

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 06/02/14; Decision Issued: 06/12/14; Agency: DOC; AHO: John R. Hooe, III, Esq.; Case No.10335; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of: Case No. 10335

Hearing Date: June 2, 2014
Decision Issued: June 12, 2014

PRELIMINARY MATTERS

Being unsuccessful in arranging a pre-hearing conference with the Grievant, the Hearing Officer established the hearing date and time for Monday, June 2, 2014 beginning at 9:00 a.m. on the grounds of Western State Hospital. By letter notice dated April 28, 2014 the Hearing Officer further required that a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called be provided to the Hearing Officer and to the other party no later than Monday, May 26, 2014 at 5:00 p.m.

APPEARANCES

Grievant
Agency Representative
Agency Advocate
Two Agency witnesses
Three Grievant witnesses

ISSUES

1. Did the Grievant falsify Agency records? If so, was the Grievant's behavior a violation of the Standards of Conduct?
2. If so, did the Grievant's conduct constitute a Group III Offense?
3. If Grievant's conduct was a Group III Offense, was termination from employment an appropriate discipline?
4. Were mitigating factors considered? If not, why were mitigating factors not considered?

EXHIBITS

The Agency Exhibits admitted into evidence are contained in a single notebook with the following contents:

1. - Written Notice Form 129-01-004 dated February 24, 2014
2. - Grievance Form A
3. - Operating Procedure, No. 135.1 Standards of Conduct
4. - Investigative interview of Grievant dated October 21, 2013
5. - Internal incident report by Grievant dated October 21, 2013
6. - Investigator's email dated December 30, 2013, Summary of Findings
7. - Copy of Page 251 from Log Book

The Grievant's exhibits included:

- Exhibit A - Original written notice dated February 24, 2014
- Exhibit B - A letter dated January 22, 2014 from Warden to Grievant
- Exhibit C - Security Post Order dated February 7, 2014

FINDINGS OF FACT

Agent D testified for the Agency. He stated that as a result of an “in custody death” at the facility he conducted an investigation. His investigation revealed that an inmate was found hung in his cell on October 21, 2013. He further testified that in the “segregation unit” cell checks were to be conducted every thirty minutes with officers verifying in log books located on the cell floor and in the control room that the required checks were made. In referring to Agency Exhibit 7, he testified that the inmate was found hanging at 6:59 and the last time the inmate was observed alive was at 6:13. He testified that the 6:42 entry in the control room log book (indicating a cell check was made at that time) was false in that video surveillance shows that no cell check was made between 6:13 and 6:59.

Agency Exhibit 4 is the investigative interview signed by the Grievant stating that she was working control during the incident and that she wrote that cell checks were done at 6:42 a.m. without confirmation or witnessing officers do the cell checks. She stated in the interview that the time 6:42 was entered because it was the time due for around twenty-nine minutes after the 6:13 a.m. count. In addition, the Grievant testified to the Hearing Officer that she made the false entry after the inmate was found hanging in his cell.

The Warden testified that he issued the Written Notice dated February 24, 2014 (Agency Exhibit 1) as a Group III, Code 74, (i.e. falsifying records), and terminated the Grievant’s employment. The Warden further testified that the Grievant’s otherwise good work record did not mitigate due to the seriousness of the offense. The Warden testified that he did not initially decide to terminate the Grievant at the time of the offense but reached his decision after discussing the matter with his superior, the Regional Administrator G.H..

The Grievant’s first witness, Lieutenant C. testified that he worked with the Grievant for four or five years, that she did her job very well and believed that she would address a violation of policy if she believed that she had violated policy. However, upon cross-examination, Lieutenant C. admitted that the Grievant should not have made the entry in the log book if she had not first observed or confirmed that the cell check had been made.

Grievant’s second witness, Lieutenant W. testified that he was an institutional trainer at the facility and trained the Grievant. He testified that the Grievant had good work ethic, was responsible and he believed was of good integrity.

The Grievant’s third witness, Sgt. M. testified that he had worked with the Grievant for seven or eight months in special housing, that she had a good work ethic and that her paperwork was very good.

Finally, while the Grievant pointed out what appears to be an irregularity of signatures between the copy of the Written Notice provided as Agency Exhibit 1 and the original of the

Written Notice (Grievant Exhibit A), the irregularity of signatures was not considered by the Hearing Officer in reaching the decision.

APPLICABLE LAW AND OPINION

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).

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.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct, Operating Procedure No. 135.1. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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 to provide appropriate corrective action.

Agency Exhibit 3 Operating Procedure No. 135.1 includes a list of Group III Offenses described as "acts and behaviors of such a serious nature that a first occurrence normally should warrant removal. Included in the list is D.2.b. "Falsifying any records."

DECISION

The disciplinary action of the Agency is upheld.

The Agency proved by a preponderance of the evidence that the Grievant was guilty of the Group III Offense alleged and that termination was not mitigated by Grievant's otherwise good work record.

APPEAL RIGHTS

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A 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 administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. "Received by" means delivered to, not merely post-marked or placed in the hands of a delivery service.

Requesting Administrative Review:

- 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 with which the hearing decision is not in compliance. The director's authority is limited to ordering the Hearing Officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-371-7401 or emailed.
- 2. A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the**

Rules for Conducting Grievance Hearings), 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 hearing 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 must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-786-0111 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

Final Hearing Decision. A Hearing Officer's original decision becomes a final hearing decision, with no further possibility of 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: Once an original hearing decision becomes final, either party may seek review by the Circuit Court on the ground that the final hearing decision is contradictory to law. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR's approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10

calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency's request.

A notice of appeal must be filed with the Clerk of the Circuit Court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

John R. Hooe, III
Hearing Officer