

Issues: Group III Written Notice (falsifying records) and Termination; Hearing Date: 09/24/08; Decision Issued: 10/07/08; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 8941; Outcome: No Relief – Agency Upheld in Full.

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 8941

Hearing Officer Appointment: September 2, 2008

Hearing Date: September 24, 2008

Decision Issued: October 7, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of her employment effective June 16, 2008, pursuant to a Group III Written Notice providing: "Falsifying Records. [Grievant] falsified count documents on May 4, 2008. Violation of Local Operating Procedure 410.2 – Count Procedure." AE A.<sup>1</sup>

The Group III Written Notice was issued on June 11, 2008 by Management of the Department of Corrections (the "Department" or "Agency"). AE A. The hearing officer was appointed on September 2, 2008. The hearing officer scheduled a pre-hearing telephone conference call at 9:00 a.m. on September 4, 2008. The Grievant, the Warden of the Facility and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant confirmed that she is challenging the termination for the reasons provided in her Grievance Form A and is seeking the relief requested in her Grievance Form A of June 23, 2008 as supplemented during the pre-hearing conference call, including reinstatement and restoration of all pay and benefits. Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered September 5, 2008, which 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 termination was warranted and appropriate under the circumstances.

The agency was represented by the Warden, who also testified as a witness. The Grievant represented herself.

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 Agency Exhibits A through Q.

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

## APPEARANCES

Representative for Agency  
Agency Witnesses  
Grievant

## FINDINGS OF FACT

1. The Grievant was a Corrections Officer (“C/O”), previously employed by the Agency at the Facility.
2. An experienced agency institutional investigator at the Facility was monitoring video when he observed that on May 4, 2008, at the time of the 4:45 a.m. count, one of two (2) C/Os assigned count duty did not leave the control booth (the “Violator”) to conduct count in a building as he was required to do.
3. The Grievant did conduct her count in the building but applicable policy requires that two (2) C/Os be present for each count: a lead count officer and a verifying count officer.
4. On May 4, 2008, Grievant signed two (2) Facility Building Count Sheets misrepresenting that both she and the Violator conducted count in each other’s presence in accordance with the Agency’s applicable count policy. AE M. Grievant admits the misrepresentation and also admits that she “called count in to master control and count cleared.” AE A.
5. Count is a vitally important procedure for public safety and is the primary mechanism the Facility uses to ensure that escapes have not occurred between counts.
6. The count sheets are crucial, official state records which must be preserved by the Facility for long periods for accreditation and other reasons.
7. The Agency has zero tolerance for escapes and the Grievant attended numerous training sessions regarding the paramount importance of, and applicable policies and procedures pertaining to, count.
8. Grievant falsified the count sheets knowingly and intentionally and Grievant admits that she is guilty of “a very bad judgment call.”
9. The institutional investigator for the facility conducted a thorough and fair investigation.

10. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances. The Agency has fully accounted for any and all mitigating factors in determining the level of discipline meted out.
11. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
12. The testimony of the Agency representative and witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of the Agency representative and witnesses at the hearing was candid and forthright.

#### 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 her 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 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. Section V.B.3 of the Commonwealth of Virginia's *Department of*

*Personnel and Training Manual Standards of Conduct Policy No. 1.60* provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.

### **GROUP III**

These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. . .

- falsification of records

AE F.

Group III offenses include but are not limited to:

- (2) falsifying any records, including but not limited to all work and administrative related documents generated in the regular and ordinary course of business, such as count sheets . . .

Department Operating Procedure 135.1 (AE F).

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

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 and Department Operating Procedure 135.1, 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.*

As the agency argued in this proceeding, the policy requires dismissal. The Department, exercising its professional judgment through the appropriate personnel, and applying the Commonwealth's policy of progressive discipline, decided that termination of the Grievant's employment was warranted and appropriate under the circumstances. Such a decision was entirely appropriate and justified. 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 gravity of the violation in the context of the public safety demands of the Facility preclude a lesser sanction. The hearing officer agrees. The Grievant's claims that her judgment might have been adversely affected by medications she was taking is not an excuse where it is contradicted by her earlier motivational explanation that she did not want to get the Violator in trouble, where she did not specifically call this to the attention of management before the time of the infraction and where it is not supported by expert medical testimony.

### DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in removing the Grievant from her employment 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.

### 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 Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).