

Issue: Group III Written Notice with termination (falsifying official State documents); Hearing Date: 08/07/02; Decision Date: 08/09/02; Agency: Department of Juvenile Justice; AHO: David J. Latham, Esq.; Case No.: 5493; **Administrative Review: Hearing Office Reconsideration Request received 08/19/02; Reconsideration Request Date: 08/29/02; Outcome: No basis to change decision or reopen hearing. Request denied; Judicial Review: Appealed to the Circuit Court in the County of Powhatan on 09/30/02; Outcome: HO's decision not contradictory to law. HO decision upheld (10/22/02)**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5493

Hearing Date:	August 7, 2002
Decision Issued:	August 9, 2002

PROCEDURAL ISSUES

This hearing was docketed for 9:00 a.m. on August 7, 2002. Shortly before 9:00 a.m., grievant telephoned the agency stating that he would arrive at 9:15 a.m. When the grievant had not arrived by 9:30 a.m., the hearing was started. Grievant appeared at 9:40 a.m. by which time documents had been admitted into the record and the agency representative was making her opening statement.

APPEARANCES

Grievant
Superintendent
Legal Assistant Advocate for Agency
Three witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the 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 and termination from employment issued for falsifying official state documents on June 1, 2002.¹ Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.²

The Virginia Department of Juvenile Justice (hereinafter referred to as agency) has employed the grievant as a security officer for two years. The grievant has no other active disciplinary action.

Grievant was working a night shift from the evening of May 31, 2002 to early morning on June 1, 2002. He was responsible to maintain security in one of four pods in a housing unit; a security officer is assigned to each of the four pods. A pod houses 12 juveniles.³ Agency policy requires that whenever an officer needs a break, he is to notify the sergeant who arranges for a floater officer to fill in during the break. At least one security officer must be in a pod at all times. The wards were locked in their rooms at about 9:30 p.m. Later, the sergeant in charge told grievant and the security officer in an adjoining pod to "break each other."⁴ Grievant knew that it was wrong to cover two pods but felt that he had to obey the sergeant's directive. He did not question the sergeant's directive and did not suggest that the floater officer be assigned to cover during the breaks. At 11:15 p.m., grievant took a 30-minute break while the other officer covered both grievant's pod and his own pod.

A pod security officer is required to comply with a number of specific duties that include:

- Conduct a visual inspection and head count of cadets on unit prior to turning over supervision to relief staff. Maintain knowledge of the whereabouts of cadets at all times. Cadets who are not under direct supervision, such as cadets in their rooms or isolation, must be observed every 15 minutes.

¹ Exhibit 14. Written Notice, issued June 7, 2002.

² Exhibit 15. Grievance Form A, filed June 14, 2002.

³ Exhibit 2. Facility floor plan of the housing unit in which grievant worked.

⁴ "Break each other" means to cover each other's responsibilities when the other officer takes a break. In this case, it required that one officer cover two pods.

- Maintain continual observation of area of control. Be alert for any unusual activities, behavior, conditions, or violations of institutional or program rules, and reports to Unit Sergeant.
- Maintain a complete and accurate log of all activities/incidents.
- Informal counts shall be made every 15 minutes by the Pod Officer during all shifts and shall be documented during sleeping hours.
- During the hours from 2315 to 0500, make room checks a minimum of every 15 minutes and log specific time on cell sheet.⁵ [Cell sheets are posted on each cell door]

At about 1:15 a.m., the other security officer took his break and grievant covered both pods. The other officer made frequent trips to the restroom due to an intestinal problem and did not return from his break until about 2:10 a.m. Thus, grievant was responsible for maintaining security in the other officer's pod for nearly one hour. The facility maintains a videotape camera surveillance system that took a picture of the central communal pod area about every 15 seconds. The videotape reflects that grievant entered the other officer's pod at about 1:19 a.m. and signed each cell sheet.⁶ However, he signed them to reflect that he was conducting a 1:30 a.m. check even though it was actually 1:19 a.m. For example, grievant wrote 1:30 a.m. on the cell sheet for room 105 even though the videotape shows that the actual time was 1:19 a.m. The monitoring form further noted that the ward was standing inside the door of his cell.⁷

At about 1:22 a.m., the ward in room 103 escaped from his room and went to assist another ward in room 105. By 1:23 a.m., the ward in room 105 escaped and both wards went into the bathroom where they were out of sight from the surveillance camera. Subsequent investigation by the agency and by Virginia State Police investigators revealed that the two wards managed to open a ceiling plate in the bathroom and climb into the maintenance area above the living area. From there it took them approximately one hour to break through a wall into a maintenance space from which they exited into the fenced yard outside the building at about 2:20 a.m. Subsequently, they scaled the fence, escaped from the facility, stole a car and may have been involved in an attempted hold-up. The escape was not discovered until about 5:20 a.m. when wards were awakened for breakfast. The two wards had partially blocked the night-lights in their cells to make viewing difficult, and had used blankets and clothes to make rudimentary dummies under their bedsheets. The two escapees were arrested in the afternoon of June 1, 2002 and returned to the facility.⁸

⁵ Exhibit 13. Security Post Order, Post # 15.

⁶ NOTE: The videotape time indicator indicates that the time was 12:19 a.m. but it was actually 1:19 a.m. The videotape surveillance system failed to automatically changeover to Daylight Savings Time, apparently due to a lightning strike earlier in the year.

⁷ Exhibit 6. Confinement Monitoring Form for cell 105 beginning on the night of May 31, 2002.

⁸ Exhibit 1. Inspector General's report on the escape, June 3, 2002.

The videotape reveals that grievant returned to the pod at about 1:46 a.m. and initialed the monitoring form for cell 105 at 1:45 a.m. noting that the ward was standing at the door of his cell. Grievant again reentered the pod at 1:57 a.m. and documented that the ward in cell 105 was again standing at the door of his cell. At both 1:46 a.m. and 1:57 a.m. when grievant initialed the monitoring form, the cell was empty because the ward had escaped from the pod living area at 1:23 a.m.

Because investigators from two state agencies were involved, considerable attention was devoted to analysis of the surveillance videotape. The State Police furnished a copy of their chronology gleaned from a detailed review of the videotape.⁹ During the hearing, the videotape was shown to the parties and the hearing officer. The videotape supports the chronology provided by the State Police.¹⁰ Upon completion of the investigation, grievant was given a Group III Written Notice and removed from employment effective June 7, 2002.

As a result of this incident, the other security officer was also discharged from employment, and the sergeant was disciplined. Grievant wears glasses for reading only; his eyesight is otherwise normal and his driver's license is not restricted.

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

⁹ Exhibit 5. Summary of Va. State Police tape review.

¹⁰ Although the videotape is not of the highest resolution, investigators were able to distinguish grievant from the other security office because grievant checked the cells in a counterclockwise fashion, while the other officer checked cells in a clockwise manner. Further, grievant does not wear his cap while the other security officer does wear his cap.

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹¹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training¹² 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 defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. One 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 official state documents.¹³

The agency has demonstrated, by a preponderance of the evidence, that grievant falsified an official state document. On June 1, 2002 grievant made three entries on the cell monitoring form. The first entry, recorded as 1:30 a.m., was actually made at about 1:19 a.m. The second entry notes that the ward was standing at the door inside his locked cell at 1:45 a.m.; in fact, the cell was empty and the ward had escaped into the ceiling area above the pod living area. The third entry again notes that the ward was standing at the door just inside his locked cell at 2:00 a.m. By this time, the ward had been gone from his cell for 37 minutes and was still in the ceiling space above the living areas.

Grievant denies falsifying any entries. However, he is unable to reconcile his entries with the compelling videotape evidence that shows the two wards escaping from the pod during grievant's absence from the pod between 1:20 a.m. and 1:46 a.m. There are only two possible explanations that could reconcile grievant's entries on the cell form with the facts documented on videotape. First, grievant could have made false entries in order to aid and abet the escape. Grievant had denied doing so and the investigation concluded that he did not intentionally assist the escapees. The only remaining explanation is that grievant

¹¹ § 5.8, Grievance Procedure Manual, Department of Employment Dispute Resolution, July 1, 2001.

¹² Now known as the Department of Human Resource Management (DHRM).

¹³ Exhibit 16. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

wrote the entries on the monitoring form but did not look into the cells to ascertain whether the wards were present. Grievant's notations that the ward was standing at the door inside his cell, when the cell was in fact empty, is falsification of an official state document.

Other than denial, grievant has offered no other testimony, witnesses, or evidence to support his position. Had grievant looked into cells 103 and 105, he should have noticed two things that would have alerted him to a possible problem. First, the lighting was very dim compared with the all the other rooms in the pod. Second, the clothes and blankets that the wards stuffed under their sheets were not realistic dummies. The fact that he did not observe these things corroborates that he did not look into the cell when he noted that the ward was standing at the door.

If grievant had looked into the cells and been alerted by these anomalies, he could have raised an alarm at 1:45 a.m. or even at 2:00 a.m. Because the wards were still within the building until 2:20 a.m., they could have been apprehended thereby preventing the wards from escaping and committing crimes. Therefore, grievant's failure to perform his job and his deliberately false entries indirectly resulted in assisting the wards to have sufficient time to make good their escape from the facility.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and termination from employment issued on June 7, 2002 are hereby UPHeld. The Written Notice shall be retained in the grievant's personnel file for the period specified in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.¹⁴

[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]

David J. Latham, Esq.
Hearing Officer

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5493

Hearing Date:	August 7, 2002
Decision Issued:	August 9, 2002
Reconsideration Received:	August 19, 2002
Reconsideration Response:	August 20, 2002

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision 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. A copy of all requests must be provided to the other party and to the Director of the Department of Employment Dispute Resolution (EDR).¹⁵

PROCEDURAL ISSUES

Grievant submitted a request for reconsideration but he failed to comply with the procedural requirement to provide a copy of his request to the Director of

¹⁵ § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

EDR and to the other party. However, in view of the brevity of grievant's request, the Hearing Officer will nonetheless respond to grievant's request.

Grievant states that he wants to acquire an attorney to represent him in this matter. Grievant may retain an attorney at any time he desires to do so. Grievant had ample opportunity to obtain an attorney before the hearing, and before he submitted his reconsideration request. He may, if he wishes, still obtain an attorney who may pursue the remaining appeals detailed at the bottom of this decision.

OPINION

The Hearing Officer agrees with grievant's statement that his superior officer approved the relief and rotation of corrections officers on the night in question (see Decision, page 2, third paragraph in Findings of Fact).

Grievant's assertion that he did not falsify documents is not supported by the evidence. The videotape evidence establishes by a preponderance of evidence that the two cadets had already escaped and were not in their cells at the time grievant signed the cell sheets stating that they were in their cells.

Grievant's challenges to the hearing officer's decision, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

DECISION

The hearing officer has carefully reviewed grievant's request but declines to reopen the hearing or to reconsider the Decision issued on August 9, 2002.

APPEAL RIGHTS

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.

David J. Latham, Esq.
Hearing Officer