Issue: Group III Written Notice with Demotion and Pay Reduction (falsifying records); Hearing Date: 02/06/14; Decision Issued: 02/26/14; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 10227; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10227

Hearing Officer Appointment: November 21, 2013
Hearing Dates: January 9, 2014 and
February 6, 2014
Decision Issued: February 26, 2014

PROCEDURAL HISTORY, ISSUES AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the issuance of a Group III Written Notice issued September 12, 2013 by the Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A dated October 13, 2013.

The Grievant is seeking the relief requested in his Grievance Form A including restoration of any lost pay and benefits and rescission and removal from his record of the Group III Written Notice.

The Grievant's advocate, the Agency's advocate, and the hearing officer participated in a first pre-hearing conference call on December 2, 2013.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on December 3, 2013, which is incorporated herein by this reference.

At the hearing, the Grievant was represented by his advocate and the Agency was represented by its advocate. 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[1].

[1] References to the agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits will be designated GE followed by the exhibit number.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was formerly employed as a Corrections Sergeant ("Sergeant") by the Agency at a correctional facility (the "Facility") which incarcerates approximately 2,600 offenders.

2. Security and safety at the Facility of staff, offenders and the public are paramount. Integral to such security and safety are the formal and informal counts of inmates to account for everyone, which are performed several times per day. Two certified Correctional Officers ("C/Os") perform the count for the inmates for which they are responsible and document it on a count sheet. A Supervisor such as a Sergeant then checks the count sheet and turns it in to the Watch Commander, who then also checks it.

3. At the time of the offense, the Grievant had been employed by the Facility for over 10 years. AE 1. The Grievant was promoted to Sergeant in 2012 and had no active disciplinary written notices prior to this offense. The Grievant had been a stellar employee and his last evaluation was "Exceed Contributor".

4. On August 12, 2013, the Grievant was assigned to Housing Unit 10, a special housing unit at the Facility. There was a count problem concerning a formal count for the Facility which involved Housing Unit S2 and the Watch Commander ordered a recount. Accordingly, because Housing Unit S2 was involved, Housing Unit 10 was required to perform a recount of offenders from S2 who were temporarily at Housing Unit 10.

5. Instead of recounting the offenders concerning an out count sheet for Housing Unit 10 (which Grievant maintains was lost), the Grievant signed the name of the C/0 who previously performed the count. Another C/0 refused to sign the Count.

6. In his Second Resolution Step, the Grievant admitted to not conducting the out count, to falsifYing the count sheet and stated that he knew he was violating policy and that he had no excuse for his actions. AE 4; Tapes.

7. In his Form A, the Grievant concedes that his actions warrant discipline but maintains that the discipline was too harsh. AE 2.

8. The testimony of the Agency witness was credible. The demeanor of such witness was open, frank and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

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 his 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 ofVirginia,* the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency Standards of Conduct (the "SOC") are contained in Agency Operating Procedure 135.1 ("Policy No. 135.1"). AE 7. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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.

Pursuant to Policy No. 135.1, the Grievant's conduct could clearly constitute a terminable offense, as asserted by the Agency.

Policy No. 135.1 provides in part:

V (D). THIRD GROUP OFFENSES (GROUP III):

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

2. *Group III* offenses include, but are not limited to:

(b) 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, vouchers, reports, insurance claims, time records, leave records, or other official state documents.

AE3.

In this instance, the Agency appropriately determined that the Grievant's violations of Agency policies concerning signing count sheets and falsifying records constituted a Group III offense.

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

The Grievant and the Grievant's advocate correctly pointed out during the hearing that an element of intent must be proven by the Department to support the charge of falsifying documents.

"Falsifying" is not defined by the SOC, but for purposes of this proceeding, the hearing officer interprets this provision to require proof of an intent to falsify by the employee. This interpretation is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6^{1}h Edition) which provides in part as follows: **"Falsify.** To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition;

to tamper with, as to falsify a record or document." Accordingly, the word "falsify" means being intentionally or knowingly untrue.

The hearing officer decides that the Department has sustained its burden of proof concerning this requisite element of intent regarding the falsification offense. In support of his finding the hearing officer notes that correctional officer P refused to sign the count sheet and the Grievant admitted to the Warden in the Step 2 interview that the count sheet was falsified, that the out count was not conducted and that the Grievant had no excuse for his actions.

The hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions concerning the falsification of records and the failure to follow count procedures could have supported termination by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group III offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or ... an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant and instead of terminating the Grievant's employment, chose to demote the Grievant to C/0 with a 10% pay reduction.

The Grievant has specifically raised mitigation as an issue in the hearing and in his Form A While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Written Notice and all of those listed below in his analysis:

1. the Grievant's exemplary service to the Agency of over 10 years;

2. the fact that the Grievant did not have any other active discipline;

3. the often difficult and stressful circumstances of the Grievant's work environment;

4. prior to the offense, the Grievant was a member of the Facility Strike Force; and

5. the Grievant's last evaluation was "Exceed Contributor."

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id*

Here the offense was very serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The Grievant argued that certain similarly situated employees were involved in disciplinary cases warranting Group III Written Notices but the employees received less discipline. For example, the Grievant specifically raised the case of C/0 W. But C/0 W was not a supervisor or a sergeant who are held to a higher standard and who are responsible for teaching others formally and by example. The Grievant himself acknowledged he was in control in the housing unit. Tapes. The Grievant asserted that C/0 W did not receive formal discipline but the Warden testified that indeed he was formally disciplined for falsifying count sheets. Accordingly, upon closer examination, the Grievant could not prove these employees were similarly situated.

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 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, 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. *!d.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009 2192; February 6, 2009.

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice 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 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 fmal and is subject to judicial review.

Administrative Review: This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. 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 refer 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. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 ore-mailed.

2. A challenge that the hearing decision does not comply with grievance procedure as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR'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 Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed ore-mailed to EDR.

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 EDR before filing a notice of appeal.

ENTER: 2/26/13

John V. Roon, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).