

Issues: Group II Written Notice (falsification and failure to follow instructions), and Termination (due to accumulation); Hearing Date: 08/31/11; Decision Issued: 09/22/11; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 9661; Outcome: No Relief – Agency Upheld; **Administrative Review**: **EDR Ruling Request received 10/05/11; EDR Ruling No. 2012-3129 issued 12/07/11; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 12/19/11; DHRM Ruling issued 01/25/12; Outcome: AHO's decision affirmed.**

**COMMONWEALTH OF VIRGINIA, DEPARTMENT OF EMPLOYMENT
DISPUTE RESOLUTION**

RE: DEDR CASE NO.: 9661

DECISION OF HEARING OFFICER

**HEARING DATE: August 31, 2011
DECISION ISSUED: September 22, 2011**

I. PROCEDURAL HISTORY

The grievant commenced this matter on May 26, 2011, challenging the issuance of a Group II Written Notice to him and his termination from employment. I was appointed as hearing officer on July 19. I conducted a telephonic pre-hearing conference on July 26. Counsel for the grievant agreed to an extension of my decision deadline. I conducted the hearing on August 31. At the hearing, I requested supplemental written argument from the agency advocate and counsel for the grievant. The agency submitted its written argument on September 9. The grievant submitted his argument on September 14.

II. APPEARANCES

Agency

Agency Advocate

Five Witnesses for the Agency

Grievant

Counsel for Grievant

III. ISSUE PRESENTED

Whether the agency justifiably issued the grievant a Group II Written Notice and terminated him from employment on April 29, 2011?

IV. FINDINGS OF FACT

The agency issued to the grievant a Group II Written Notice on April 29 for submitting false or fraudulent documents and for failing to follow instructions. The agency had previously issued to this grievant a Group III Written Notice, which Notice remained active on April 29. The agency terminated the grievant from employment on April 29 based on the cumulative discipline.

On April 16 the grievant was working for the agency as a Corrections Officer. His shift on that date was from 9:00 a.m. until 9:00 p.m. At approximately 11:40 a.m. on that date a Captain made rounds through the building where the grievant was stationed. Other officers accompanied the Captain. The grievant reported nothing unusual to these officers at that time.

Shortly before 1:00 p.m., the grievant left his assigned post to turn in count sheets and exchange certain items of laundry. These were part of his assigned duties. While carrying out these duties, he made a stop in the medical unit to converse with another Corrections Officer. This was meant to be a personal conversation, unrelated to any work matters.

When he arrived at the medical unit, the grievant noticed five pills in the floor near a medications cart. He had found loose medications on other occasions. In February 2011, he had turned over medications he had found to the Warden after hiding them in a closet for an undetermined amount of time. The Assistant Warden counseled him that if pills were again

found loose, he should immediately notify his supervisor. Later in that month, the Assistant Warden again counseled the grievant about the importance of following the appropriate chain of command.

When he found the loose pills on April 16 the grievant retrieved them and told the medical unit officer that he was going to file an incident report. He left the medical unit with the pills and made no effort to contact his immediate supervisors. Upon determining that the watch commander was not in his office, the grievant proceeded to the office of the Warden. He described to the Warden what had happened and turned the pills over to him.

The Warden immediately contacted the watch commander who commenced an investigation between 1:30 p.m. and 2:00 p.m. on April 16. The watch commander spoke with the medical unit officer and obtained a statement from him on April 16. He did not contact the grievant until the following day.

The watch commander then directed the grievant to write an incident report. The grievant stated in his initial report that he had found the pills at approximately 9:50 a.m. on the preceding day. The watch commander knew from his meeting with the Warden that the pills had not been turned in until after 1:00 p.m. He also knew that he had spoken with the grievant at 11:40 a.m. on April 16, at which time nothing was said about any pills being found. He ordered the grievant to write a second incident report. The grievant stated in that report that he had the pills in his possession when speaking with the watch commander and the other officers at 11:40 a.m.

Video taken of the medical unit on April 16 did not show the grievant being present there prior to approximately 1:00 p.m. The grievant was not present in that unit prior to that time.

The statement in the second incident report about the grievant being in possession of the pills at 11:40 a.m. was false.

The Warden issued to the grievant the Group II discipline and terminated him from employment on April 29. The grievant had previously been issued a Group III Written Notice on June 17, 2010.

V. APPLICABLE LAW AND OPINION

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedural Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It has the burden of proving by a preponderance of the evidence that its actions were warranted and appropriate.

The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolutions, Rules for Conducting Grievances. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

I will discuss these considerations in the order presented.

The agency is basing its action on the filing of the second incident report, as well as the failure by the grievant to follow his chain of command in reporting the finding of the loose pills. The grievant admits that he made the second incident report. He further admits that he failed to follow the appropriate chain of command. He denies, however, that his actions constitute misconduct.

The making of a false document is an act subject to discipline under agency Operating Procedure 135.1. That policy has consistently been interpreted to require, in order to justify termination, that the falsification or misrepresentation be intentional. Here, no direct evidence supports a conclusion that the grievant acted with the intent to mislead his superior officers. The circumstantial evidence is ambiguous. For example, by submitting the second incident report, the grievant made the situation appear more incriminating than the actual facts. Under the facts described in that report, the grievant failed to follow the chain of command as early as 11:40 a.m. and then proceeded to carry contraband around the institution for at least another ninety minutes. The grievant clearly acted recklessly in his preparation and signing of the second report. Recklessness, however, does not rise to the level of misconduct for which a Group II Written Notice can be issued.

The failure to follow a supervisor's instruction is listed as a Group II offense. The grievant argues that his failure to follow the proper chain of command in this instance was excusable. He alleged that he was uncomfortable reporting events to certain of his superior

officers for fear of retaliation. He testified that he had been warned that he needed to make a greater effort to get along with his co-workers and not file incident reports that would reflect badly on a co-worker. I find these justifications to be lacking.

Upon finding the pills, the grievant had the responsibility to notify his immediate supervisor. Instead, he reported the event to the warden. Other than his own testimony, the grievant presented no evidence to support his assertion that following the chain of command would have been of no avail. In addition, he failed to show that proceeding further up the chain of command, bypassing any perceived roadblocks but stopping short of reporting to the warden, was not feasible. Therefore, I find that his failure to properly follow instructions does qualify as misconduct for which discipline may be imposed.

The agency has presented a prima facie case that its discipline here was consistent with law and policy. The grievant argues that he is not subject to discipline. He asserts that he is a protected employee under the Virginia Whistle Blower statute, Chapter 30 of Title 2.2 of the Code of Virginia of 1950, as amended. It is the policy of the Commonwealth that employees of state government shall be freely able to report instances of wrongdoing or abuse committed by their employing agency. Virginia Code Section 2.2-3009. Section 2.2-3010 defines wrongdoing as "a violation, which is not of a merely technical or minimal nature, of a Federal or State Law or regulation. . .designed to protect the interest of the public or employee." That same statute defines "abuse" as "an employer's or employee's conduct or omissions that results in substantial misuse, destruction, waste, or loss of funds for resources." Although different verbiage is used in these definitions, they have the common requirement that the wrongdoing being reported be of a significant nature.

The grievant was reporting the failure of the medical unit nursing staff to properly handle medications. The argument is that leaving pills lying on the floor constituted a threat to safety, those pills being available to inmates or even other employees. In the abstract, this argument has some superficial appeal. Upon closer examination, the argument fails.

No conclusive evidence was presented as to whether the pills found by the grievant on April 16 were controlled substances or over-the-counter medications. Furthermore, the evidence would require me to speculate as to any immanency of any safety threat. The finding of the five pills, even viewed in light of prior findings, does not rise to the level of event for which protection under the Virginia Whistle Blower statute was intended to provide.

Some may view the statute as allowing an agency to deal with minor problems with a wink and a nod, all the while disciplining an employee in the position of the grievant. That may indeed be the effect of the statute. The language of it, however, is unambiguous. I can only apply it as it is written.

The last issue for me to decide is whether circumstances exist that would justify the mitigation of the punishment of the grievant. As the Warden testified, the failure to follow instructions can be disciplined as a Group III offense. In determining the level of discipline, the decision of the agency is entitled to substantial deference. Rules for Conducting Grievance Hearings VI (B)(1). I note that the Warden testified that he considered in mitigation the fourteen years of experience of the grievant with the agency. I cannot find that the agency exceeded the bounds of reasonableness in its action.

VI. DECISION

For the reasons stated, I hereby uphold the issuance of the Group II Written Notice to the grievant and his termination from employment by the agency.

VII. 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, One Main Street Centre, 600 E. 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 Section 17.1-405.

ENTERED this September 22, 2011.

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Department of Corrections

January 25, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9661. For the reasons stated below, we will not interfere with the application of this hearing decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer state the following as relevant in his FINDINGS OF FACT:

The agency issued to the grievant a Group II Written Notice on April 29 for submitting false or fraudulent documents and for failing to follow instructions. The agency had previously issued to this grievant a Group III Written Notice, which Notice remained active on April 29. The agency terminated the grievant from employment on April 29 based on the cumulative discipline.

On April 16 the grievant was working for the agency as a Corrections Officer. His shift on that date was from 9:00 a.m. until 9:00 p.m. At approximately 11:40 a.m. on that date a Captain made rounds through the building where the grievant was stationed. Other officers accompanied the Captain. The grievant reported nothing unusual to these officers at that time.

Shortly before 1:00 p.m., the grievant left his assigned post to turn in count sheets and exchange certain items of laundry. These were part of his assigned duties. While carrying out these duties, he made a stop in the medical unit to converse with another Corrections Officer. This was meant to be a personal conversation, unrelated to any work matters.

When he arrived at the medical unit, the grievant noticed five pills in the floor near a medications cart. He had found loose medications on other occasions. In February 2011, he had turned over medications he had found to the Warden after hiding them in a closet for an undetermined amount of time. The Assistant Warden counseled him that if pills were again found loose, he should immediately notify his supervisor. Later in that month, the Assistant Warden again counseled the grievant about the importance of following the appropriate chain of command.

When he found the loose pills on April 16 the grievant retrieved them and told the medical unit officer that he was going to file an incident report. He left the medical unit with the pills and made no effort to contact his immediate supervisors. Upon determining that the watch commander was not in his office,

the grievant proceeded to the office of the Warden. He described to the Warden what had happened and turned the pills over to him.

The Warden immediately contacted the watch commander who commenced an investigation between 1:30 p.m. and 2:00 p.m. on April 16. The watch commander spoke with the medical unit officer and obtained a statement from him on April 16. He did not contact the grievant until the following day.

The watch commander then directed the grievant to write an incident report. The grievant stated in his initial report that he had found the pills at approximately 9:50 a.m. on the preceding day. The watch commander knew from his meeting with the Warden that the pills had not been turned in until after 1:00 p.m. He also knew that he had spoken with the grievant at 11:40 a.m. on April 16, at which time nothing was said about any pills being found. He ordered the grievant to write a second incident report. The grievant stated in that report that he had the pills in his possession when speaking with the watch commander and the other officers at 11:40 a.m.

Video taken of the medical unit on April 16 did not show the grievant being present there prior to approximately 1:00 p.m. The grievant was not present in that unit prior to that time. The statement in the second incident report about the grievant being in possession of the pills at 11:40 a.m. was false.

The Warden issued to the grievant the Group II discipline and terminated him from employment on April 29. The grievant had previously been issued a Group III Written Notice on June 17, 2010.

In his APPLICABLE LAW AND OPINION, the hearing officer stated:

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedural Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It has the burden of proving by a preponderance of the evidence that its actions were warranted and appropriate.

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In his DECISION, the hearing officer wrote, "For the reasons stated, I hereby uphold the issuance of the Group II Written Notice to the grievant and his termination from employment by the agency."

DISCUSSION

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. 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.

In his appeal to this Agency, the grievant contends that the hearing officer misinterpreted relevant policy because the cited policy did not require that he follow the chain of command when reporting infractions. To the contrary, the policy is clear in its instructions regarding following the chain of command. DHRM concludes that the hearing officer did not violate any human resource management policy. Rather, it appears that the grievant is disagreeing with the hearing officer's assessment of the evidence and the conclusions he drew as a result of that assessment. Therefore, this Agency has no basis to interfere with the application of this decision.

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services