

Issue: Group III Written Notice with Suspension (failure to follow policy); Hearing Date: 06/13/14; Decision Issued: 06/17/14; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 10346; Outcome: Partial Relief.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 10346

Hearing Date: June 13, 2014  
Decision Issued: June 17, 2014

**PROCEDURAL HISTORY**

The Grievant was issued a Group III Written Notice on February 14, 2014, for:

Pursuant to Special Investigations Unit (SIU) Investigation Report (#130241 PCC) it has been determined by the SIU that you impeded an SIU Investigation into allegations that you retrieved and provided and offender access to his institutional Health Record and provided false statements to the SIU Investigator in the course of an administrative investigation of this allegation. Specifically, it is determined that you violated the two (2) following Operating Procedure provisions:

1. Operating Procedure 030.4, Special Investigations Unit (section IV, E, 4, f).
2. Operating Procedure 701.3, Health Records (section IV, A, 4 and B, 3).<sup>1</sup>

Pursuant to this Written Notice, the Grievant was suspended for 40 hours.<sup>2</sup> The Grievant timely filed a grievance to challenge the Agency's actions on February 28, 2014.<sup>3</sup> On May 1, 2014, this appeal was assigned to a Hearing Officer. Due to calendar conflicts between the parties, the hearing in this matter was not held until June 13, 2014. On that date, a hearing was held at the Agency's location.

**APPEARANCES**

Advocate for Agency  
Party Representative for Agency  
Grievant  
Witness

**ISSUE**

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<sup>1</sup> Agency Exhibit 1, Tab 1, Pages 1-2

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

<sup>3</sup> Agency Exhibit 1, Tab 2, Page 1-2

1. Did the Grievant violate Operating Procedure 030.4, Section IV(E)(4)(f)?
2. Did the Grievant violate Operating Procedure 701.3, Sections IV(A)(4) and (B)(3)?

### **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>4</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 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>5</sup> However, proof must go beyond conjecture.<sup>6</sup> In other words, there must be more than a possibility or a mere speculation.<sup>7</sup>

### **FINDINGS OF FACT**

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<sup>4</sup> See Va. Code § 2.2-3004(B)

<sup>5</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>6</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>7</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

The Agency provided me with a notebook containing 10 tabs and that notebook, with the exception of Tab 6(B), was accepted in its entirety as Agency Exhibit 1, without objection. The Grievant objected to Tab 6(B) and during the course of the hearing, I overruled that objection.

The Grievant did not file any documentary evidence with me, however at the hearing the Grievant submitted two written affidavits, each dated April 22, 2014. Those exhibits were accepted as Grievant Exhibit 1, without objection.

Operating Procedure 030.4, Section IV(E)(4)(f), states as follows:

Employees are expected to cooperate fully during the course of administrative investigations and to respond with truthful and complete answers to all proper questions of official interest and provide Special Agents with any and all information or evidence that may pertain to the specific matter under investigation.<sup>8</sup>

Operating Procedure 701.3, Sections IV(A)(4), states as follows:

Information from the Health Record may only be released in accordance with the *Dissemination* section of this operating procedure.<sup>9</sup>

Operating Procedure 701.3, Sections IV(B)(3), states as follows:

Access to the Health Record shall be controlled by the health authority and shall be granted only to those who require it under DOC procedures and applicable state and federal law.<sup>10</sup>

Operating Procedure 701.3, Sections IV(F)(2), states as follows:

The Facility Unit Head or designee may view the Health Record of an offender if it is necessary to resolve grievances, to evaluate performance of health services staff, or respond to complaints or litigations.<sup>11</sup>

I heard testimony from several Agency witnesses regarding the events that lead to this hearing. On or about July 31, 2013, an inmate at this facility reported that he had been assaulted. Pursuant to that report, a member of the SIU was tasked with investigating this allegation. The summary results of that investigation were introduced into evidence by the Agency.<sup>12</sup> During the course of that investigation regarding the inmate's assault, an issue arose as to whether or not

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<sup>8</sup> Agency Exhibit 1, Tab 7, Page 4

<sup>9</sup> Agency Exhibit 1, Tab 8, Page 2

<sup>10</sup> Agency Exhibit 1, Tab 8, Page 2

<sup>11</sup> Agency Exhibit 1, Tab 8, Page 4

<sup>12</sup> Agency Exhibit 1, Tab 6(A), Pages 1-9

this Grievant had reviewed that inmate's medical file in violation of Operating Procedure policy 701.3. Upon being questioned by the investigator, the Grievant stated, "I at no time got the file or look in the offender file from the file room."<sup>13</sup>

I heard testimony from both of the nurses who were present during the time frame where the inmate's file was obtained and where it was viewed. Both of the nurses indicated that neither of them got the file for the Grievant. They indicated, in their testimony, that the Grievant got the file and that the Grievant and the inmate viewed the file. As an aside, there is no allegation that the file was being viewed for a nefarious purpose. The inmate had rather vociferously explained that he was being served an incorrect diet during Ramadan and that this was not proper and that his medical records should so indicate. The Grievant was trying to find a solution to the inmate's immediate complaint.

Based on the totality of the testimony of the two nurses and the written documentation in Agency Exhibit 1, I find that the Grievant did personally retrieve the file and that he did look at it's contents with the inmate.

The Grievant argues that Operating Procedure 701.3(4)(f)(2), allowed him to view this file, as he was the designee and as he was attempting to resolve a grievance and/or resolve a complaint. It appears to me that there is some substantial confusion within this Agency as to the definition of "designee." I heard from a Human Resources Officer who testified that the designee would only be an Assistant Warden. I heard from the third-ranking member of this management team, the officer in charge of security, that the Grievant, on the shift in question, was in fact the "watch commander," and accordingly was the Warden's designee. I heard from the Assistant Warden who indicated that, while the Grievant was in charge during this shift, he was not the designee. The Assistant Warden stated that the designee would be the Watch Commander. I did not hear from the Warden, although, in the Warden's response to the Second Resolution Step to this grievance, he indicates that the Grievant was not his designee.<sup>14</sup> It is of some interest that the Warden does not state who his designee was at that time.

In summary, I heard from an HR expert on policy who testified that only the Warden and the Assistant Warden would be proper designees under this Section. I heard from the Major in charge of security for this facility that the Grievant was a Watch Commander and would be the designee. I heard from the Assistant Warden that the Grievant was not the Watch Commander and I have documentary evidence from the Warden that the Grievant was not his designee but the Warden does not state who his designee might be. Everyone who testified on behalf of the Agency reads Section IV(E)(F)(2), as if the word "emergency" is imbedded in it. The Warden, in his Second Resolution Step, states, "As well, the issue brought to you by the offender was not an emergency..." The Assistant Warden spoke of the need for there to be an emergency for a designee to step in place. The advocate for the Agency, in her closing, used the word "emergency" perhaps 15 times. However, that word is not to be found in the Operating Procedure that is relevant to this matter. It simply states that a "designee" may view a health record if necessary to resolve a grievance, or respond to a complaint. In this matter, the Grievant was responding to an inmate complaint about his dietary choices and it seems perfectly logical that the medical record would be where one would look to see if there was a special diet

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<sup>13</sup> Agency Exhibit 1, Tab 6(D), Page 1

<sup>14</sup> Agency Exhibit 1, Tab 2, Page 8

prescribed. Clearly, the Grievant thought he was a Watch Commander, and therefore a “designee.”

Based upon the testimony of the Agency’s own witnesses, I am uncertain as to who is a “designee.” Accordingly, I find that, while the Grievant viewed a medical record with the inmate whose medical record it was, the Grievant was most likely the “designee” and was allowed to view such a record. I find that the Grievant did in fact violate Policy 030.4, in that he failed to fully cooperate with the investigation and he failed to be completely truthful. I find that he did not violate the allegation regarding unauthorized access to medical records.

Finally, at the Second Resolution Step, the Warden stated as follows:

...I am willing to reduce the disciplin[ed] [sic] received to a Group II written notice with a 24 hour suspension.<sup>15</sup>

The Warden applied no condition whatsoever to his reduction from a Group III Written Notice to a Group II Written Notice with 24 hours suspension. The closest thing to a condition was that he stated, “I am willing...” Perhaps he intended to add additional language to that sentence that would have stated, “If you do not continue to Step 3 of the Grievance Procedure...” Had that language been added, I find that the Warden would have been seriously demeaning the entire concept of the Grievance Procedure. Thankfully, the Warden did not include such language. The Warden, having reviewed all of the documentation, on March 25, 2014, found that the proper punishment for this Grievant was a Group II Written Notice with 24 hours suspension. The Grievant then exercised his rights under the Grievance Procedure to request a hearing before a Hearing Officer. Accordingly, I find that the punishment that is before me under this Written Notice is a Group II with 24 hours of suspension.

### **MITIGATION**

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” Under the Rules for Conducting Grievance Hearings, “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. 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.

### **DECISION**

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<sup>15</sup> Agency Exhibit 1, Tab 2, Page 8

I find that the Agency has borne its burden of proof in this matter regarding the issue of the Grievant not being in compliance with Operating Procedure 030.4 Section IV(E)(4)(f). I uphold the Warden's finding that this warrants a Group II Written Notice with 24 hours suspension. I direct that the Grievant's records reflect a Group II Written Notice, not a Group III Written Notice and that the Grievant be reimbursed for four days of suspension and that any and all benefits that may accrue to him for those four days be credited to him.

### **APPEAL RIGHTS**

You may file an administrative review request if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

2. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received by** the reviewer within 15 calendar days of the date of the original hearing decision. A copy of all requests for administrative review must be provided to the other party, EDR and the hearing officer. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>16</sup> 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>17</sup>

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<sup>16</sup>An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>17</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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