

Issue: Group III Written Notice (falsifying records); Hearing Date: 06/28/13; Decision Issued: 07/08/13; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 10075; Outcome: Full Relief.

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: CASE NO.: 10075

DECISION OF HEARING OFFICER

HEARING DATE: JUNE 28, 2013

DECISION ISSUED: JULY 8, 2013

I. PROCEDURAL HISTORY

The agency issued the grievant a Group III Written Notice on August 15, 2012. The grievant filed his Grievance Form A on August 28, 2012. The Director of the agency qualified the matter for hearing on March 8, 2013. I was appointed as hearing officer on April 25. I conducted a prehearing conference by telephone on May 18. As agreed during the prehearing conference, the hearing was conducted at the agency facility on June 28, 2013.

II. APPEARANCES

A lay advocate represented the agency. It presented three witnesses.

The grievant was represented by legal counsel. He was the only witness on his behalf.

III. ISSUE PRESENTED

Whether the agency acted appropriately in issuing the grievant a Group III Written Notice on August 15, 2012 for falsifying agency records in violation of Operating Procedure 135.1?

IV. FINDINGS OF FACTS

The grievant is a corrections officer employed by the agency at a secure facility. He has a long, satisfactory work history with the agency. In and around December, 2011 he experienced several issues with inmates in the area of the facility to which he was assigned. One inmate in particular (hereafter Inmate M) seemed to be the leader of the inmates with regard to contraband and other issues. On December 18, 2011 the grievant sent an email to other agency officials notifying them of developments in his area of supervision. The message included a summary of a crackdown announced to the inmates on December 16. Both prior to December 16 and afterwards the Inmate M had threatened to take actions to force the agency to transfer the grievant from this particular cell block. On December 18 at 6:59 a.m. the grievant learned from several inmates that a number of other inmates were writing grievances against him in an effort to have him transferred from the building.

On that same date, Inmate M wrote an informal complaint against the grievant. The complaint stated that the officer had told him on December 16 that a female in the community (hereafter "the female") had conversed with him about the inmate and asked the grievant to tell the inmate "hello." The informal complaint made reference to the wife of the inmate as also wondering why the grievant was "having conversations about me with a stranger." The complaint correctly stated that the relaying of messages to an inmate from a private citizen is against agency policy.

The complaint was filed on December 19, 2011. The agency investigator assigned to the facility first became aware of the complaint on January 23, 2012. He was told that the grievant had passed a message from an ex-girlfriend of Inmate M around December 11, 2011. He contacted a master special agent investigator who took over the investigation January 24, 2012. The master special agent interviewed the inmate, the grievant, and the female.

The female was an employee at a physician's office used by the grievant. The office had multiple physicians. She told the investigator that she had asked the grievant to relay a message to the inmate. She stated that the inmate had been an acquaintance of hers for several years and that she had even visited with him at another correctional facility. She correctly identified the facility at which the grievant worked. She stated that she and the inmate had been socially "set up by his sister." The master special agent had used the full legal name of Inmate M in discussing him with the female. She referred to him by a different name or nickname. The inmate was the only inmate with his surname incarcerated at the facility at the time of these events. No other inmate within the agency's control had recently been incarcerated at that facility.

V. ANALYSIS AND CONCLUSIONS OF LAW

This matter arises under the sections of the Code of Virginia providing certain due process rights to state employees. The agency designated with overseeing these rights is the Department of Human Resource Management. That agency has promulgated a Grievance Procedure Manual ("GPM") and Rules for Conducting Grievance Hearings ("Rules"). Section VI (B) of the Rules provides that in disciplinary actions (such as this case) the hearing officer is to determine "whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances." The hearing officer is required to determine:

- I. Whether the employee engaged in the behavior described in the written notice;
- II. Whether the behavior constituted misconduct; and

III. Whether the disciplinary action taken by the agency was consistent with law and policy.

The hearing officer conducts a de novo review of the evidence. He is not bound by any factual determinations by the agency.

The agency issued the grievant a Group III Written Notice, alleging that the grievant gave false information to Investigators. Providing false information is a violation of agency Operating Procedure 135.1. The agency's basis for its disciplinary action against the grievant was his denial of having received and relayed a message to Inmate M from the female. The grievant has consistently denied that he did so. The inmate told the investigators that a message was passed to him by the grievant from the female.

The direct evidence of the agency consists solely of the hearsay statements of Inmate M. The agency relies on the hearsay statements of the female to corroborate the statements of the inmate. Two links constitute the chain of evidence presented by the agency. The first is the claimed statement by the female to the grievant. The master special agent recorded her interview and the tape was introduced in evidence. Several curious points become apparent upon a careful review of the tape. When the investigator first mentioned the name of the grievant, the female did not appear to immediately recognize it. She had the same response when the agent mentioned the name of Inmate M. She then began speaking (with regard to the inmate) of how she had known him for years. She stated that she had visited with him when he was incarcerated at another different facility. She knew at which facility he was incarcerated at the time of these events.

The evidence establishes that the inmate had to be the same inmate to which the female was referring. No other inmate by the same or similar name had been incarcerated at the subject

facility during the relevant time period. The female referenced a different physician at her former place of employment than the one seen by the grievant. No evidence was presented that the physician named by the female had ever treated or examined the grievant. No evidence was presented as to how the female and the grievant may have happened to have had contact around December of 2011. If the grievant was, in fact, seen at this particular medical practice during that month, no evidence was presented of that visit. In short, there is no evidence that the grievant and the female ever had any contact, aside from the statement of the female.

Her statement is further called into question by the other evidence. The inmate referred to the female as a “stranger.” This contradicts her statement. It also contradicts the statement of the facility investigator that he was told that the wife of the inmate had referred to the female as an ex-girlfriend of the inmate. Inmate M falsely denied knowing the female.

Resolving all doubts about the statement of the female in favor of the agency leads only to the second link in the chain. The agency is still required to show that the grievant falsely stated that he did not pass along the message from the female and did not know her. The grievant has denied both of these contentions. He has argued that this particular inmate would be among the least likely inmates for whom he would be expected to provide any favors. It is undisputed that this inmate was one of the leaders of the other inmates in the cell block. It is undisputed that he had a vendetta against the grievant.

I see three possible scenarios that might have occurred in this situation:

A. The female made the request to the grievant intending to cause any harm to the grievant;

B. The female made the request to the grievant as part of a collaboration or conspiracy to cause trouble for the grievant; or

C. No request was made by the female and she provided materially false information to the interviewer.

As stated above, the agency has the burden of proving its allegations against a grievant in a disciplinary action. I find it to be, at least, to be as likely as not that the grievant did not pass along a social message to an inmate with whom he was regularly engaged in an adversarial relationship. Additional evidence regarding the circumstances surrounding these allegations could have been presented by the agency, but it failed to do so. It did not review the phone or visitor logs to determine whether the inmate had communicated with, or been visited by, the female. It failed to obtain verification of the last time that the grievant had visited this particular medical practice prior to December 16, 2011. It failed to fully investigate how likely it was that the grievant would have had contact with this female employee at that practice. The evidence is insufficient to prove that the message was sent. I accept the testimonial and prior denials of the grievant over the incomplete, contradictory statements of the female and Inmate M. The agency has not met its burden of proving the case by a preponderance of the evidence.

VI. DECISION

For the reasons stated above, I hereby direct the agency to vacate the Group III Written Notice issued against the grievant on August 15, 2012 and restore to him any benefits lost as a result of the issuance of the disciplinary action.

VII. APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

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

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

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 the decision was issued. You must provide a copy of all of your appeals 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 requests for administrative review have been decided.

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.¹

[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].

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

RENDERED this July 8, 2013.

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