

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 10/15/14; Decision Issued: 10/16/14; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 10428; Outcome: No Relief - Agency Upheld.

DECISION OF HEARING OFFICER  
IN RE: CASE NO. 10428  
HEARING DATE: October 15, 2014  
DECISION ISSUED: October 16, 2014

PROCEDURAL HISTORY

A complaint was made against Grievant based on an event of April 19, 2014 regarding Grievant's falsification of state records regarding security check log entries. An aggravating circumstance of the offense was that when Grievant did actually make checks, the checks were not properly made. Grievant was issued a Group III Written Notice with termination on June 19, 2014 for violation of Operating Procedure 135.1, "Standard of Conduct"<sup>1</sup> and offense Code number 74.<sup>2</sup>

A Hearing Officer was appointed on July 30, 2014 and a pre-hearing conference was scheduled on August 13, 2014 at which time Agency's attorney was not available. A later phone conference was rescheduled on August 21, 2014. During the prehearing conference a Hearing was scheduled for October 2, 2014 but, due to a medical emergency of the Hearing Officer, was rescheduled to October 15, 2015.

APPEARANCES

Agency Attorney  
Agency representative as witness  
2 Agency witnesses  
Grievant

ISSUES

- 1) Whether Grievant failed to do a security check in compliance with written instruction.
- 2) Whether Grievant falsified state records.
- 3) Whether mitigation was considered by Agency.
- 4) Whether Grievant's discipline of termination was warranted as compared to the discipline of others.

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual (GPM) § 5.8. A preponderance of the evidence is evidence which shows that what is sought is to be proved is more probable than not. GPM § 9. Grievant has the burden of proving any affirmative defenses raised by Grievant GPM §5.8.

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<sup>1</sup> Agency Exhibit 6 and Operating Procedure 135.1 pg. 9 D(b)

<sup>2</sup> Agency Exhibit 7 Written Notice

### APPLICABLE LAW and POLICY

The Agency relies on its Operating Procedure 135.1 "Standard of Conduct" and Agency Offense Code #74.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."<sup>3</sup>

### FINDING OF FACTS

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

On the morning of April 19, 2014, Grievant was assigned to and on duty at a segregation pod at the facility. Grievant had been an employee for fourteen months with no disciplinary history. Grievant had been trained on policies and procedures and was aware he was to do security checks of offenders no less than every thirty minutes at staggered times.<sup>4</sup> Daily logs were kept to enter the time of these checks being done.<sup>5</sup> A rapid eye video camera monitored the Grievant's actions. The log and video coverage for April 19, 2014 would indicate Grievant made checks at 7:57 am, 8:25 am, and 8:54 am. Another officer did a check at 9:23 am. Grievant checked at 9:52 am and 10:21 am. The next check after 10:21 am which should have been about 10:50 am was entered and then redacted by Grievant. The facility video showed that Grievant did not do a check at 10:50 am. The video also showed that during the 9:52 am and 10:21 am checks the offender's window was covered so that Grievant was unable to see offender and activities in his cell.

While the post orders did not specifically state all cell windows should be uncovered, it is obvious an offender could not be observed if his window was covered. At approximately 11:15 am another officer advised Grievant that offender's window was still covered and perhaps Grievant should do a check.<sup>6</sup> Upon checking offender's cell Grievant found that offender was unresponsive.<sup>7</sup> Offender's cell was then open according

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<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> Agency Exhibit 4 pg. 1 and 2

<sup>5</sup> Agency Exhibit 2

<sup>6</sup> Agency Exhibit 3

<sup>7</sup> Agency Exhibit 1

to protocol and offender was found bleeding and unconscious or possibly dead. Offender was transported to the local hospital where he was pronounced dead.<sup>8</sup>

Grievant admits offender's window was covered at the 9:52 am and 10:21 am checks. Grievant further admits attempting to rectify his log sheet by entering a time he did not actually do a check and then redacting that entry after being told by another officer that Grievant should not write in times he had not actually done.<sup>9</sup>

Grievant stated he thought offender was bathing himself and Grievant thought nothing of the covered window. Grievant stated he was delivering food trays during the time of his required check after the 10:50 am check. Grievant stated he was very upset by finding offender bleeding and unconscious which caused him to write a check time in the log when the check had not been done.

Grievant produced evidence of others who had received a Group II or Group III for failure to obey instructions/policy and they had not been terminated.<sup>10</sup> Grievant admitted no other discipline for failure to follow policy were coupled with a falsification of state records. Grievant believed the pod was under staffed thus making it difficult for Grievant to complete his tasks.<sup>11</sup> Agency representative stated that the ideal situation would have more officers at a pod but state policy does not require such. The Agency representative stated he had issued the Written Notice for falsification of state records aggravated by failure to follow policy. The Agency representative stated he had considered mitigation due to Grievant's record of no previous disciplines but considered the combination of Grievant's action as an aggravating circumstance.

### OPINION

Grievant admitted he had done two security checks of offender's cell when he was unable to see into offender's cell (windows covered) and also admitted he had falsified records for several cells by indicating on log records that he done a 10:50 am check. He admitted he later redacted the time.

Falsifying state records is Group III offense which was further aggravated by his failure to properly monitor offender's cell. Grievant presented no valid reason for his actions that would warrant mitigation of the discipline. Grievant was unable to prove an example of behavior that paralleled his action that received less harsh discipline.

### DECISION

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<sup>8</sup> Agency Exhibit 1

<sup>9</sup> Agency Exhibit 3

<sup>10</sup> Grievant Exhibit 1 and Agency Exhibit 8

<sup>11</sup> Agency Exhibit 5

For the above reasons, Agency's Group III discipline 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>12</sup>

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

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Sondra K. Alan, Hearing Officer

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<sup>12</sup> See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant.