

Issues: Group III Written Notice with Suspension (falsifying records – travel time), and Group III Written Notice with Termination (falsifying records – duty roster); Hearing Date: 08/25/14; Decision Issued: 09/28/14; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 10356; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 10/13/14; EDR Ruling No. 2015-4018 issued 11/03/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 10/13/14; DHRM Ruling issued 11/05/14; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10356

Hearing Date: August 25, 2014
Decision Issued: September 28, 2014

PROCEDURAL HISTORY

Grievant was issued two Group III Written Notices on March 14, 2014:

- a. Grievant was issued a Group III Written Notice (offense date June 17 through June 20 of 2013) with a 20 day suspension for falsifying records (Written Notice Offence Code 74). The Written Notice's *Nature of Offense and Evidence* stated:

Violation of OP 135.1 and 110.2. False reporting of time. According to information gathered during SIU investigation, [Grievant] authorized [Officer] to be paid for three hours of travel time to GLOCK training each day at the [location] facility. According to OP 110.2, because her travel time to [location] did not exceed her normal commute that time should not have been paid work time.¹

- b. Grievant was issued a Group III Written Notice (offense date: 5-28-13) with "Termination" for falsifying records (Written Notice Offence Code 74). The Written Notice's *Nature of Offense and Evidence* stated:

Violation of OP 135.1. False reporting of time on Daily Duty Roster. According to information gathered during SIU investigation, [Grievant] signed [Officer's] initials to the duty roster and recorded her timeout at 6:15 am. [Officer] left work at 3am that day. This resulted in her being overpaid for 3 hrs and 15 minutes.²

Grievant timely grieved issuance of both Group III Written Notices. The grievance proceeded through the resolution steps and, when the outcome was not satisfactory to Grievant, he requested a hearing. The matters were qualified for a hearing and the undersigned was appointed hearing officer effective May 12, 2014 by the Department of Human Resources Management, Office of Employment Dispute Resolution.

Pre-Hearing matters:

a. **Document Production:** Two requests for production of document were made by Grievant (dated May 9, 2014 and May 18, 2014).

b. **Motion to Compel:** Grievant filed a Motion to Compel Production of Documents on May 19, 2014

¹ A. Tab 1; G. Tab A.

² A. Tab 2; G. Tab A.

c. **Extension:** Upon discussion of matters at pre-hearing conference the parties agreed to and requested extension of the 35 day period for holding a hearing in order to allow for parties to resolve matters or for a decision on pending production of document issues. Hearing Officer granted such extension in order to afford opportunity to resolve matters and to afford a full and fair hearing of matters.

d. **Determination of 6/24/14:** After pre-hearing telephone conferences and after requesting and receiving written position statements from each party Hearing Officer made a determination of pending matters. On June 24, 2014 *Hearing Officer's Determination on Grievant's Motion to Compel Production of Documents and Addressing Reasonable Cost for Such Production* together with an *Attachment* thereto were issued.

e. **Compliance Ruling Requests:** Grievant and Agency both requested compliance rulings from the Office of Employment Dispute Resolution challenging the 6/24/14 Hearing Officer's Determination.

f. **Compliance Ruling of 7/18/14:** Rulings Numbers 2014–3926, 2015–3933 were issued by the Office of Employment Dispute Resolution on July 18, 2014, providing, among other matters:

- EDR was not persuaded that the documents requested by Grievant were so material to his case that they must be provided to him at no cost;
- the hourly rate indicated in the Hearing Officer's order was not disturbed; *and*
- Agency may charge \$0.10 per page for copies and not the \$.08 per page indicated by the Hearing Officer.

g. **Revision of 7/28/14:** As provided in the Compliance Rulings, the Hearing Officer on 7/28/2014 Hearing Officer revised his determination of 6/24/14 and indicated Agency may charge \$0.10 per page and not the \$0.08 per page previously indicated in his decision.

h. **Hearing and exchange dates re-set:** By agreement of the parties the grievance hearing date was set for 8/25/14 and the exchange due date was set for 8/18/14.

i. **Witness Request:** Grievant requested 14 witnesses, who were agency's employees, be available at hearing by agency. After discussion, and it appearing that two such witnesses had conflicts, it was agreed that the two witnesses would be available for testimony via conference calls post hearing.

HEARING

a. **Hearing:** On August 25, 2014 hearing was held at facility and at conclusion of the hearing the parties, after discussion, were afforded until 9/8/14 to submit written closing arguments to the Hearing Officer. Additionally, at the conclusion of hearing, it was agreed that no testimony by telephone would be required from any witness post hearing.

Appearances at hearing: Grievant
Grievant's attorney
Agency Advocate
Agency party representative
Witnesses

b. **Exhibits:** Exhibits were admitted at hearing, *en masse*, by agreement. Agency's Exhibits consist of one binder of exhibits tabbed 1 through 7 (tab 7 being one DVD disc). By agreement, page 17A of Agency Exhibit Tab 6 was included at hearing (being page 2 of a 3 page document) and there being two pages number "46" in Agency Exhibit Tab 6 one such page was designated page 46A and one designated 46B. Grievant's Exhibits consist of one binder of exhibits tabbed A through Z.

c. **Written Closings:** On September 8, 2014 written Closing Agreements were timely received by the Hearing Officer.

ISSUES

Whether the issuance to Grievant of each the two Group III Written Notices were warranted and appropriate?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.

The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.³

FINDINGS OF FACT

After reviewing the evidence admitted and observing the demeanor of the witnesses, the Hearing Officer makes the following findings of fact:

01. Grievant was employed by Agency for a period of approximately 21 years and has been a supervisor for approximately 7 years.⁴

02. On or about July 24, 2013 Agency received an anonymous letter alleging an inappropriate relationship between Grievant and Officer, a female subordinate of Grievant. Warden initiated an inquiry into these allegations and employees were interviewed concerning the allegations. During such inquiry additional issues came to Warden's attention and Warden requested an S.I.U. investigation of matters be conducted.⁵

03. An Investigation by S.I.U. Investigator was conducted. The S.I.U. Investigator issued a Report of Investigation, signed August 29, 2013, addressing a number of matters including matters related to:

- a. Compensation and documentation for payment related to Officer's travel time to Glock training (June 17-20, 2013).
- b. Daily Duty Roster for May 28-29, 2013.

³ Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

⁴ G. Tab A and B; A. Tab 1 and 2.

⁵ A. Tab 6.

c. Relationship at work of Grievant and Officer.⁶

04. Officer is employed at Facility as a Correctional Officer and was assigned to attend Glock training from June 17-20, 2013 at [location], Virginia.

05. Overnight accommodations were not available for Officer at the Glock training site for the June 17-20, 2013 training.⁷

06. Officer's travel time from her home to the Glock training site was approximately 50 minutes and this was approximately the same travel time from her home to Facility.⁸

07. On 7/9/13 Grievant handed Sergeant a stack of leave documents to sign. These documents included documents related to travel time to and from the academy for Officer. Sergeant did not read the documents carefully, but signed the stack of documents, and passed them out to the officers in briefing who signed and returned the documents.⁹

08. Officer reported to work the evening of 5/28/13 and left work on the morning of 5/29/13. Officer logged out of Master Control at approximately 2:58 a.m. and left the premises at 3:00 a.m. having received permission from Grievant to leave work early. However, the initials of Officer's first and last name were written on the Daily Duty Roster with the time of her leaving being written in as 6:15 a.m. on the morning of May 29, 2013.¹⁰

09. Officer did not write her initials on the Daily Duty Roster nor write in her time out as 6:15.¹¹

10. Grievant stated in writing:

[Investigator] asked me if I signed *[Officer's]* initials and I concede that I probably did it but I don't recall that I did it. I normally don't make it a practice to sign initials unless there is a circumstance that they are not going to be working the next assigned shift. If they are working the next assigned shift I normally try to get them to sign out on their own. I do not make it a normal practice to sign initials in case there is an issue with the documented time.

...It was an accident that I wrote 6:15 on the duty roster and at no time was it intentional.¹²

11. Correctional Officers are non-exempt employees of Department.¹³

12. Facility shifts end upon count being taken and an announcement of count clearing which indicates accountability for inmates and certain equipment has been verified. Upon count clearing the shift or watch commander authorizes master control to announce the count has cleared and thus the shift would be over. Employees are authorized one tenth of an hour to proceed to front search area, process out, and leave premises. A shift could end at different times on different dates.¹⁴

⁶ A. Tab 6.

⁷ A. Tab 6 pg. 35, testimony.

⁸ A. Tab 1, A Tab 6 pg. 25, testimony.

⁹ A. Tab 6 pg. 27.

¹⁰ A. Tab 6 pg. 25, 37, and 38.

¹¹ A. Tab 6 pg. 25.

¹² A. Tab 6 pg. 20.

¹³ Testimony.

¹⁴ Testimony.

CONCLUSIONS

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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001.

Standards of Conduct:

The Department of Corrections ("DOC"), pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department.

The *Standards of Conduct* (Operating Procedure Number 135.1, Effective Date: April 1, 2011) divide unacceptable behavior into three groups, according to the severity of the behavior. Group I offenses include types of behavior less severe in nature, but which require correction in the interest of maintaining a productive and well-managed work force. Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal. Group III offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal.¹⁵

Standards of Conduct, Operating Procedure 135.1 states, in pertinent part:

IV. GENERAL

- C. The standards of conduct outlined in this procedure are designed to protect the well-being and rights of all employees, to assure safe, efficient government operations, and to assure compliance with public law.
- D. The Standards of Conduct
 - 1. Establish a fair and objective process for correcting or treating unacceptable conduct or work performance
 - 2. Distinguish between less serious and more serious actions of misconduct, and provide corrective action accordingly
- E. The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary

¹⁵ A. Tab 5 DOC Operating Procedure 135.1, "Standards of Conduct".

action consistent with the provisions of this procedure based on the severity of the offense.

V. GROUPS OF OFFENSES AND MITIGATING CIRCUMSTANCES

D. Third Group Offenses (Group III)

1. These offenses include acts and behaviors of such a serious nature that a first offense normally should warrant removal.
2. *Group III* offenses include, but are not limited to:
 - b. Falsifying any records, including but not limited to all work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports, insurance claims, time records, leave records, or other official state documents
3. Procedures for Issuing a *Group III* Notice
 - a. When issuing an employee a *Written Notice* for a *Group III* offense, management should issue such notice as soon as practical. Discipline should normally take the form of the *Notice* and removal or *Notice* and up to 30 work days maximum suspension without pay in lieu of removal.

Operating Procedure 110.1 ... Hours of Work and Leaves of Absence¹⁶ provides in pertinent part:

O. Abuses of Leave or Time

2. False Reporting of Leave-Time - Inaccurate reporting of time/leave, failure to properly record time/leave use, falsification of timesheets, leave balances or leave records will be subject to disciplinary action under DOC Procedure 135.1 *Standards of Conduct*. This includes the employees failure to submit signed P8s prior to an absence or promptly thereafter. The Supervisor may treat these absences as leave without pay and may proceed with disciplinary action in accordance with operating procedure 135.1 *Standards of Conduct*.

Operating Procedure 110.2 ... Overtime and Schedule Adjustments¹⁷ provides in pertinent part:

IV. PROCEDURE

G. Special Pay Situations

1. Work-Travel Time for Non-Exempt
 - a. The following is considered work time for non-exempt employees within their scheduled hours:
 - i. Time worked
 - ii. Actual time spent in training (not scheduled time)
 - iii. Time in travel to or from a different location (other than normal work location) for training
 - b. Travel time for non-exempt employees to attend training that exceeds their scheduled hours is compensable as follows:
 - i. Same day travel -Travel for the time that exceeds employees' normal home

¹⁶ A. Tab 3.

¹⁷ A. Tab 4; G. Tab E.

to work commute is considered work time.

- c. When employees choose to commute each day to the Academy (or other training location) because of personal preference when overnight accommodations are provided, only one round trip is considered work time. In this case, employees will not be paid for multiple round trips.

Matters relevant to this proceeding first came to management's attention when Warden was inquiring into allegations of an improper work relationship between Grievant and a female officer ("Officer"). His inquiry led to additional concerns arising which resulted in Warden requesting a S.I.U. Investigation of matters.

A S.I.U. investigation was conducted and a Report of Investigation was issued. Among other concerns, the Report of Investigation addressed Grievant's involvement in matters concerning travel time compensation for Officer and Daily Duty Roster entries related to Officer. As a result of the Investigation, on March 14, 2014, Grievant was issued two Group III Written Notices for Written Notice Offense Code "74" falsifying records.

Grievant received one Group III Written Notice for falsifying records, which further stated violations of OP 135.1 and OP 110.2 and false reporting of travel time in that Grievant authorized Officer to be paid for three hours of travel time to Glock weapons training held at the [location] facility each day of the four day training period (June 17-20, 2013). The Written Notice further provided, according to OP 110.2, because her travel time to [location] did not exceed her normal commute that time should not have been paid work time. This Written Notice provided for a disciplinary action taken in addition to issuing a written notice of a 20 day suspension.

Grievant received another Group III Written Notice falsifying records, which further stated violation of OP 135.1 and the false reporting of Officer's time on the Daily Duty Roster involving Grievant entering the Officer's initials on the Daily Duty Roster and entering Officer's time out as 6:15 a.m. when she actually left at 3:00 a.m. on 5/29/13.¹⁸

Agency identified these two matters as separate and distinct Group III offenses. Warden testified matters and circumstances related to falsifying records concerning travel time warranted a Group III with suspension. He further testified that the matters and circumstances related to falsifying records as to the daily duty roster warranted a Group III with termination. Warden expressed concerns that Grievant was a supervisor and shift commander, his duties as a shift commander made him responsible for time and the accurate reporting of time, and supervisors are held to a higher standard. Concern was expressed as to the greater effect on Agency if a supervisor does not follow policy. Warden testified that, under these circumstances, termination was warranted for falsifications on the Daily Duty Roster even if there were to be no other Group III Written Notices at the time of it being issued.¹⁹

Falsifying:

Group III Offenses under OP 135.1 include falsifying any records, including but not limited to all work and administrative related documents generated in the regular and ordinary course of business, such

¹⁸ A. Tab 1 and A. Tab 2.; G. Tab A.

¹⁹ Testimony.

as count sheets, vouchers, reports, insurance claims, time records, leave records, or other official state documents.²⁰

"Falsifying" is not defined by the DOC Standards of Conduct (OP 135.1), but Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level of a Group III and/or justifying termination. This interpretation is less rigorous but consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) which provides:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition: to tamper with, as to falsify a record or document. ...

The Hearing Officer's interpretation is also consistent with New Webster's Dictionary and Thesaurus which defines "falsify" as:

to alter with intent to defraud, to falsify accounts, to misrepresent, to falsify an issue, to pervert, to falsify the course of justice.

Group III (offense date 6/17-6/20 2013) Falsifying records travel time:

Operating Procedure 110.2 provides that travel time for non-exempt employees to attend training that exceeds employees' normal home to work commute is considered work time. It also provides that time in travel to or from a different location (other than normal work location) for training is considered work time for non-exempt employees within their scheduled hours. Also, when employees choose to commute each day to the Academy (or other training location) because of personal preference when overnight accommodations are provided, only one round trip is considered work time. In this case, employees will not be paid for multiple round trips.

Overnight accommodations were not provided to Officer at the [location] training site for the Glock weapon training of June 17 through June 20 of 2013 which Officer was assigned to attend. The [location] training site was about a 50 minute travel time for Officer from her home. Officer's travel time from her home to Facility where she normally worked was approximately the same travel time as the travel time to the training site. Given this, the Officer would not be entitled to be paid for her travel time to the training site.

Agency alleged Grievant authorized Officer to be paid for three hours of travel time to the [location] facility for Glock training on each of her 4 training days even though her travel time to [location] did not exceed her normal commute time. Agency indicates Officer should not have been paid for this as work time.²¹

Grievant had conferred with HRO and was informed that policy provided that travel that exceeds employees' normal home to work commute is considered work time. On conferring on the same matter with other staff, on June 21, 2013, Grievant received the same information via e-mail with policy pasted/attached.

²⁰ A. Tab 5; DOC Operating Procedure 135.1, "Standards of Conduct".

²¹ A. Tab 1; G. Tab A.

Officer stated in writing to Investigator she did not know if she was entitled to receive travel time or not. She stated a supervisor told her that her time was wrong and a new sheet was given her with what she believed to be commute time.²²

Two pages of a form entitled *[Facility] Leave Change and Schedule Adjust Form* were admitted. Each page of this form states, "Please make the following adjustments to my work schedule, leave previously reported on the roster, and/or my cycle sheet as follows:". Each form has spaces for the employee's name to be written in, date to be written in, and boxes which provide "Adjust rest" and/or "Change leave" to be checked. "From" and "To" are printed with lines for documenting what a matter is being changed from and documenting what the matter is being changed to. Both forms had Officer's name handwritten at the top.

One page sets out adjustments/changes for Officer for 6/5/13 (a date not at issue in this cause) and for "6/19/13". The section for 6/19/13 shows a check in the *Change leave box* and *From: "w8/ar3.5" To: "w11/AR.5"* hand written therein. This form was signed by Officer on 7/9/13 and was signed by Sergeant as supervisor.²³

A second *[Facility] Leave Change and Schedule Adjust* page was admitted that had one section filled in with the dates of 6/17 & 6/18. A check was placed in the *Change leave box* and *From: "0" To: "w11"* written in on the provided lines. A second section on the page has the date 6/20/13 written in with the *Change leave box* checked and *From: "w9.5/ar2" To: "w11/ar.5"* written in on the provided lines. This second page has Officers name written in at the top of the page but is not signed by Officer or any employee, is not dated in the signature lines, and is not signed by Sergeant or by any Supervisor. This form page bears no signatures at all.²⁴

No evidence was presented that Grievant signed, modified, or altered any document concerning reporting time or payment of travel time for Officer to the [location] training site. Evidence was presented that on 7/9/13 Grievant gave Sergeant a stack of "8 or 10 to 15" of the *[Facility] Leave Change and Schedule Adjust* forms including forms for Officer and other employees in a briefing for Sergeant and the employees to sign off on and for the forms to be to return to Grievant. Sergeant stated one of these documents was for Officer's time adjustment which he signed on 7/9/13. Sergeant did not fill out the information on Officers 6/19/13 form and did not know who did fill in this form. Sergeant stated he was not aware this form was for travel time to and from the academy and didn't read the document carefully. He signed the stack of documents and passed the documents out to the officers in briefing, got the officers to sign them, and turned them in. Sergeant did not read or review the forms and was disciplined for not verifying the information before signing.²⁵

Grievant gave Sergeant a stack of leave documents/*[Facility] Leave Change and Schedule Adjust* forms on 7/9/13 one of which Sergeant did sign without reading. No document related to travel time/travel payment was admitted which bears Grievant's signature. For the 4 dates of travel at issue Sergeant only was able to address the one page *[Facility] Leave Change and Schedule Adjust* which addressed matters on 6/5/13 (which date is not at issue) and matters on 6/19/13 date is one of the 4 dates at issue.

²² A. Tab 6 pg. 25.

²³ G. Tab O; A. Tab 6 pg. 46A.

²⁴ G. Tab O; A. Tab 6 pg. 46B.

²⁵ A. Tab 6 pg. 27 and testimony.

Consideration is given to the fact that the form at issue for the dates of 6/17, 6/18, and 6/19 was not signed by any one, employee or supervisor. Consideration is given to Sergeant testifying he received a stack of forms from Grievant and did not have knowledge of who filled out the forms. Testimony was received that this was not the first time officers have been paid improperly. Testimony indicated travel payment in compliance with policy was “a challenge” and they have to frequently remind supervisors concerning this. Evidence was also admitted as to inconsistency and confusion within Agency as to when and as to what amount of travel time is work time/to be paid.

The Written Notice notes that according to OP 110.2, as Officer’s travel time to [location] did not exceed her normal commute time, that time should not have been paid work time. The Investigation Report notes one supervisor understood officers were only supposed to be paid for one commuting trip when assigned to the academy and notes also the forms to amend Officer’s time for the training days authorized Officer to be paid an additional five hours and twenty minutes she would not have been entitled to receive as her actual commute time was one hour forty minutes per day. The Investigation Report also notes that on re-interview Officer stated she was approached by a supervisor and told her that her time was incorrect and presented her with a leave change form to sign. She signed the form believing that she was supposed to be paid for the commute time because someone in the class had asked if housing was available and the instructor advised it was not. It also was noted in the Report that there were concerns of having a lot of problems with new supervisors getting the time records correct.

As to allegations concerning Officer’s travel time to Glock training, there is insufficient evidence to find Agency has proved, by a preponderance, Grievant had an intent to falsify or that he falsified any such records.

For the reasons stated herein the Hearing Officer finds Agency has not met its burden of proof as to this Group III Written Notice (offense date June 17 through June 20 of 2013) with a 20 day suspension for Falsifying Records (and addressing Violation of OP 135.1 and 110.2. and false reporting of time/authorizing Officer to be paid for 3 hours of travel time to Glock training each day at the [location] Facility).

Group III Offense (offense date: 5-28-13) Falsifying records Daily Duty Roster

Officer was employed at Facility and was assigned to a shift working from the evening of May 28, 2013 until the morning of May 29, 2013. Her shift ended on 5/29/13 at approximately 6:15 A.M. However, Officer had asked Grievant and received permission from Grievant to leave work early that shift. Officer logged out of Master Control at 2:58 a.m. and left the premises at 3:00 a.m. on the morning of May 29, 2013.²⁶

Agency utilizes a “Daily Duty Roster”, a work related document, utilized to document employees’ time and other related matters. This Roster provides lines of information for each employee with one line for each employee providing both printed information and spaces for information to be written in. Each line has printed information regarding the post number, post title, officer assigned, and other information. Each line additionally has spaces for “Time In”, “Time Out”, and the “Officer’s Initials”, among other matters, to be handwritten in.

At issue in this cause is the Daily Duty Roster for Shift: A-Nights 5:45pm-6:15am” Date: May 28, 2013 and specifically the handwritten information thereon for Officer. This Roster indicated Officer’s “Time

²⁶ A. Tab 6 pg. 37.

Out” was handwritten on the form as “6:15” and Officer’s Initials were handwritten in the space entitled “Officer’s Initials”.

Officer asked her Sergeant to leave the shift early as she was going on leave. Sergeant referred her to Grievant who approved her leaving early. Officer stated in writing she left at 3:00 a.m. on 5/29/13. Officer further stated she did not sign her initials on the Daily Duty Roster nor report herself as leaving at 6:15 a.m. on the Roster.²⁷

Grievant stated in writing to:

[Investigator] asked me if I signed [Officer’s] initials and I concede that I probably did it but I don’t recall that I did it. I normally don’t make it a practice to sign initials unless there is a circumstance that they are not going to be working the next assigned shift. If they are working the next assigned shift I normally try to get them to sign out on their own. I do not make it a normal practice to sign initials in case there is an issue with the documented time.

It was an accident that I wrote 6:15 on the duty roster and at no time was it intentional. It was an error. If she said that she asked me to leave early, I don’t recall but I probably did approve it.²⁸

This Group III was issued for Written Notice Offense Code “74”, Falsification of Records. *The Nature of Offense and Evidence* addressed signing Officer’s initials to the duty roster, and recording her time out as 6:15 a.m. when she actually left at 3:00 a.m. Both the signing of Officer’s initials to the document and recording a Time Out of 6:15 a.m. are of concern in this matter.

Officer stated in writing she left work at 3:00 a.m. on May 29, 2013. She also stated:

[Investigator] showed me the daily roster showing I signed out at 6:15 a but I did not sign out I don’t know who did. No one has told me they signed out for me. [Grievant] approved for me to leave. I don’t know what time was used I assume it adjusted rest or some form of time I had available.

At the request of Warden, Facility Investigator reviewed Facility camera footage and certain documents. Facility Investigator reported footage of Officer leaving the premises at 3:00 a.m. on the morning of 5/29/13 after having logged out of Master Control at 2:58 a.m. He also raised the fact the Daily Duty Roster showing Officer’s initials were written on the Roster indicating a time out/time of leaving of 6:15 a.m. on 5/29/14. He further reported, as to the Daily Duty Roster at issue, footage showed that Grievant had at times been in control of the Roster and/or was near the Roster. He reported from 6:03 to 6:07 a.m. Grievant was seen on camera writing on the Roster and then Grievant puts the Roster on the counter and was close to it while waiting for the shift to initial out.²⁹

Issue was raised concerning the consistency on the Roster of a 6:15 a.m. Time Out being written. Testimony indicated that employee shifts end upon authorized announcement that counts have cleared. At this time employees are free to leave the premises via an established procedure. The 6:15 (a.m.) time was written into the Daily Duty Roster as this was the shift end as determined by announcement of count

²⁷ A. Tab 6 pg. 25.

²⁸ A. Tab 6 pg. 20.

²⁹ A. Tab 6 pg. 36-38 (Statement).

cleared with a .1 hr. period for any necessary travel. Employees would then initial the Time Out /shift end time upon exiting the premises.

As shift commander Grievant has duties and responsibilities related to Time and as to the Daily Duty Roster. Grievant had control and access to the Daily Duty Roster and Grievant conceded he probably entered Officer's initials. He stated he normally doesn't make it a practice to sign initials unless employees are not going to be working the next assigned shift. He also stated he does not make it a normal practice to sign initials in case there is an issue with the documented time and stated it was an accident he wrote 6:15 on the duty roster.³⁰

Officer did not sign her initials to the daily duty roster, did not know who did, and was not informed someone signed out for her. Grievant, as discussed above, stated he concedes he probably did sign Officer's initials and stated writing in the 6:15 was an accident.

Given the statements of Grievant and the evidence admitted in this case, Agency has met its burden of proof (by a preponderance) as to this Group III Written Notice with termination. Even if the Hearing Officer were to determine Grievant wrote in the 6:15 a.m. Time Out as an "accident" or as being the time the shift time ended while forgetting Officer left at 3:00 a.m., there is still the matter of writing the Officer's Initials on the document. The writing of Officer's initials to this document was an intentional act. Writing Officer's initials on the Daily Duty Roster gave a false appearance and misrepresented a matter. Grievant knew, or should have known, placing an employee's initials on this document would misrepresent and give a false appearance, as a minimum, that the Officer initialed the document and/or the initials would give an appearance of the employee's verification the written information concerning that employee was correct.

Delay in issuance:

OP 135.1 provides that when issuing an employee a *Written Notice* for a *Group III* offense, management should issue such notice as soon as practical.

Warden received the Investigation Report, discussed the investigation with Regional Administrator, and it was decided to pursue with disciplinary process regarding. There was a delay of approximately 6 ½ months between the Investigation Report (signed August 29, 2013) and the Written Notices (issued March 14, 2014).

During this period the evidence indicates that Grievant was on Short Term Disability/Sick Leave/Stretch Leave and this affected the time frame for the issuance of any Written Notices. Warden testified he delayed the disciplinary process due to Grievant's Doctor recommending that Warden meeting with Grievant would be too stressful for Grievant. Grievant's Doctor did not advise Warden meeting with Grievant due to Grievant's health. Additionally, Warden desired, given the serious nature of the offenses, to afford Grievant the right to meet with the Warden regarding matters and be afforded opportunity to present information or rebuttal and have that information taken into consideration prior to making the final determination as to issuing any discipline.

Upon consideration of the evidence in this case, the Hearing Officer finds that the Written Notices were issued in a manner consistent with policy and due process.

³⁰ A. Tab 6 pg. 20.

Mitigation:

Va. Code § 2.2 – 3005.1 authorizes hearing officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with the rules established by the Department of Human Resources Management ..." ³¹ 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". 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."

The Hearing Officer does not find that Agency's discipline exceeds the limits of reasonableness.

DECISION

For the reasons stated above, based upon consideration of all the evidence presented at hearing, the decision of the Hearing Officer as to each of the two Group III Written Notices issued on March 14, 2014 is as follows:

A.

Regarding the Group III Written Notice (offense date June 17 through June 20 of 2013) with a 20 day suspension for Written Notice Offence Code "74", Falsifying records (addressing matters related to travel time and/or payment for travel time), Agency has not met its burden of proof and Agency's issuance of a Group III Written Notices with suspension is **REVERSED**.

B.

Regarding the Group III Written Notice (offense date: 5-28-13) with "Termination" for Written Notice Offence Code "74", Falsifying records (and addressing matters related to the Daily Duty Roster) Agency has met its burden of proof and additionally, it is found that:

1. Grievant engaged in the behavior described in such Group III Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action and Agency's discipline of issuing a Group III Written Notice with termination does not exceed the limits of reasonableness.

For the reasons stated above, the Agency has proven by a preponderance of the evidence that the disciplinary action of issuing such Group III Written Notice (offense date: 5-28-13) with termination was warranted and appropriate under the circumstances and the Agency's issuance of the Group III Written Notices with termination is **UPHELD**.

APPEAL RIGHTS

³¹ Va. Code § 2.2-3005.

As the *Grievance Procedure Manual* (effective date: July 1, 2012) 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.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

A hearing officer's 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.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/ Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

copies e-mailed to:

Grievant's attorney

Grievant c/o Grievant's attorney

Agency's advocate

EDR