Issues: Group I Written Notice (unsatisfactory job performance) and Group III Written Notice with 5-day suspension (falsification of records); Hearing Date: 02/06/03; Decision Issued: 02/18/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5627/5628

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 5627 & 5628

Hearing Date: February 6, 2003
Decision Issued: February 18, 2003

APPEARANCES

Grievant
Warden
Advocate for Agency
Four witnesses for Agency
Observer for EDR[1]

[1] § 5.7 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual,* effective July 1, 2001 provides that a representative of EDR may attend any hearing. *See also* Section IV.A, *Rules for Conducting Grievance Hearings*, effective July 1, 2001, which provides that the EDR Director or his designee may observe any hearing.

ISSUES

Did the grievant's actions warrant disciplinary action under the agency's 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 grievance from two Written Notices. She received a Group I Written Notice issued for unsatisfactory work performance on September 17, 2002.[2] She received a Group III Written Notice for falsification of records on October 9, 2002.[3] She was suspended for five days as part of the second disciplinary action. Following failure to resolve the grievance, the agency head qualified the grievance for a hearing.[4] The Department of Corrections (DOC) (hereinafter referred to as agency) has employed grievant for five years; she is a corrections officer senior.

Group I Offense

Grievant has read and understands the post order for housing unit officer, which provides specific post duties including:

> 5. Record information in the pass down log book, when appropriate and necessary.
> 9. Relay pertinent information to supervisory personnel, relief officers and other staff as necessary.[5]

At 6:30 a.m. on September 17, 2002, grievant assumed her post in the security cage of a dormitory unit. She went on break at 9:40 a.m. and returned at 10:10 a.m. Another corrections officer relieved grievant during her 20-minute break. On this day, the unit was scheduled for a general cleaning. At 9:41 a.m., the relieving corrections officer opened a fire door so that inmates could push dirty water outside the building. A lock accessible only from the outside secures the fire door. In addition a bar is padlocked to brackets outside the door to provide a second security measure. The officer unlocked the door and took the bar inside to the security cage.[6]

At approximately 11:00 a.m. a sergeant (grievant's direct supervisor) found the bar leaning against the wall outside the building. She brought the bar inside the building and placed it in the security cage, telling grievant to secure the

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[2] Exhibit 1. Written Notice, issued November 15, 2002.
[3] Exhibit 2. Written Notice, issued November 15, 2002.
[4] Exhibit 3. Grievance Form A, filed November 26, 2002.
[5] Exhibit 7. Post Order # 18, June 13, 2002; and Review Log, signed by grievant June 20, 2002.
[6] Exhibit 5. Incident report by relieving officer, September 21, 2002.

door when inmates had finished cleaning. The bar was set on the floor behind a count board that was leaning against the wall. The bar was not visible behind the board. At 1:05 p.m., a different corrections officer relieved grievant from the post.[7] Grievant did not tell the relieving officer that the bar was in the cage and that it should be placed on the fire door after cleaning ended. On the evening of September 18, 2002, a corrections officer discovered that the security bar was not in place on the fire door and reported it to his supervisor.[8]

Group III offense

Between September 20 and 25, 2002, grievant, her sergeant and two other corrections officers were asked to write incident reports. A captain and a major met with grievant on September 30, 2002 to discuss the incident and thereafter forwarded a report to the assistant warden of operations (AWO).[9] The AWO met with grievant on October 4, 2002. He also reviewed the pass down log and found that grievant's only entry on September 17, 2002 was two lines noting that a particular inmate was scheduled for kitchen duty. Subsequently he sent a report to the warden on October 7, 2002 recommending that grievant be given a Group I Written Notice for unsatisfactory job performance for failure either to replace the security bar or to notify her relief of the need to do so.

On November 1, 2002, the warden met with grievant to discuss the incident. During the meeting, grievant asserted that she had passed down information about the security bar to her relief and that it was documented in the pass down log. Because this contradicted the grievant's previous admission that she had not passed down the information, the warden obtained the pass-down log. Upon examination, it was found that the entry for September 17, 2002 now included a third line in grievant's handwriting that said, "Wing 1 back door bar and lock left in cage per Sgt. _____. "[10] The entry is unsigned and does not contain a notation to reflect that it was a Late Entry. Grievant admitted that she had added this entry to the logbook on October 9, 2002.

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

[7] Exhibit 6. Logbook, September 17, 2002.
[8] Exhibit 9. Pass Down Log, entry at 8:05 p.m., September 18, 2002.
[9] Exhibit 8. Report from major to AWO, September 30, 2002.
[10] Exhibit 9. Passdown log, September 17-23, 2002.

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 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 Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards 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 should normally warrant removal from employment.

The Department of Corrections, pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct. Group I offenses are the least serious and include unsatisfactory or inadequate job performance. Group III offenses include falsification of any records or other official state documents.[12]

Group I Offense

The agency has demonstrated, by a preponderance of evidence, that grievant failed to replace the security bar or, in the alternative, failed to notify her

[11] § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.
[12] Exhibit 10. Section 5-10.17A & B.2, Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

relief that the bar should be replaced when inmates had finished cleaning. Grievant has admitted that she should have notified her relief and, during the hearing, averred that she is no longer grieving the written notice administered for this offense. Therefore, the Group I Written Notice issued for unsatisfactory job performance is affirmed.

Group III Offense

Grievant has admitted adding an entry to the pass-down log on October 9, 2002 to supplement the entry logged on September 17, 2002. However, she contends that she did not intend to falsify the entry but only wanted to make a record, "so that I would not forget when the incident happened." [13]

Black's Law Dictionary defines "falsify" as, "To counterfeit or forge; to make something false; to give a false appearance to anything. … The word "falsify" may be used to convey two distinct meanings – either that of being intentionally or knowingly untrue, made with intent to defraud, or mistakenly and accidentally untrue. Washer v. Bank of American Nat. Trust & Savings Ass'n, 21 Cal2d 822, 136 P.2d 297, 301."

The agency maintains that when making a late entry in any logbook, the practice is that one should annotate the entry with the words, "Late Entry," sign the entry, and note the date on which the late entry was made. Grievant avers that she was unaware of this procedure. The agency failed to provide any evidence of a written policy or training that addressed this practice.

Nonetheless, grievant's contention that she made the entry only to remember when the incident occurred stretches credibility beyond the breaking point. Grievant had already written an incident report on September 20, 2002 that documented the incident.[14] In addition, she wrote a two-page statement on October 5, 2002 that again documented her version of the incident in some detail.[15] In view of these two detailed written statements, it would appear unnecessarily duplicative to make a note in the passdown log solely for the purpose of remembering "when the incident happened." Moreover, if grievant had wanted to make a note of the date of the event, she could either have referred to her written statements, or she could have made another note to herself.

Given the totality of the circumstances, it appears more likely than not that grievant's late entry in the logbook was intended to shift at least part of the responsibility for the incident to her supervisor. The entry makes it appear that grievant was only following the sergeant's order to leave the security bar and lock in the cage. The note fails to include the sergeant's instruction to leave the bar in

[13] Exhibit 4. Grievant's written statement, November 1, 2002.
[14] Exhibit 5. Incident report, signed by grievant September 20, 2002.
[15] Exhibit 4. Grievant's written statement, October 5, 2002.

the cage *until inmate cleaning was completed*. Therefore, the entry was only a half-truth that conveyed a clearly false impression. The logical inference is that grievant made the entry with the hope that her supervisor would be found at least partly responsible for the incident. As grievant's intent was to deceive those who read the entry, it constitutes a falsification.

Grievant argues that receiving two disciplinary actions is a form of double jeopardy. Both the Federal Constitution and the state constitution embody the principle that no person shall be put in jeopardy of life or limb more than once for the same offense. Grievant suggests that since all of her discipline flows from the September 17, 2002 incident, two disciplinary actions constitute double jeopardy. However, grievant's basic premise is flawed. Double jeopardy occurs when one is tried for the same offense, not for two separate offenses. (A bank robber who commits a murder during the robbery will be tried both for murder and for robbery – two separate offenses – even though both occurred during the commission of the robbery.)

In fact, grievant committed two separate offenses more than three weeks apart. First, she committed the offense of unsatisfactory job performance on September 17, 2002 by failing to notify her relief about the security bar. Grievant committed the second, more serious offense on October 9, 2002 when she falsified a state document by making a misleading entry without signing it or noting that it was added at a time different from the original entry. Thus, the two offenses were committed at two different times, and involved two separate actions. She has been disciplined separately, and appropriately, for each offense.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued on November 15, 2002 for unsatisfactory job performance is hereby UPHELD.

The Group III Written Notice issued on November 15, 2002 for falsifying an official state record, and the five-day suspension are hereby UPHELD.

The disciplinary actions shall remain active pursuant to the guidelines 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.[16] 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.[17]

[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

[16] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, Record No. 2853-01-4, Va. App., (December 17, 2002).

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