

Issues: Group III (failure to report criminal charges), Group III (violation of drug policy), Group II (falsifying records), and Termination; Hearing Date: 09/09/14; Decision Issued: 09/25/14; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 10300; Outcome: Partial Relief.

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

IN RE: CASE NUMBER 10300

DECISION OF HEARING OFFICER

HEARING DATE: SEPTEMBER 9, 2014

DECISION ISSUED: SEPTEMBER 25, 2014

I. PROCEDURAL HISTORY

The agency issued to the grievant three Written Notices and terminated her employment on January 16, 2014. The grievant filed her challenge to the actions on February 11. I was appointed as hearing officer on March 6. On March 12, I spoke with the grievant. She advised that she was deciding whether to retain counsel or other representation in this matter. I sent an e-mail to her and the agency advocate advising that I would postpone the scheduling of a prehearing conference until the grievant advised whether she would be represented. Having heard nothing from the grievant in the interim, I sent an e-mail to her on March 31 to determine the status of her search for representation. The following day she provided the name and contact information for her attorney. I requested the agency advocate contact counsel to obtain dates for the prehearing conference.

The agency advocate subsequently reported multiple attempts to contact counsel. On

April 10 an e-mail address for counsel was finally provided. After the advocate was unable to obtain prehearing conference dates, I sent an e-mail message on April 15 confirming that the prehearing conference would be held by telephone on the following date. At the set time for the conference I placed a phone call to the attorney. He was not in the office at that time and the prehearing conference was not conducted. Later that same day counsel sent an e-mail requesting that the hearing not be scheduled for a date earlier than August. He apprised that his client had pending criminal charges set for trial later in the year and that he did not want to jeopardize her right not to incriminate herself. On that same date I sent an e-mail asking for an explanation of how his client's constitutional rights were implicated if the grievance preceded the criminal trial.

I asked on April 22 again for clarification of the position of the grievant. Having heard nothing from counsel by May 9, I requested counsel and the advocate provide me with hearing dates by May 13. I asked for dates beginning June 16. Counsel failed to provide any response whatsoever. On May 13 I sent notification that I was scheduling the hearing for July 10. I issued my Prehearing Order on May 14 and sent that to counsel and the advocate. On May 29 the agency advocate requested that the grievant be required to submit a list of prospective witnesses, winnowing the list given by the grievant as part of her initial filing of the challenge to the disciplinary actions. On June 5 I advised the parties that the July 10 hearing date was no longer acceptable due to a conflict in my schedule. I asked for additional possible dates to be provided.

The following day counsel apprised that he had been appointed as Special Prosecutor in a criminal matter having a trial date of August 4. Also, the criminal charges against the grievant remain pending. Counsel also had a civil trial scheduled for August 21. He

requested that the hearing be scheduled after September 1. On June 21 I asked that he provide a signed waiver by his client of her right to a hearing prior to September 1. Additional documents were requested. The waiver and documents were received by me on July 14. I had received a request on July 5 from the agency for the setting of a hearing at the earliest available date.

On July 22 I directed the agency to provide me with written argument as to how its rights would be prejudiced by the hearing being delayed further. The grievant was given the option of providing argument on that issue. Both parties were directed to provide argument and citations to authorities dealing with the question of how a hearing officer should balance the right of a grievant not to incriminate herself with that of the opposing party for a prompt hearing. The agency responded on August 6. The grievant filed no response and on August 11 I sent notice to the parties that I was setting the matter for hearing. My independent research, including a review of DHRM Ruling 2012-3290, and the lack of response from the grievant, led me to conclude that I was not required to accept at face value the argument of the grievant that her rights would be prejudiced. I also notified the grievant that I was observing the option under Section III (E) of the Grievance Procedural Manual to disallow her counsel from representing her.

Counsel failed to respond to this e-mail message and on August 15 I set the matter for hearing for September 9. A formal Prehearing Order was entered on August 17.

On August 25 I sent an e-mail to counsel requesting clarification of the status of the grievance after noting from online court records that the criminal cases against the grievant had been continued from August 18 to September 5. No response was forthcoming from the grievant. On August 29 I directed the grievant to file an amended witness list as described above.

On September 8 I sent an e-mail to counsel to determine the status of the criminal charges against the grievant. After hearing nothing from him for four hours and twenty-three minutes, I directed the agency advocate to contact counsel to determine whether the grievant intended to pursue this matter. At 2:44 p.m. the grievant sent an e-mail requesting that the grievance hearing be continued. The agency objected to a postponement. At 3:30 p.m. counsel apprised that neither he nor his client would be appearing at the hearing the following day due to concerns about her waiving her right not to incriminate herself. At 3:32 p.m. I sent formal notification that the request for a continuance was being denied. At 4:05 p.m. the grievant sent an e-mail to the Department of Employment Dispute Resolution appealing my decision. The agency advocate responded and counsel submitted a short reply. At 4:55 p.m. the Office of Employment Dispute Resolution submitted its response denying, without prejudice, the appeal of the grievant.

The hearing was conducted as scheduled on September 9, 2014. Neither the grievant nor her counsel appeared.

II. APPEARANCES

The agency was represented by a lay advocate. Three witnesses were presented by the agency, including the Warden who was present throughout the hearing as the agency representative. It introduced eight exhibits. As stated above, neither the grievant nor her counsel appeared.

III. ISSUES

A. Whether the agency acted appropriately in issuing to the grievant a Group III Written

Notice for failing to report criminal charges in violation of Agency Operating Policy 135.1?

B. Whether the agency acted appropriately in issuing to the grievant a Group III Written Notice and terminating her from employment for a violation of Agency Operating Policy 130.2 for distributing drugs in the workplace?

C. Whether the agency acted appropriately in issuing to the grievant a Group II Written Notice for submitting falsified records in violation of DHRM Policy 135.1?

IV. FINDINGS OF FACT

The grievant was a corrections officer with the agency at all relevant times herein. Prior to September 24, 2013 she had discussed with another corrections officer their respective medical issues. They determined that each had a valid prescription for Lortab, a Scheduled III Controlled Substance under the Virginia Drug Control Act. On September 24, 2013 the other officer asked the grievant for two Lortabs. She provided them to him on that date. He gave her two Lortabs in return the following date. She transferred the pills to the other officer on the grounds of the agency facility.

One of the duties of the grievant in the Fall of 2013 was that of a Field Training Officer. Her duties inquired her to instruct corrections officers in training, including those sent from other facilities. Her responsibilities included properly documenting the training so that the trainees could become fully certified as corrections officers.

The grievant submitted false records for an individual I have designated as Trainee No. 1. The records submitted were false in the following particulars:

1. The grievant certified that on November 23 Trainee No. 1 received one hour

of training in mail procedures. The training was stated to have occurred when at a time when the trainee was actually with another officer in another area of the facility. Trainee No. 1 stated that she had received no training in mail procedures.

2. The grievant certified that Trainee 1 received four hours of training at a housing control gun post. The hours shown by the grievant included time prior to the start of her shift. Also, for ninety minutes of those four hours the trainee was with a different officer at a different site within the facility.

With regard to a separate trainee (Trainee No. 2) the grievant submitted false reports as follows:

1. She certified training in mail procedures during time when she was actually on her break;
2. She certified training that was conducted at improper locations; and
3. For November 23 she certified training for Trainee No. 2 at two different locations for the same forty minute time frame. For that date she certified a total of 12.5 hours.

The maximum number of hours a trainee could be provided during a shift was 10.5.

On December 10, 2013 the grievant was indicted in the Circuit Court for a County on seven felonies related to welfare benefits. She was arrested on the charges on December 11, 2013. On the following day she provided copies of the indictment to a Special Agent with the agency who was investigating the corrections officer to whom the grievant had supplied the Lortab. The grievant never directly reported the indictments to the Warden.

V. DISCUSSION AND ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedural Manual* (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolutions, *Rules for Conducting Grievance Hearings*. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so,

whether aggravating circumstances existed that would overcome the mitigating circumstances.

A. CHARGE OF FAILURE TO REPORT

The evidence is uncontradicted that the grievant was indicted and arrested on felony charges, and failed to report these events to the Warden. Agency Operating Procedure 040.1 IV (A) (2) requires an employee charged with a criminal offense to inform the organizational unit head by no later than the next work day, depending on when the charge is received. The grievant clearly committed the acts constituting a violation of the policy. Under Operating Procedure 135.1 a violation of Operating Procedure 040.1 can be classified as either a Group II or Group III offense, depending on the nature of the violation. The Warden chose to issue the grievant a Group III Written Notice and terminate her from employment. I find that this decision by the Warden is entitled to deference. See *Rules*, Section VI (B) (1). The nature of the charges on which the grievant was indicted, and the number of charges, make the violation serious enough to justify a Group III Written Notice and termination.

An argument can be made that the failure of the grievant to report the indictments to the Warden is mitigated by the fact that she disclosed the charges to the investigating Special Agent. I reject this argument; the Special Agent was not an agency employee in the chain of command for the facility. If the grievant had notified her Lieutenant or an Assistant Warden (although such notification would still not be sufficient to comply with the Operating Procedure) a closer question would exist.

B. DISTRIBUTION OF DRUGS

The grievant admitted to having distributed Lortabs to a fellow officer while at the workplace. The transaction likely would have never been discovered but for her admission that to the Special Agent, during his investigation of the other officer upon the report by the grievant of a possible substance abuse problem by him. DHRM Policy No. 1.05 makes it a violation for an employee to unlawfully distribute a controlled substance in the workplace. Operating Procedure 135.1 makes the violation of that policy either a Group II or Group III offense violation. The level of the offense depends on the nature of the violation. The acts of the grievant clearly violated the policy. I believe that the nature of the violation justifies the issuance of only a Group II Written Notice.

The evidence is that the grievant committed the offense on only one occasion. The other officer had a valid prescription for the drug. The grievant received no consideration for the distribution, it being merely an accommodation distribution. The Commonwealth's Attorney for the jurisdiction where the event occurred declined to prosecute the transaction as a criminal offense. She resisted further efforts by that officer to have her provide him with the drugs. She reported his suspected abuse to appropriate authorities, resulting in her admitting to the violation. All these factors serve to mitigate the level of the offense.

C. FALSIFICATION OF RECORDS

As with the other offenses discussed above, the grievant has provided no evidence to contradict that of the agency. The training record and other documents submitted as exhibits clearly establish that the grievant submitted false reports.

The agency disciplined her under Operating Procedure 135.1 (D) (2) (B). That section makes it a Group III offense to falsify any records including work related documents.

The training records submitted by the grievant qualify under this section. The evidence establishes that the grievant committed multiple offenses. These offenses could not have occurred from mere negligence on her part. Collectively they support the issuance of the discipline.

VI. DECISION

I uphold the issuance of the Group II Written Notice for falsification of records and the Group III Written Notice for failing to report a criminal charge. I reduce the written notice for violation of the drug policy to a Group II Notice. The termination of the grievant from employment is sustained, based on the single Group III Written Notice or the two Group II Written Notices, or any combination of these disciplinary actions.

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 to EDR.

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.

RENDERED this September 25, 2014.

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