

Issues: Group III Written Notice (falsifying records) and Termination; Hearing Date: 07/30/09; Decision Issued: 08/06/09; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9133; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 9133

Hearing Date: July 30, 2009  
Decision Issued: August 6, 2009

**PROCEDURAL HISTORY**

The Grievant was issued a Group III Written Notice on March 23, 2009 for:

Based on your own admission, you failed to make appropriate rounds in segregation and as a result, falsified times on the Offender Individual Log Sheet. According to rapid eye, you made a round at 0136 (count), 0255, 0309, 0409. According to the status sheets that you documented, you made rounds at 0241, 0316, 0339, 0407 and 0437. Per policy, checks are not to exceed thirty (30) minutes and should be conducted at random times. <sup>1</sup>

Pursuant to the Group III Written Notice, the Grievant was suspended from March 24, 2009 through May 24, 2009. On April 22, 2009, the Grievant timely filed a grievance to challenge the Agency's actions. <sup>2</sup> On July 2, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On July 30, 2009, a hearing was held at the Agency's location.

**APPEARANCES**

Agency Representative  
Advocate for Agency  
Grievant  
Witnesses

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<sup>1</sup> Agency Exhibit 1, Tab 1, Page 1

<sup>2</sup> Agency Exhibit 1, Tab 1, Page 2

## **ISSUE**

1. Did the Grievant falsify state records?
2. Was the Agency consistent in its punishment of other employees involved in this matter?

## **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 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. 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 seven (7) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing three (3) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

The Grievant in this matter worked in the Segregation Unit. He was supposed to make checks of the Offenders in this Unit every thirty (30) minutes or less and the checks were supposed to be on a random basis. After making his check, the Grievant was supposed to fill in a Log Book indicating the time that the checks were made. The Agency has a camera system in place known as Rapid Eye. On February 27, 2009, the Grievant made an entry in the Log Book indicating that he had done a security check at 3:36 a.m. A review of the Rapid Eye video footage indicated that he was not on the Pod at that time. The Grievant, in his testimony before the Hearing Officer, indicated that he was not on the Pod at that time and that he had made that entry in the Log Book in order to make it appear that he had made the rounds that he was required to make. The Grievant admitted that he falsified the state records.

A fellow Corrections Officer was also making rounds during that time frame and she made an entry in the Log Book that indicated that she made a security round on the Pod at a different time than when she actually made the rounds pursuant to Rapid Eye. This Officer received a Group I Written Notice. The Assistant Warden for the Agency testified that the rationale for the Group I Written Notice for this Officer was that she actually made the round and merely placed the wrong time in the Log Book.

Another Corrections Officer was involved in this matter. He was in a position where he would have to unlock certain doors to allow the Grievant and the other Corrections Officers to make their rounds. This Corrections Officer signaled the Grievant to make his rounds and, assuming that the Grievant was going to make the rounds, made an entry in the Log Book that the round was being made. In point of fact, the round was not completed. This Officer also received a Group I Written Notice. The Assistant Warden for the Agency testified that she did not think that this entry rose to the level of falsification of a state record as this Officer had no intent to falsify, as he assumed that the Grievant was making the round. This is in contrast to the Grievant's acknowledgment that he knowingly falsified the record with the intent to make it appear that he had made his proper rounds.

It is bothersome that this second Officer knew that he had to unlock certain doors in order for the Grievant to make his round and knew that he had not unlocked those doors. It is certainly possible that his negligence in not realizing that a round had been performed might have elevated his offense to a Group II Written Notice. However, the Hearing Officer finds that there is a clear distinction in the levels of culpability between these three (3) Officers. One simply filled in the Log Book with a slightly inaccurate time, but in fact made her round. The Second notified the Grievant that it was time for him to make his rounds and made an entry in the Log Book under the assumption that the Grievant was making the rounds. The Grievant knew exactly what he was doing and had the intent to make the Log Book appear as if a round had been made when he

knew that it had not. Accordingly, the Hearing Officer finds that the Grievant knowingly falsified the Log Book.

### **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...”<sup>3</sup> 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. The Hearing Officer has considered all of the delineated items in mitigation as set forth in this paragraph and, the Hearing Officer also considered any and all other possible sources of mitigation which were raised by the Grievant at the hearing and the Hearing Officer finds that there are no grounds for mitigation in this matter beyond the fact that the Agency chose not to terminate this employee but to give him a thirty (30) day suspension. The Hearing Officer can find nothing extraordinary that would require mitigation beyond what the Agency has already done.

### **DECISION**

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof for the Grievant's falsification of a state record and that the Group III Written Notice was validly and properly issued and that a thirty (30) day suspension was proper.

### **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:

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.

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<sup>3</sup>Va. Code § 2.2-3005

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 14<sup>th</sup> Street, 12<sup>th</sup> 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  
600 East Main Street, Suite 301  
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.<sup>4</sup> 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.<sup>5</sup>

[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]

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William S. Davidson  
Hearing Officer

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<sup>4</sup>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).

<sup>5</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.