

Issue: Group III Written Notice with termination (falsifying a state document);  
Hearing Date: October 10, 2001; Decision Date: October 11, 2001; Agency:  
Department of Corrections; AHO: David J. Latham, Esquire; Case Number:  
5296



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5296

Hearing Date: October 10, 2001  
Decision Issued: October 11, 2001

**APPEARANCES**

Grievant  
Legal Representative for Agency  
Warden Senior  
Two witnesses for Agency

## ISSUES

Was the grievant's conduct on May 27, 2001 subject to disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

## FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on June 26, 2001 because she falsified a state document. In addition, the grievant was discharged from employment on July 2, 2001. Following failure to resolve the matter at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of Corrections (Hereinafter referred to as "agency") has employed the grievant as a correctional officer for five years. At the time of discharge, she was a correctional officer senior. On July 2, 2001, grievant had three other active disciplinary actions – two Group I Written Notices and one Group II Written Notice – all for unsatisfactory attendance or tardiness.

On May 27, 2001, grievant was working on the midnight shift (9:45 p.m. to 6:15 a.m.) in the special housing unit. She had been working in this unit for approximately three to four months. The inmates assigned to this particular housing unit are the most hostile and dangerous inmates in the facility. Accordingly, an individual log isolation/segregation/detention form is maintained for each inmate. The log is posted on the wall outside each inmate's cell. The correctional officers assigned to the unit are required to make a visual check on each inmate every 30 minutes, and then record the time and their initials on the form.<sup>1</sup> The grievant understood this requirement and had been conducting such checks regularly since being assigned to the unit. During the first part of her shift on May 27, 2001, grievant had been assigned to the control room. At about 2:00 a.m., an officer who had never previously worked in the special housing unit was assigned to the control room and grievant was assigned to conduct inmate checks during the rest of her shift.

The control room officer presses a release button to permit access to the area where inmates are housed in order for correctional officers to conduct inmate checks. The grievant conducted an inmate check at 3:08 a.m. but did not conduct a check 30 minutes later. A third officer, who was working with grievant, told the new control room officer that he and grievant were going to "double up"

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<sup>1</sup> Exhibit 1. Record Keeping, Item # 8, *Post Order #201, 202, 203*, revised November 3, 2000. See also Exhibit 2. Section 822-7.2J – Supervision, *Institutional Operating Procedure 822, Isolation, Segregation and Detention*, April 15, 2001.

on the next two checks.<sup>2</sup> At about 4:06 a.m. the watch commander – a captain – entered the building as part of his routine rounds. The control room officer called the office where grievant and another correctional officer were sitting to alert them to the officer’s presence. As the captain approached the office, the grievant quickly exited the office and went into the inmate area where she began to conduct inmate checks. When the captain entered the office he observed that the other officer had red eyes and appeared to have been sleeping. The captain then followed grievant into the housing area where he observed grievant making double entries for both the 3:36 a.m. and the 4:04 a.m. checks.<sup>3</sup>

The captain called for the lieutenant in charge of this area to inspect the log sheets. When the lieutenant arrived, both officers checked the log sheets and found that the last entry was at 3:10 a.m. By this time, it was 4:15 a.m. The captain also questioned the control room correctional officer, who said that the other correctional officer had told him that he and grievant were going to “double up” on rounds for the 3:00 – 4:00 a.m. hour. The control room officer did not admit grievant or the other officer into the inmate housing area after 3:08 a.m. until sometime after 4:06 a.m. During the investigation of this matter, both the control room officer and the officer who appeared to have been sleeping admitted that the 3:36 a.m. rounds were not made by any officer, including grievant.

The grievant denied her actions and was given a Group III notice and discharged from employment because of the accumulated active disciplinary actions. The two other correctional officers acknowledged what they had done and were given corrective action and suspended for 30 days. They received less discipline than grievant because they admitted guilt and because they had no prior active disciplinary actions.

### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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).

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<sup>2</sup> “Doubling up” means skipping one check, and then recording two entries when making a check one hour later.

<sup>3</sup> Exhibit 3. *Uniform Individual Log Isolation/Segregation/Detention Forms* for the period ending May 27, 2001.

Code § 2.1-116.05(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>4</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. An example of a Group III offense is falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other state documents.<sup>5</sup>

The grievant admits that she did not record the 3:36 a.m. inmate check. She avers that she physically conducted the check but as she was doing so, she experienced diarrhea and spent the next 30 minutes in the restroom.<sup>6</sup> She contends she just didn't have time to record the time and her initials because she had to run to the bathroom.

The grievant's version of events is less credible than that put forth by the agency for four reasons. First, the control room officer testified very credibly that grievant did not enter the inmate housing area after 3:08 a.m. until sometime after 4:06 a.m. Second, there is credible hearsay evidence from the other

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<sup>4</sup> § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

<sup>5</sup> Exhibit 2, Standards of Conduct.

<sup>6</sup> Grievant contended that she had been taking "colon cleansing pills" for several months and that they would cause diarrhea after she ate. She had eaten some food at about 2:00 a.m.

correctional officer that confirmed the control room officer's testimony. Third, the captain's sworn testimony is that grievant exited the office "quickly" after being alerted by a phone call that the officer was entering the building. This suggests that grievant was scurrying to bring the logs current in order to avoid detection by the captain. Fourth, the control room officer also offered uncontradicted testimony that the other correctional officer had told him that he and grievant were going to "double up" on the 3-4 a.m. inmate checks. The combined weight of both the direct testimony and the circumstantial evidence outweighs grievant's denial.

Therefore, it is concluded that the agency has borne the burden of proof, by a preponderance of the evidence, to demonstrate that grievant 1) did not make the 3:36 a.m. inmate check and, 2) made a false entry at a later time in an effort to conceal her failure to follow instructions.

Grievant contends that the captain, the warden and the associate warden who issued the prior disciplinary actions, all had something against her and that, in essence, none of the discipline had merit. However, grievant offered no evidence or rationale to support this conspiracy allegation. During the hearing, grievant presented no written evidence, conducted almost no cross-examination and offered relatively little testimony of her own except to proclaim her innocence.

### DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice issued on June 26, 2001 and the discharge from employment are AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

### APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally,

newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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 HRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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David J. Latham, Esq.  
Hearing Officer