Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 10/21/09; Decision Issued: 10/26/09; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 9205; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 11/10/09; EDR Ruling #2010-2465 issued 03/04/10; Outcome: Remanded to AHO; Remand Decision issued 03/19/10; Outcome: Decision Reversed – Agency Upheld; Administrative Review: DHRM Ruling Request received 11/10/09; DHRM Ruling issued 02/18/10; Outcome: AHO's decision affirmed.**

VIRGINIA: IN THE DEPARTMENT OF EMPLOYMENT
DISPUTE RESOLUTION

IN RE: CASE NO.: 9205

DECISION OF HEARING OFFICER

PROCEDURAL BACKGROUND

The grievant was terminated from employment with the Department of Corrections on May 22, 2009. I was appointed as hearing officer on September 30. I conducted a telephonic pre-hearing conference call on October 2. I scheduled the matter for hearing on October 21, and conducted the hearing on that date.

APPEARANCES

Grievant

Agency Representative

Warden

ISSUE

Whether the agency was justified in issuing to the grievant a Group III Written Notice and terminating him from employment on May 22, 2009?

FINDINGS OF FACTS

The grievant served the agency as a corrections officer, beginning employment on September 10, 2007. In May of this year he worked the evening shift in a segregation unit of a penitentiary operated by the agency. Among his duties was the task to count the inmates in his unit at regularly scheduled intervals. He was to properly note, for each cell, whether the inmate was present or absent or if the cell was not assigned at that time. The officer responsible for performing the count is required to make the appropriate notations on a written record.

At some point in May the warden received word that the counts were not being properly performed in a particular unit. He reviewed the surveillance tapes to determine whether these violations of policy involved only a single employee or if it was a "culture" problem. Upon his reviewing the tapes the warden discovered that seven correctional officers, including the grievant, and one corrections sergeant had been failing to count or submitted falsified count sheets.

The tapes showed that on May 4, 5, 6, 8, and 9 the grievant failed to count, or improperly counted the inmates in the pod. He has not disputed those offenses. He was given the opportunity to review the tapes with the Warden and the Warden withdrew or amended certain charges he had planned on bringing against the grievant. On May 22 the Warden issued a Group III Written Notice for submitting falsified count sheets (5 charges) and for failing to follow instructions or policy (3 charges). The Warden terminated the grievant from employment on that date.

One of the other six corrections officers voluntarily resigned from employment after being confronted with ten charges of falsifying count sheets in five days. Another officer (referred to as Employee B) received a Group III Written Notice and was suspended for 30 days. He had received three charges of falsifying count sheets and two charges of failing to follow count procedures. The other four corrections officers (Employees C, D, E, and F) each received a Group III Notice and were suspended for no greater than seven days. One of those four officers was suspended for seven days based on one count of a falsified count sheet and two charges of failing to follow procedure. Each of the other three had only a single charge of a falsified count sheet.

The sergeant who was disciplined received a Group III Notice for failing to follow instructions that could have resulted in a security threat. He was suspended for 40 hours. His discipline was based on eight falsified count sheets being submitted under his supervision and two improper counts while he was physically present in the pod.

ANALYSIS OF LAW AND OPINION

Chapter _____ of Title 2.2 of the Code of Virginia of 1950, as amended, provides certain protections to employees of the Commonwealth. One of those protections is the right to grieve termination from employment for disciplinary reasons. Under Section 5.8 of the Grievance Procedural Manual promulgated by the Department of Employment Dispute Resolution, in disciplinary grievances the agency has the burden of going forward with the evidence and the burden of proving by a preponderance of the evidence that its actions were warranted and appropriate. In a disciplinary grievance a hearing officer "reviews the facts e novo…to determine (I) whether the employee engaged in the behavior described in the written notice; (II) whether the behavior constituted misconduct; (III) whether the agency's discipline was consistent with law…and policy…and, finally, (IV) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances." Rules for Conducting Grievance Hearings Section V (B). In this case, the grievant admitted the allegations were true. Based on this stipulation, I have no choice but to conclude that the misconduct occurred.

The agency issued the written notice pursuant to Operating Procedure No. 135.1, the Standards of Conduct. That policy provides that Group III offenses are those acts or

behavior of such a serious nature that a first offense normally should warrant removal. Specifically listed as a Group III offense is the falsification of any record, including count sheets. Also listed is the "refusal to obey instructions that could result in a weakening of security." The admitted actions of the grievant clearly qualify as Group III offenses.

The agency was warranted in giving the grievant and the other officers this level of notice.

The crux of the argument of the grievant is that he should not have been terminated because of the other officers receiving only suspensions. Employee B is the other officer whose number of charges is closest to that given to the grievant. Employee B was given a Group III Notice and suspended for 30 days. He had 14.9 years of service with the agency at the time of the offenses.

The Warden testified that Employee B was not terminated because of his length of service with an otherwise blemish-free work record. The Warden saw those factors as being mitigating reasons to not terminate Employee B. Section IX of agency Operating Procedure 135.1 allows as consideration in mitigation "those conditions related to an offense that would serve to support a reduction of corrective action in the interest of fairness." The same section also allows a disciplinary action to be mitigated upon consideration of the good service record of an employee. The Warden testified under cross-examination by the grievant that had Employee B been found to have committed the same number and type of offenses as the grievant he would have still only been suspended for 30 days and not terminated.

The Warden contrasted the nearly 15 years of service by Employee B with the two years of service by the grievant. This concession by the Warden is troublesome.

Assuming that the inmate count violations constituted a serious safety threat, as argued by the agency, the length of good service by one employee is a slim thread on which to base the imposition of a significantly lighter punishment. One can reasonably argue that a more seasoned employee should be more aware of the potential risk involved in such violations. A more experienced officer should lead by example, not be part of a "culture" that tolerates a threat to security. By discriminating between the grievant and Employee B, the agency has acted unfairly toward the grievant. This is highlighted by the testimony of the Warden that Employee B would not have been terminated even had he been found to commit the same number of violations as the grievant.

I am mindful that I must give due deference to the discretion of the agency in managing its affairs. Section VI (B), Rules for Conducting Grievance Hearings. I cannot find, however, that the agency acted reasonably in this instance.

DECISION

For the reasons stated above, I uphold the issuance of the Group III Written Notice of May 22, 2009. I further order that the grievant be reinstated to employment with the agency. He shall be awarded full back pay, with the exception of 30 days. The interim earnings of the grievant shall be deducted from this award. He shall be entitled to a restoration of full benefits and seniority.

APPEAL RIGHTS

As the Grievant 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** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director=s authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14th St., 12th Floor, Richmond, VA 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, Main Street Centre, 600 East Main St., Suite 301, Richmond, VA 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 the original hearing decision**. 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 court shall award reasonable attorneys= fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code ' 17.1-405.

ENTERED this 26th day of October 2009.

/ s/ Thomas P. Walk
Thomas P. Walk, Hearing Officer

VIRGINIA: IN THE DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO.: 9205

AMENDMENT TO FINAL DECISION

I issued a final decision in this matter on October 26, 2009. The agency requested reviews of my decision by the Department of Human Resource Management and the Department of Employment Dispute Resolution. On February 18, 2010 the Department of Human Resource Management ruled that it was without authority to review my mitigation of the punishment given the grievant. It deferred to the Department of Employment Dispute Resolution for determination of these matters.

On March 4, 2010 the Director of the Department of Employment Dispute Resolution ruled that my application of the portion of the Rules for Conducting Grievance Hearings regarding mitigating circumstances was incorrect. The Director ruled that the finding by me of inconsistent discipline was inappropriate, given the determination by the agency that the grievant and another employee who had been disciplined for a similar offense were not "similarly situated."

Based upon this ruling I hereby modify my decision rendered herein to uphold the issuance of the Group III Written Notice of May 22, 2009 and the termination of the grievant from employment pursuant to said Notice.

ENTERED this March 19, 2010.

/s/ Thomas P. Walk
Thomas P. Walk, Hearing Officer

POLICY RULING OF THE DEPARTMENT
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections
February 18, 2010

The agency has requested an administrative review of the hearing decision in Grievance Case No. 9205. The agency is challenging the decision because it feels the decision is inconsistent with state and agency policy, and more particularly does not comply with the VDOC Operating Procedure 135.1: Standards of Conduct. For the reason stated below, the Department of Human Resource Management (DHRM) will not interfere with the hearing decision. The agency head, Ms. Sara R. Wilson, has requested that I respond to this appeal.

FACTS

The grievant was employed by the Department of Corrections as a Corrections Officer at one of its facilities until he was terminated. He was charged with the following:

> Falsifying any record (count sheets): During an internal investigation, it was discovered on 5/4/09 (9:30 PM), 5/5/09 (5:30 AM and 9:30 PM), 5/6/09 (5:30 AM), and 5/9/09 (5:30 AM) you did not physically count the Segregation POD (C-2). You falsifying count sheets certifying you had counted the Segregation Pod when actually you did not. FAILURE TO FOLLOW INSTRUCTIONS AND/OR POLICY: It was also discovered you failed to follow count instructions and policy on and policy on 5/4/09 (5:30 PM), 5/5/09 (5:30 PM), and 5/8/09 (5:30 PM). These acts violate the Count Policies, Training and Post Orders. During the investigation, you admitted to falsifying the count sheets on 5/5/09, 5/6/09, and 5/9/09 and not following count policy on 5/4/09, 5/5/09 and 5/8/09.

The agency issued to him a Group III Written Notice with termination, effective May 22, 2009. The grievant filed an expedited grievance in which he stated that he was treated unfairly because other employees who had committed the same infractions were issued different disciplinary actions. In his decision, the hearing officer upheld the Group III Written Notice but reinstated the grievant with full back pay.

In his **Finding of Facts**, the hearing officer listed the following as having occurred:

> The grievant served the agency as a corrections officer, beginning employment on September 10, 2007. In May of this year he worked the evening shift in a segregation unit of a penitentiary operated by the agency. Among his duties was the task to count the inmates in his unit at regularly scheduled intervals. He was to properly note, for each cell, whether the

inmate was present or absent or if the cell was not assigned at that time. The officer responsible for performing the count is required to make the appropriate notations on a written record

At some point in May the warden received word that the counts were not being properly performed in a particular unit. He reviewed the surveillance tapes to determine whether these violations of policy involved only a single employee or if it was a "culture" problem. Upon his reviewing the tapes the warden discovered that seven correctional officers, including the grievant, and one corrections sergeant had been failing to count or submitted falsified count sheets.

The tapes showed that on May 4, 5, 6, 8, and 9 the grievant failed to count, or improperly counted the inmates in the pod. He has not disputed those offenses. He was given the opportunity to review the tapes with the Warden and the Warden withdrew or amended certain charges he had planned on bringing against the grievant. On May 22 the Warden issued a Group III Written Notice for submitting falsified count sheets (5 charges) and for failing to follow instructions or policy (3 charges). The Warden terminated the grievant from employment on that date.

One of the other six corrections officers voluntarily resigned from employment after being confronted with ten charges of falsifying count sheets in five days. Another officer (referred to as Employee B) received a Group III Written Notice and was suspended for 30 days. He had received three charges of falsifying count sheets and two charges of failing to follow count procedures. The other four corrections officers (Employees C, D, E, and F) each received a Group III Notice and were suspended for no greater than seven days. One of those four officers was suspended for seven days based on one count of a falsified count sheet and two charges of failing to follow procedure. Each of the other three had only a single charge of a falsified count sheet.

The sergeant who was disciplined received a Group III Notice for failing to follow instructions that could have resulted in a security threat. He was suspended for 40 hours. His discipline was based on eight falsified count sheets being submitted under his supervision and two improper counts while he was physically present in the pod.

ANALYSIS OF LAW AND OPINION

Chapter _____ of Title 2.2 of the Code of Virginia of 1950, as amended, provides certain protections to employees of the Commonwealth. One of those protections is the right to grieve termination from employment for disciplinary reasons. Under Section 5.8 of the Grievance Procedural Manual promulgated by the Department of Employment Dispute

Resolution, in disciplinary grievances the agency has the burden of going forward with the evidence and the burden of proving by a preponderance of the evidence that its actions were warranted and appropriate. In a disciplinary grievance a hearing officer "reviews the facts de novo…to determine (I) whether the employee engaged in the behavior described in the written notice; (II) whether the behavior constituted misconduct; (III) whether the agency's discipline was consistent with law…and policy…and, finally, (IV) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances." Rules for Conducting Grievance Hearings Section V (B). In this case, the grievant admitted the allegations were true. Based on this stipulation, I have no choice but to conclude that the misconduct occurred.

The agency issued the written notice pursuant to Operating Procedure No. 135.1, the Standards of Conduct. That policy provides that Group III offenses are those acts or behavior of such a serious nature that a first offense normally should warrant removal. Specifically listed as a Group III offense is the falsification of any record, including count sheets. Also listed is the "refusal to obey instructions that could result in a weakening of security." The admitted actions of the grievant clearly qualify as Group III offenses.

The agency was warranted in giving the grievant and the other officers this level of notice. The crux of the argument of the grievant is that he should not have been terminated because of the other officers receiving only suspensions. Employee B is the other officer whose number of charges is closest to that given to the grievant. Employee B was given a Group III Notice and suspended for 30 days. He had 14.9 years of service with the agency at the time of the offenses.

The Warden testified that Employee B was not terminated because of his length of service with an otherwise blemish-free work record. The Warden saw those factors as being mitigating reasons to not terminate Employee B. Section IX of agency Operating Procedure 135.1 allows as consideration in mitigation "those conditions related to an offense that would serve to support a reduction of corrective action in the interest of fairness." The same section also allows a disciplinary action to be mitigated upon consideration of the good service record of an employee. The Warden testified under cross-examination by the grievant that had Employee B been found to have committed the same number and type of offenses as the grievant he would have still only been suspended for 30 days and not terminated.

The Warden contrasted the nearly 15 years of service by Employee B with the two years of service by the grievant. This concession by the Warden is

troublesome. Assuming that the inmate count violations constituted a serious safety threat, as argued by the agency, the length of good service by one employee is a slim thread on which to base the imposition of a significantly lighter punishment. One can reasonably argue that a more seasoned employee should be more aware of the potential risk involved in such violations. A more experienced officer should lead by example, not be part of a "culture" that tolerates a threat to security. By discriminating between the grievant and Employee B, the agency has acted unfairly toward the grievant. This is highlighted by the testimony of the Warden that Employee B would not have been terminated even had he been found to commit the same number of violations as the grievant.

I am mindful that I must give due deference to the discretion of the agency in managing its affairs. Section VI (B), Rules for Conducting Grievance Hearings. I cannot find, however, that the agency acted reasonably in this instance.

DECISION

For the reasons stated above, I uphold the issuance of the Group III Written Notice of May 22, 2009. I further order that the grievant be reinstated to employment with the agency. He shall be awarded full back pay, with the exception of 30 days. The interim earnings of the grievant shall be deducted from this award. He shall be entitled to a restoration of full benefits and seniority.

DISCUSSION

The Department of Human Resource Management offers the following in response to the Department of Corrections' request for an administrative review. Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is beyond the limit of reasonableness, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness." Attachment A, Unacceptable Standards of Conduct, of this policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive. In addition, the Department of Corrections has promulgated DOC Operating Procedure 135.1, Standards of Conduct, to suit specific business needs of the agency.

Based on the evidence, the hearing officer determined that the grievant violated the Standards of Conduct policy as related to falsifying records and was disciplined accordingly (Group III Written Notice and termination). However, the hearing officer reinstated the grievant with full backpay based on how other employees who had more years of experience and committed the same violations, but for a different number of times, were disciplined.

Please note that there are two points in the grievance procedure where mitigating and/or aggravating circumstances may be considered: (1) during the management steps, and (2) at the hearing level. In the instant case, the hearing officer determined that the evidence supported that the grievant, as did other employees, committed the infractions as stipulated by agency management. However, the evidence also supports, through testimony, that management officials took into consideration mitigating circumstances for all involved employees and meted out discipline accordingly. It appears that the considered factors included that the number of years the employees had worked and the number of violations they had committed. Thus, except for one employee who resigned, all were evaluated in accordance with those standards.

The other point at which mitigating and/or aggravating circumstances may be considered is at the hearing stage. The standards for consideration of mitigating and/or aggravating circumstances at this stage may differ from those considered by management. Only the Director of the Department of Employment Dispute Resolution (EDR) is authorized to determine the appropriateness of the mitigating and/or aggravating circumstances considered by the hearing officer. We note that the agency has filed a request with the Director of EDR for an administrative review. That request is the same request filed at the DHRM and the mitigating circumstances issues should be addressed by the EDR.

Thus, while the agency identified that the hearing decision is inconsistent with state and agency policy, namely the VDOC Operating Procedure 135.1, Standards of Conduct, it appears that the agency disagrees with what evidence the hearing officer

considered, how he assessed the evidence and his resulting decision. This Agency has no authority to interfere with the application of this decision.

_____

Ernest L. Spratley