

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 11651

Hearing Date: April 30, 2021  
Decision Issued: May 5, 2021

**PROCEDURAL HISTORY**

On September 11, 2020, the Grievant was issued a Group II Written Notice.<sup>1</sup> On October 16, 2020, the Grievant timely filed a grievance challenging the Agency's actions.<sup>2</sup> On February 8, 2021, the grievance was assigned to a Hearing Officer. A hearing was held on April 30, 2021.

**APPEARANCES**

Agency Counsel  
Agency Representative  
Grievant  
Witnesses

**ISSUES**

Did the Grievant, in the early morning of March 25, 2020, fail to count all locations assigned to him in violation of OP 410.2 – Facility Count Procedures.

**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. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>3</sup> 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

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

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

<sup>3</sup> See Va. Code § 2.2-3004(B)

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. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.<sup>4</sup> However, proof must go beyond conjecture.<sup>5</sup> In other words, there must be more than a possibility or a mere speculation.<sup>6</sup>

### **FINDINGS OF FACT**

After reviewing the evidence presented, I make the following findings of fact:

The Agency provided me with a notebook containing 7 tabs. There were objections entered, but after questioning by me, the Grievant had no relevant objections to the contents of Agency's notebook and it was accepted as Agency Exhibit 1.

The Grievant did not submit any documentary evidence.

The Written Notice, which was issued on September the 11, 2020, set forth a violation of OP 410.2 - Facility Count Procedures. OP 410.2 (I)(B) states in part of follows:

- (1)... Counting Officers should not know the assigned number of offenders prior to counting.
- (3) During night counting, the Counting Officer must see flesh and observe movement or hear the offender speak... enough light must be used to ensure the actual presence of the offender.<sup>7</sup>

The Grievant and another officer were tasked with making a count of dormitories A and B, a special

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<sup>4</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>5</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>6</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

<sup>7</sup> Agency Exhibit 1, Tab 4, Page 4

purpose cell where an inmate on suicide watch was being held, and the basement below these dormitories. Each of the dormitories contained 72 beds, which were in 4 separate rows of 9 bunk beds each. There were 9 such bunks against one outside wall, an aisle, 9 more on the other side of the aisle, 9 more backing up to these, a second aisle and finally 9 more against the other outside wall. The head of this facility testified before me. Her uncontradicted testimony was that counting officers needed to comply with OP 410.2. She testified that 2 of the 3 criteria of seeing flesh, movement, or hearing speech must be met in order to properly perform a count. In addition, for safety and security reasons, the counting officers needed to cover the entirety of the space to be certain no one was hidden from view. Said another way, they needed to walk from front to back of each aisle of the dormitory, look in the special purpose cell, and go to the basement to make a count there.

The Agency offered into evidence a DVD-R disk that was a video obtained from Rapid Eye.<sup>8</sup> This video captured the 3:00 am count made by Grievant on March 25, 2020. The count of dormitory B was done properly, taking approximately 2 minutes and 43 seconds to complete. However, the video clearly showed the Grievant and the other officer proceeding only approximately 1/3 of the distance of one aisle in dormitory A. There was an offender beyond that point that was not checked as called for in OP 410.2. Neither of them proceeded to the end of that aisle. Neither of them walked any part of the second aisle. The count in dormitory A was completed in approximately 1 minute and 5 seconds. Neither of them approached the special purpose cell and neither of them went to the basement.

A second DVD-R disk was entered into evidence. It clearly showed both the Grievant and the other officer preparing and signing Living Unit Count Sheets.<sup>9</sup> Grievant signed one such sheet certifying that a proper count was made of dormitory A, the special purpose cell, and the basement for the dormitories.<sup>10</sup> The clear evidence from the Rapid Eye Video was that this certification was false.

The head of the facility testified that she had considered a Group III Written Notice for falsification of state records but mitigated that to this Group II Written Notice with no consequence other than it will remain on Grievant's record for the appropriate period.

The Grievant testified and did not attempt to refute the video evidence. He testified that he thought a Needs Improvement Notice would have better suited this matter.

### **MITIGATION**

*Va. Code § 2.2-3005(C)(6)*, authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings ("Rules"), provide that a Hearing Officer is not a super personnel officer. Therefore, in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior

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<sup>8</sup> Agency Exhibit 1, Tab 6

<sup>9</sup> Agency Exhibit 1, Tab 5

<sup>10</sup> Agency Exhibit 1, Tab 7, pages 3 and 4

described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency's discipline was consistent with law and policy, then the Agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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.

I find no reason to mitigate this matter.

### **DECISION**

For the reason stated herein, I find the Agency has borne its burden of proof in this matter and that the issuance of the Group II Written Notice was proper.

### **APPEAL RIGHTS**

You may request an administrative review by EDR within **15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EDR within 15 calendar days of the date the decision was issued.**

Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.


You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for

administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. 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>[1]</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>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.