were not entitled.

The Grievant's testimony concerning this issue was unconvincing, inconsistent and defied the facts, logic and common sense. The Grievant signed a Performance Evaluation on October 12, 2006 stating that "Our office specializes and [subject PO] is mainly a PSI Writer for [Circuit Court]." AE Q. In substantially the same time period, the Grievant signed six annual

Performance Evaluations concerning the subject six PO's which flat out contradicted the six PO Tier Review Forms for the same six PO's, also signed by the Grievant. AE H-M and Q.

The Grievant at one stage of the hearing testified as follows concerning his signing of any of the subject six Tier Review Forms: “. . . [A]nd to this date, to this date, I do not know why I signed it; why I put my signature on it . . .” Tape 9, Side A. When questioned by the Department's Advocate about this statement during the cross-examination, the Grievant was clearly flustered. The Advocate asked whether the Grievant would have signed the six Tier Review Forms if the Deputy Chief had filled in all “E's” (Not Applicable) as opposed to “D's” (Highest Skill Level) and the Grievant replied probably not and then subsequently reverted to his position that the subject six PO's did both and that he had done nothing wrong.

The Grievant himself testified that in the minds of his officers “primary” would be 60/40 or 51/49. Tape 9, Side A. The Grievant, however, did not logically continue to analyze the implications of this percentage breakdown for his own case.

The Deputy Chief has served in that position for about three years. At the hearing and during this proceeding, neither she nor any of the other Agency witnesses exhibited any inappropriate personal ill-will or vindictiveness toward the Grievant. The Deputy Chief's demeanor at the hearing was at all times very open, candid and forthright. Her testimony was very convincing and credible.

The Deputy Chief testified that she was primarily responsible for assigning the cases for the office during the Period and was familiar with the job duties of the PO's under her supervision. She drafted and signed the annual Performance Evaluations for each of the subject six PO's during the Period. When questioned, the three subject PO's whom the Grievant called as his witnesses all admitted that their job duties as described on their Performance Evaluations were accurate. Of course, each of the PO's also attested to this fact when they signed the applicable evaluations.

The Grievant instructed the Deputy Chief to fill out the subject Tier Review Forms giving them all “D's” and classifying the PO's as “generalists”. During the Period, the Deputy Chief was aware that one of the subject PO's had assisted the Department on a Tier Review work group. This PO expressed concerns, including during a staff meeting at the office attended by all office staff including the Deputy Chief and Grievant, that to be eligible for the Tier III compensation, any PO would have to be performing both functions – writing PSI's and case supervision. The staff were upset by this information and certain of the staff expressed clear, verbal displeasure. While she was willing to sign the Performance Evaluations, the Deputy Chief informed the Grievant that she was not comfortable signing the Tier Review Forms because she had not been trained concerning them and because they classified the PO's as generalists. The Deputy Chief did draft the Tier Review Forms, as instructed by the Grievant. The Grievant reassured the Deputy Chief that the compensation consultant/analyst had told the Deputy Chief that as long as the PO's were performing both functions by the end of the Period it would be acceptable.



During the hearing, the Grievant denied that he told the Deputy Chief to rate the subject PO's as "D's" on the Tier Review Forms. Tape 9, Side A. As previously described, at first he testified that he did not know why he signed the Tier Review Forms and then he reverted to his position that he did nothing wrong in signing them.

Each of the three PO's called by the Grievant as his witnesses, admitted during the hearing that they performed only one of the two functions as their primary job duty during the Period.

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 (4<sup>th</sup> Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, 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 is not a "super-personnel officer" and 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. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The grievant's apparent refusal to recognize and accept the seriousness of his violations of Agency policy and procedures preclude a lesser sanction. The hearing officer agrees.

### DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in issuing the respective Group II and Group III Written Notices and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy. The hearing officer also adopts as support for this decision the additional arguments advanced in the Department's post-hearing brief.

## 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 decision 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 decision 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. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

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 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 or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of a final decision, a party may appeal on the grounds 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 Director before filing a notice of appeal.

ENTER:

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John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).