Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 10/06/08; Decision Issued: 10/10/08; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 8888, 8912, 8918, 8919, 8920, 8921, 8922; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos: 8888, 8912, 8918, 8919, 8920, 8921, 8922

Hearing Date: October 6, 2008
Decision Issued: October 10, 2008

PROCEDURAL HISTORY

The Grievants each received a Group I Written Notice between March 27th and 28th of 2008 for:

Falsifying inmate records/unsatisfactory job performance.

Pursuant to the Group I Written Notice, there was no disciplinary action taken against the various Grievants other than having the Group I Written Notices placed in their records. On various dates, the Grievants each timely filed a grievance to challenge the Agency's action. On August 29, 2008, the Department of Employment Dispute Resolution ("EDR") consolidated these appeals and assigned these appeals to a Hearing Officer. On October 6, 2008, a hearing was held at the Agency's location.

APPEARANCES

Grievants
Agency Party
Agency Representative
Witnesses

ISSUE

1. Whether or not the evidence supported the allegation that each of the Grievants falsified an inmate record and/or had unsatisfactory job performance.

AUTHORITY OF HEARING OFFICER

Code Section 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 Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to

independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and should 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. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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. 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 Agency provided the Hearing Officer with a notebook containing eight (8) tabbed sections, and that notebook was accepted in its entirety as Agency Exhibit 1. Each of the seven (7) Grievants provided the Hearing Officer with a notebook and those notebooks were accepted in their entirety as each Grievants' Exhibits 1.

In this matter, the Agency offered two (2) witnesses whose testimony was common to all seven (7) Grievants. The basic evidence presented to the Hearing Officer was uncontroverted. All of the Grievants were nurses at the Agency facility. Over a number of years, perhaps decades, a policy was in place at this Agency location that a nurse could note in a chart a "verbal order" from the doctor without having actually called the doctor. The next time that the doctor came to work, he would initial the chart indicating that he had seen and approved this action. Both of the Agency witnesses acknowledged that this pattern of behavior had been going on for years. Indeed, one of the Agency witnesses was the nurse in charge and her position was known as the Healthcare Authority. The doctor at this facility was known as the Medical Authority. Both the Healthcare Authority and the Medical Authority were aware that there was a standing practice whereby the doctor was not called and the nurse indicated in the chart "verbal order,"

and the doctor signed off next time he was at work. Several documents were proffered by the various Grievants showing this pattern of behavior.[1]

The witnesses for the Agency testified that where a doctor had given a verbal order regarding a specific patient, then that verbal order would have standing authority until such point in time as it was rescinded. This was policy for the Agency. [2]

An unrelated incident arose in March, 2008 which led to the Agency reviewing this policy. The Central Region Administrator either talked to in person or called each of the Grievants. She asked them one (1) question and it was as follows:

> Have you ever documented a verbal order without actually talking to the doctor?

The Grievants who were charged answered in the affirmative to that question. They were not told why they were asked that question, nor were they given any background at all as to why they had been contacted by this person. Based on the affirmative answer to that open-ended question, each of the Grievants was charged with falsifying a document in that they had charted the verbal order as if they had actually talked to the doctor. When questioned, it became apparent from the witnesses' answers that the Administrator did not know if the Grievant was referring to something that she may have done in 1980, 1990, 2000, 2004 or last week. Further, the question did not specify if the Grievants had acted according to the doctor having given a standing order regarding a particular patient or whether it had been a standing order regarding a generic set of patients. In the former, the rules do not require that the nurse continually call the doctor to verify whereas in the latter, it appears that current rules do require the nurse to actually call the doctor and verify. The Agency's attempt to remedy this situation may well have resulted in people being punished for something done 20 years ago or for something that was perfectly legitimate according to the Agency's own rules and regulations.

Virginia Department of Corrections Operating Procedure 135.1(VI)(B) provides in part as follows:

> **Supervisors should be aware of inadequate or unsatisfactory work performance or behavior of employees and attempt to correct the performance or behavior immediately.** Depending on the severity of the situation, corrective action may be accomplished through informal or formal means. Informal corrective action may take the form of a counseling session or issuance of a Counseling Memorandum or letter. Formal disciplinary action is accomplished by the issuance of a Written Notice form. **While it is anticipated that most performance and behavior problems can be resolved through a counseling process,** counseling is not a prerequisite to taking formal disciplinary action. [3] (Emphasis added)

[1] Grievant R Exhibit 1, Tab 3
[2] Grievant D Exhibit, Tab 3
[3] Agency Exhibit 1, Tab 1, Page 4

In this matter with regards to these Grievants, the Agency established that it does not know when the Grievants may have falsified an inmate record, it does not know if a falsification took place because there were certain circumstances where the answer to the question presented to each of the Grievants would have been answered in the affirmative without there being a falsification, and the Agency established that this was an Agency-wide policy for years, if not decades. Indeed, one of the Agency witnesses pointed out that when the Warden was consulted regarding this matter, he stated, "All of the nurses do this." It is clear that the Warden was aware of what was happening, the chief nurse was aware of and participated in this pattern of conduct, essentially all of the nurses participated in this conduct and now the Agency chooses to issue Group Notices rather than counsel. The Agency, because of the unrelated incident in March 2008, overreacted.

The Hearing Officer finds that this is not a situation that should have been resolved with the issuance of Written Notices, but should have been resolved with counseling.

MITIGATION

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 Employment Dispute Resolution..." [4] 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency was in error in issuing the Group I Written Notices to the Grievants and orders that the Group I Written Notices be rescinded and removed from their records.

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:

[4]Va. Code § 2.2-3005

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the Hearing Officer either to reopen the hearing or to reconsider the decision.

2. 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 Street, 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

Director
Department of Employment Dispute Resolution
830 East Main Street, Suite 400
Richmond, VA 23219

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 give a copy of your appeal to the other party and to the EDR Director. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[5] 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.[6]
[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]

_____
William S. Davidson
Hearing Officer

[5]An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[6]Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.