

Issue: Group III Written Notice with Termination; Hearing Date: 11/15/13; Decision Issued: 11/19/13; Agency: DJJ; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10185; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 11/25/13; EDR Ruling No. 2014-3773 issued 12/17/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 11/25/13; DHRM form letter issued 01/08/14; Outcome: Declined to review. No policy violation cited.**

COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution
Department of Human Resource Management

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10185

Hearing Date: November 15, 2013
Decision Issued: November 19, 2013

PROCEDURAL HISTORY

Grievant was a corrections officer with the Department of Juvenile Justice (“the Agency”), and she challenges the Group III Written Notice issued on August 12, 2013 for conduct occurring on July 14, 2013—failure to comply with applicable policy and procedure and falsification of documents. The discipline was termination of employment.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action. On October 1, 2013, the Office of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer to conduct the grievance hearing. A pre-hearing conference was held by telephone on October 3, 2013, at which time the grievance hearing was initially scheduled for November 6, 2013. Because of counsel unavailability for the scheduled hearing, by agreement of the parties, the hearing was ultimately re-scheduled for November 15, 2013, on which date the grievance hearing was held, at the Agency’s facility. For such good cause, the time for completing the grievance hearing and decisions was extended, accordingly.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency’s Exhibits. The Grievant, by counsel, indicated the Agency’s documents were comprehensive and the Grievant had no additional documentation for submission. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Agency Representative
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized under applicable policy)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

The Grievant requests rescission or reduction of the Written Notice, reinstatement, back pay, and attorney's fees, as appropriate.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

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 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.

The State Standards of Conduct, DHRM Policy 1.60, provides that Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. Agency Exh. 5. Falsification of records specifically is considered a Group III offense. *Id.* The Standards of Conduct require Employees to:

- Perform their assigned duties and responsibilities with the highest degree of public trust.
- Must make work-related decisions and/or take actions that are in the best interest of the agency.
- Comply with the letter and spirit of all state and agency policies and procedures.

Agency Exh. 5.

The Agency's IOP # 236, Isolation, at ¶4.2, requires:

Officers assigned to the isolation unit will complete visual checks of residents a minimum of every 15 minutes. Observations of significant emotional distress, self abusive behaviors or threats to harm self will be reported to the Shift Commander immediately.

Agency Exh. 8. At ¶4.3, the procedure requires:

Confinement Monitoring Forms (Attachments #1 and #2) will be completed on each resident placed in isolation by the officer assigned to the unit. All sections must be completed as required. Observations will be documented at least every 15 minutes.

Agency Exh. 8.

The Agency's IOP # 212, Movement and Supervision of Residents, at ¶3.0, defines "Sight Supervision" as "direct visual observation of resident under supervision." At ¶4.2, the procedure provides that "[a]ll staff are responsible for maintaining sight and sound supervision of assigned (and physically present) residents, inside and outside the buildings, at all times." The procedure also invokes IOP # 207, Physical Count Procedures. IOP # 207, at ¶ 3.0, requires counts "to be made every fifteen (15) minutes" by the officer on duty in the unit. Further, it provides that the officer "must see the face of each resident being counted." At ¶4.1, the procedure requires officers during all shifts to document the checks during sleeping hours. Agency Exh. 8.

The Agency's security post order # 9, for Behavioral Management Officers, requires constant eyesight supervision of residents assigned to that pod, and requires that the officer "ensure that cell doors remain locked at all times, with no more than one (1) resident allowed out of his cell at any time. The post order also requires fifteen (15) minute checks and signed check sheets of all residents. Agency Exh. 9.

Va. Code § 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 § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), 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."

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions.

The Grievant is a long time employee for the Agency—a corrections officer with at least 10 years tenure. The Written Notice charged:

On 07/14/13, while assigned to the Behavior Management Unit (BM), you and another officer failed to properly supervise the residents by not conducting fifteen (15) minute room checks from 0713 to 1125 hours. You also falsely documented on the Confinement Monitor Form that the room checks were conducted. You also let a resident out of his room to take a shower and failed to maintain sight supervision of the resident, which afforded the resident the opportunity to stuff his door lock with paper. After tampering with his door lock, the resident was able to break out of his room. Your actions as described in this narrative is a violation of the following: IOP # 212-4.2 (Movement and Supervision of Residents), IOP # 236-4.2 (Isolation), Post Order # 9 (15 minute room checks) and DHRM 1.60 (Falsifying Documents).

Agency Exh. 2. As for circumstances considered, the Written Notice did not specify any additional circumstances.

The Grievant, by counsel, indicated general stipulation to the facts and did not present evidence challenging the essence of the facts stated in the Written Notice.

The facility's training lieutenant testified that the Grievant received the prescribed training on the applicable procedures, especially including the fifteen minute checks and the

documentation for them. He testified that an officer must look into the residents' rooms and observe them at least every fifteen minutes and document the applicable status. This procedure is for the protection of the residents. The Grievant's transcript of training is Agency's Exhibit 18. The lieutenant testified that the fifteen minute check is a universal requirement for all Agency corrections officers. The lieutenant, based on the Rapid Eye Video (Agency Exh. 23¹) of the Grievant's shift on July 14, 2013, testified that the Grievant violated several policies and procedures, including improper sight supervision and not making the required fifteen minute checks of the residents. Specifically, he testified that an officer cannot make such supervision and observations of residents from the office desk as the Grievant's conduct is demonstrated on the video.

The facility's assistant superintendent for security testified to the facts of the Written Notice which were largely captured via the institution's Rapid Eye Video of the post in question. The assistant superintendent testified to the floor plan of the unit (Agency Exh. 24) and the Agency's investigation report (Agency Exh. 7). He testified to the unique and disruptive nature of the residents and the importance of vigilance of supervision and observation of the residents. The assistant superintendent testified that the video showed that during the shift in question, the Grievant never left her desk to do her fifteen minute checks. The Grievant, however, documented her fifteen minute checks on the appropriate form. The assistant superintendent testified that such documentation of a performed duty when the duty was not performed was falsification of documents, conduct alone that merits the Group III Written Notice.

The assistant superintendent testified to the importance of accurate, reliable documentation. Without it, the Agency is at risk for liability. The assistant superintendent testified that it was impossible for the Grievant to observe the residents lying down in their rooms from the desk, without walking over to each door and looking into the rooms. The assistant superintendent testified that the Agency considered the Grievant's documentation indicating that she did the resident checks, when she clearly did not, falsification of documents. Falsification of records is specifically considered under the Standards of Conduct to be a Group III offense. He also testified that mitigation was considered, but the egregious nature of the offense was an aggravating circumstance that stripped away all Agency trust of the Grievant.

The assistant superintendent testified that the current administration at the facility was about two years old, and that during that time the discipline of any employee found to have falsified records has consistently been termination.

On cross-examination, the assistant superintendent testified that incidents lead the Agency to review the applicable Rapid Eye Video. Otherwise, except for random viewings, the storage of video is overwritten by more recent video. He testified that there was much conversation among the management team regarding the level of discipline, and that the falsification was the overriding reason the Grievant's discipline was termination—consistent with other incidents of falsification. Other disciplinary actions are documented by the Agency. Agency Exh. 21.

¹ The Agency maintains the Rapid Eye Video and is available for use during any administrative review or appeal of this grievance decision.

The assistant superintendent also testified that, despite a contrary reference in email communication from the Agency's assistant deputy director, all members of management considering the discipline knew the Grievant did not have a prior Written Notice. (Agency Exh. 16.)

A facility sergeant, the manager for the behavioral management unit, testified that the Grievant did not perform the required checks as shown by the Rapid Eye Video, and that the Grievant did not secure the resident's door according to policy and procedure. He testified that, other than this offensive conduct, he had considered the Grievant a top performer.

The facility's captain testified he was the administrator on call on July 14, 2013, and that he actually made rounds and did a round of fifteen minute checks in the behavioral management unit. He confirmed the important purpose of the checks, to make sure the residents were present and safe, and that observations of the residents cannot be done from the office desk. The captain testified that viewing a resident's entire body may not be required in each instance, but that documenting that a resident is lying down without viewing the resident is falsification.

A facility corrections officer, T.C., testified that the Grievant was considered by her peers as a strong officer. She testified that since the Grievant's discipline, management has emphasized the fifteen minute checks and changed the documentation procedure. The placement of the check sheets has changed. However, the process of actually checking and observing the residents every fifteen minutes has not changed.

Another facility corrections officer, K.E., testified that he was a shift partner of the Grievant. He testified that before July 14, 2013, he would complete the documentation of the resident checks without going on the floor and observing each resident. K.E. testified that he knew such a short cut was wrong, and he confirmed that an officer could not see a resident lying down from the office desk. On re-direct examination, K.E. testified that he had not reported such conduct before his testimony. In response to the hearing officer's questioning, he testified that the administrators on call were unaware of this practice of documenting checks without observing the residents.

Another facility corrections officer, L.C., testified that the Grievant actually trained him on the proper procedures, and that the Grievant is a good officer. He testified that the Grievant trained him to observe each resident during the checks. He testified that if the resident can be seen through the door window, walking up to the window may not be necessary, but that if a resident is not visible or lying down the checking officer must look through the window and see the resident. L.C. testified that he has observed administrators on call perform the checks, and they would not do so without actual observation. Since the Grievant's discipline, everyone is now more sensitive to this process.

Facility corrections officer S.J. testified to the Grievant's good reputation as an officer. He confirmed the proper procedure for the fifteen minute checks is to observe personally each resident, and that a resident lying down cannot be observed from the office desk.

The Grievant testified on her behalf. She testified to her tenure and good work record, including commendations and bonuses for her contributions. She was selected to work on the facility's audit process and was rated a major contributor. She testified that during the audit preparations, she would complete forms by adding information without knowing whether the information was true, and she was never told that such conduct was falsification.

The Grievant testified that by assuming a resident was lying down and documenting such status without observing the resident was just the way they did it. If the time of day was a typical sleeping hour for the resident, and the resident was not visible, she assumed the resident was lying down and would document the status as such—without observing the resident. The Grievant testified that she had observed administrators on call doing the check sheet the same way—entering the activity from the previous line without observing the resident. The Grievant did not identify such staff by name or timeframe.

The Grievant testified that she understood from supervisors that if the resident can be seen through the window of the resident's door, then approaching each resident's door was not necessary.

The Grievant testified she had no intention of falsifying records, and that she believed the information she put on the forms, specifically noting that residents were lying down, was accurate even though she did not personally observe such residents. The Grievant also testified that she was having to respond to the disciplinary process at the same time she was in need of medical leave.

On cross-examination, the Grievant admitted she repeatedly noted on the fifteen minute check sheets that residents were lying down without observing the residents or their activity. Agency Exhs. 7-13, 7-40, 7-52. The Grievant testified that she was trained to observe personally the residents for the fifteen minute checks, and that she knew it was improper procedure not to do so.

The Agency called the assistant superintendent for rebuttal. He testified that the Grievant was under his supervision for her audit work, and that he was unaware, until hearing the Grievant's testimony, of any falsification of forms during that process. He also testified that he has not become aware of any administrators on call falsifying reports as described by the Grievant.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. 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 applicable policy, management has 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.* As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

I find that the Agency has met its burden of showing the Grievant’s conduct as charged in the Written Notice. Further, I find that the offenses, collectively charged in one Written Notice, are appropriately considered a Group III offense, with falsification of documents specifically justifying a Group III Written Notice. I find the Grievant’s conduct of documenting the fifteen minute checks without personally observing such residents to be falsification of documents. The unchallenged purpose of the fifteen minute checks is to ensure the safety and presence of each resident. Without observing either the presence or safety of the resident when documenting the resident is lying down is a false representation. Thus, the Agency has borne its burden of proving the offending behavior, that the behavior was misconduct, and that it rose to the level of a Group III offense. The Grievant testified and asserts that her tenure and good work record were not considered during the discipline, and that she should not suffer job termination.

Mitigation

Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution.” 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, and (3) the disciplinary action was free of improper motive.

While the hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that termination was its only option. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

On the issue of mitigation, EDR has ruled:

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather,

mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency presents a position in advance of its obligation and need to manage the important affairs of the Agency. The hearing officer accepts, recognizes, and upholds the Agency's important responsibility for the safety of the staff, residents, and the public. The Grievant's position as a corrections officer placed her in sensitive, responsible role regarding the safety of the residents and staff. The Grievant's lack of judgment was in direct conflict with known, stated policy. I find that the Agency has demonstrated a legitimate business reason and acted within the bounds of reason in its discipline of the Grievant.

The Grievant has alleged similar practices have gone undisciplined, but she has provided insufficient proof of mitigating factors that permit the hearing officer to reduce the level of discipline. While she alleged it, the Grievant did not sufficiently show that the Agency management was aware of and condoned similar conduct. Her allusions to other administrators either knowing of or doing the same thing lack the specificity required to find that the procedure was not enforced or condoned by management. To the contrary, the Grievant's shift partner testified that, while he also did the same thing, management was unaware. Further, the Agency showed actual examples of other staff members terminated for falsifying records.

The Grievant complains she did not receive adequate due process, and that the Agency did not follow appropriate disciplinary protocol. GPM, at § 6, provides the proper manner for raising such alleged defects in the grievance process prior to the actual grievance hearing. The grievance hearing is a *de novo* review of the charges and evidence, and it provides due process.

Termination is necessarily a harsh result. The Agency's decision for termination is fairly debatable. However, there is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that the chosen discipline was its only option. While the

Agency could have justified or exercised lesser discipline, a hearing officer may not substitute his judgment for that of Agency management. I find no mitigating circumstances that render the Agency's action of a Group III Written Notice with termination outside the bounds of reasonableness. The conduct as stated in the written notice occurred. The conduct at issue, specifically, falsely documenting that she performed resident checks every fifteen minutes, involves the very essence of the Agency's purpose. The Grievant was disciplined for failing to comply with known policy and actually falsifying records to indicate she did so. There were also other bases for discipline included in the Written Notice. The normal result of a Group III Written Notice is termination. Here, the Agency credibly asserts the lack of trust renders mitigation of discipline to something less than termination is not feasible. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

DECISION

For the reasons stated herein, the Agency's issuance of the Group III Written Notice with termination must be and is **upheld**.

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.²

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

A handwritten signature in blue ink, appearing to read 'Cecil H. Creasey, Jr.', written over a horizontal line.

Cecil H. Creasey, Jr.
Hearing Officer

² Agencies must request and receive prior approval from EDR before filing a notice of appeal.