

Issue: Group III Written Notice with Termination (falsifying records and failure to follow policy); Hearing Date: 10/22/13; Decision Issued: 11/05/13; Agency: DJJ; AHO: John V. Robinson, Esq.; Case No. 10184; Outcome: No Relief – Agency Upheld.

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

DIVISION OF HEARINGS

In the matter of: Case No. 10184

Hearing Officer Appointment: September 23, 2013

Hearing Date: October 22, 2013

Decision Issued: November 5, 2013

**PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING**

The Grievant requested an administrative due process hearing to challenge termination of his employment effective August 21, 2013, pursuant to a Group III Written Notice issued by Management of the Department of Juvenile Justice as described in the Grievance Form A dated August 28, 2013. The Grievant is seeking the relief requested in his Grievance Form A.

The Grievant's attorney (the "Attorney"), the Agency's advocate (the "Advocate") and the hearing officer participated in a first pre-hearing conference call at 2:00 p.m. on September 26, 2013.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on September 26, 2013 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant was represented by the Attorney and the Agency was represented by the 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 into evidence at the hearing .

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

References to the Agency's exhibits will be designated AE followed by the exhibit number. The Grievant did not submit any documentary exhibits. The recording of the hearing is on five (5) compact disks (each, a "CD" and collectively, the "CDs").

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 which he asserts.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. During the time period relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as a Juvenile Correctional Officer ("C/O") at a juvenile correctional facility (the "Facility").
2. The Grievant has been employed by the Agency at the Facility for approximately two (2) years.
3. Amongst other primary job duties, the Grievant was generally expected to maintain sight and sound supervision of assigned (and physically present) residents at all times. AE 7-2. Specifically, the Grievant was required by applicable policy to complete visual checks of residents while in their cells a minimum of every 15 minutes. IOP 237-4.6(2), (AE 3-6 & AE 8-8); Security Post Order #8(B)(25) (AE 6-4).
4. The Grievant during the Period was the primary C/O assigned to a particular Intensive Behavior Redirection Unit (the "IBR"), which serves kids who are at a higher risk of self-injurious behavior ("SIB") within the Facility. These kids have to be closely visually examined during the mandated 15-minute cell checks for evidence of SIB such as cutting themselves, etc.
5. The Grievant has received significant training from the Agency concerning the importance of sight and sound supervision, including specific training on how to position himself to achieve the best results. The cell doors to the kids' rooms are a physical barrier to adequately seeing the kids to check for SIB and, on cross-examination, the Grievant admitted that he had to get up and look in the cell windows to ensure that kids were physically safe. CD 4 of 5. The Grievant received significant training to this effect.

6. The Grievant also admitted, on cross-examination, that there was no way he could have seen the two kids lying down in rooms 5 and 6. CD 4 of 5.
7. The Grievant and the other C/O assigned to the IBR were both required to ensure the 15-minute cell checks were completed and both officers were required to undertake the mandated cell checks.
8. Towards the beginning of their shift in the IBR, the Grievant and the other C/O performed cell checks in accordance with the applicable policy at approximately 7:23a.m. Rapid Eye Video. The Grievant also correctly performed the cell check at 12:15 p.m.
9. However, the Grievant did not get up and look in the windows to the cells of the 7 kids in the IBR at other required times during the Period and neither did the other C/O.
10. At first, the Grievant tried to argue that he did not check through the windows of the cells because he was completing paperwork, including at least 3 charges and 3 incident reports. However, the Grievant later admitted, on cross-examination, that the safety and security of the kids should have assumed priority over the paperwork, which he could have resumed after completing the cell checks. The Grievant acknowledged that safety and security of residents and staff at the Facility are of paramount importance.
11. In his resident door check sheets, the Grievant wrote that he made cell security checks which were not conducted. AE 3.

ADDITIONAL FINDINGS, 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 of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Department's Standards of Conduct (the "SOC") are contained in the Operating Procedure Number 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 and to provide appropriate corrective action.

Pursuant to the SOC, the Grievant's infraction could clearly constitute a Group III offense, as asserted by the Department. Amongst other things, *Group III* offenses include: falsification of records and violating safety rules (where threat of bodily harm exists).

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 Facility's Institutional Operating Procedure Number 212 ("IOP 212") concerning Movement and Supervision of Residents provides, in part, as follows:

[Facility] staff shall provide 24-hour awake supervision of residents on campus seven days per week as follows:

1. All staff are responsible for maintaining sight and sound supervision of assigned (and physically present) residents, inside and outside the building at all times. . .
4. Staff shall always position themselves where they will have maximum sight supervision and no "blind spots" in the coverage/supervision of residents. . .
5. Staff shall maintain required supervision and counts as specified in IOP 207 Physical Count Procedures.

IOP 212 § 212-4.2; AE 7-2.

"Sight Supervision" is defined as direct visual observation of resident under supervision.
IOP 212 § 212-3.0; AE 7-1.

The Facility's Security Post Order Number 8 provides, in part, as follows:

Maintain continual observation of area of control. Be alert for any unusual activities, behavior, conditions, or violations of institutional rules, and report same to the Housing Unit Manager. Maintain a complete and accurate log of all activities and incidents...

Fifteen minute watches at a minimum are logged in the Log Book and on the confinement monitoring form...

Check cells at random a minimum of every 15 minutes; do not set a pattern and log specific time on cell sheets.

AE6.

The Grievant signed a Post Order Review Log on June 7, 2013 and July 7, 2013, certifying that he had read and understood these post orders prior to his assuming the duties concerning the IBR. AE 6-17.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated IOP 212 by not conducting certain mandated cell checks in the manner in which Grievant admits he should have utilized for the safety and security of the kids.

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 hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions justified the discipline by Management concerning the subject infractions. 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 terminable 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 apparently did not consider mitigating factors in disciplining the Grievant.

While the Grievant may 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, and all of those listed below in his analysis:

1. the Grievant's service to the Agency over approximately two (2) years;
2. the fact that the Grievant has no prior discipline;
3. the fact the often difficult and stressful circumstances of the Grievant's work environment; and
4. that the other JCO was not the Grievant's regular partner in the IBR.

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*

The seriousness of the Grievant's disciplinary infractions mandate a conclusion that the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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, eif, Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293,299 (4 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.
Id

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.

Here, adequate cell checks were conducted by the Grievant at approximately 7:23 a.m. and 12:15 p.m. Accordingly, to the extent the Written Notice alleges infractions for these times, it is in error. However, the Agency's remaining allegations concerning the Grievant's failure to conduct the required cell checks within the Period are accurate and warranted. The above UVA case defeats the Attorney's motion to dismiss in this regard because these instances constituted misconduct by the Grievant justifying the disciplinary action taken by the Agency while arguably not as much misconduct as asserted in the Written Notice.

The hearing officer decides for the offense specified in the written notice concerning the Grievant's infractions during the Period (i) the Grievant engaged in the behavior described in the

written notice; (ii) the behavior constituted 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 disciplinary action of the Agency concerning the infractions by the Grievant 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 final 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

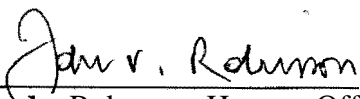
occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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: 11 / 05 / 2013


John V. Robmson, 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 *Rules for Conducting Grievance Hearings*, § V(C)).