Issue: Group III Written Notice with 4-day suspension and demotion (falsification of records); Hearing Date: 07/10/03; Decision Issued: 07/16/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5747

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5747

Hearing Date: July 10, 2003
Decision Issued: July 16, 2003

PROCEDURAL ISSUE

Due to availability of participants, the case could not be docketed for hearing until the 29th day following appointment of the hearing officer.[1]

Grievant requested as part of his relief that corrective action be administered to the superintendent. Hearing officers may provide certain types of relief including rescission of discipline, and payment of back wages and benefits.[2] However, hearing officers do not have authority to take any adverse action against an employee.[3] Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of

[1] § 5.1 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001, requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.
[2] § 5.9(a) *Ibid.*
[3] § 5.9(b)5. *Ibid.*

Virginia, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Two Attorneys for Grievant
Observer for Grievant
Superintendent
Advocate for Agency
One witness for Agency

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 a Group III Written Notice issued for falsification of records.[4] He was suspended for four days, demoted to corrections officer senior, and given a salary reduction of ten percent as part of the disciplinary action. The suspension was rescinded during the second resolution step of the grievance process. Following failure to resolve the remaining issues, the agency head qualified the grievance for a hearing.[5] The Department of Corrections (DOC) (hereinafter referred to as agency) has employed grievant for 11 years; he was a lieutenant prior to the issuance of this disciplinary action. His most recent performance evaluation rated him an extraordinary contributor.[6]

On April 3, 2003, grievant was leaving work at the end of his shift. He noticed that an incoming female corrections officer appeared to be upset and asked if she was alright. The female officer began crying and said that she had personal problems and car problems; she did not mention that she had any traffic violations. On or about April 10, 2003, grievant again encountered the female officer during shift change.[7] She told grievant that she had incurred charges for

[4] Exhibit 1. Written Notice, issued May 5, 2003. *See also* corrected copy of Notice at p. 7.
[5] Exhibit 1. Grievance Form A, filed May 7, 2003.
[6] Exhibit 4. Grievant's performance evaluation, signed October 16, 2002.
[7] Exhibit 5. Written statement of female corrections officer, April 16, 2003. NOTE: The female corrections officer states that her second conversation with grievant occurred one day later (rather than one week later), however, this difference is not significant since they generally agree on what transpired.

driving under the influence (DUI) and speeding. Grievant advised her to tell the Chief of Security. Grievant spoke with her again on two subsequent occasions during that week. The female officer said she had talked with the Chief of Security and grievant thereafter gave the matter no further thought.

During early April 2003, the superintendent had obtained from Department of Motor Vehicles a copy of the female officer's driving record. Upon review of the record, the superintendent asked the female officer why she had not reported her traffic offenses. The officer stated that she had told grievant about them. The superintendent then spoke with grievant on April 17, 2003 and asked if he knew that the female officer had traffic violations. Grievant responded that he was not aware of such charges and that the female officer had told him only that she had unspecified personal problems. The superintendent asked grievant to write a memorandum confirming what he had told her. Grievant sent an e-mail to the superintendent repeating what he had told her verbally.[8]

The superintendent has known grievant for four years, trusted him, and had not ever known him to lie. She decided that the female officer should be disciplined for falsely stating that she had told grievant about her traffic violations. On April 21, 2003, she notified grievant to report to her office at 6:00 p.m. for the purpose of administering discipline to the female officer. At about 4:00 p.m., grievant went to the superintendent and told her that the female officer had indeed told him about her DUI charge. The superintendent asked grievant if he had lied to her. Grievant admitted that he had lied stating words to the effect of, "I have no reason for lying; I guess you need to do what you need to do."

After reviewing this turn of events with the regional director, the superintendent questioned grievant later the same day and he again acknowledged that he had lied. During his two meetings with the superintendent on April 21, 2003, grievant did not tell the superintendent that he had forgotten what the female officer had told him.

The superintendent had initially recommended that grievant be demoted one rank to sergeant.[9] However, the small facility in which grievant works does not have any sergeant positions, and he was therefore demoted to corrections officer senior.[10] At some point during the grievance process, grievant was offered an opportunity to be demoted to sergeant at a different corrections facility, but he rejected the offer because he preferred to stay at his current facility.

APPLICABLE LAW AND OPINION

[8] Exhibit 1, p. 5. Interoffice memorandum from grievant to superintendent, April 17, 2003.
[9] Exhibit 2. Memorandum from superintendent to regional director, April 22, 2003.
[10] Exhibit 3. Organization chart.

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 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 III offenses include acts and behavior of such a serious nature that a first occurrence normally should

[11] § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.

warrant removal from employment. Group III offenses include falsification of any records or other official state documents.[12] The policy also states:

> The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head, although not listed in the procedure, undermines the effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of the procedure.[13]

Grievant sought to obfuscate the nature of the offense in this case by arguing that no records had been falsified. It should be apparent from the blanket language in the preceding citation that the Standards of Conduct encompasses all offenses, including both written and verbal falsifications. Thus, whether one focuses on grievant's oral statement to the superintendent, or on his written note of April 17, 2003, the fact is that grievant provided false information to the superintendent. 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" means being intentionally or knowingly untrue, made with intent to defraud. *Washer v. Bank of American Nat. Trust & Savings Ass'n*, 21 Cal2d 822, 136 P.2d 297, 301. The agency elected to characterize the offense as a falsification of records.[14] A preponderance of evidence demonstrates that grievant's written statement was false because, at the time he wrote it, he knew that the female corrections officer had told him about her DUI and speeding charges.

Grievant contends that he had many responsibilities that kept him very busy and that his workload caused him to forget that the female corrections officer had told him about her DUI charge. It is undisputed that grievant had many responsibilities, however, it is not credible that grievant "forgot" about his multiple conversations with the corrections officer in such a short time. He spoke with her on April 3, April 10 and two more times about her problems. It is just not believable that he would have forgotten the substance of these conversations when the superintendent questioned him a few days later. It is especially incredible that when the superintendent directed him to write down the gist of his discussions, he still would not have remembered the DUI charge.

Grievant contends that his written statement to the superintendent reflects only his first conversation with the female corrections officer on April 3, 2003.

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[12] Exhibit 6. Section 5-10.17A & B.2, Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

[13] Section 5-10.7C *Ibid*.

[14] The regional director considered grievant's verbal statement to the superintendent to be the actionable offense, while the superintendent focused on grievant's April 17, 2003 memorandum as being the falsification. Since grievant's verbal statement was virtually identical to his memorandum, both constitute falsifications. Thus, whether considered separately or together, grievant's false statements were the actionable offense.

The superintendent did not ask grievant only about one conversation; she asked whether grievant knew about the corrections officer's traffic violations. Therefore, if grievant wrote his response as he contends, he knowingly wrote a half-truth. A half-truth is equally odious because it can mislead just as effectively as a lie.

Grievant told the superintendent that he had no reason for lying, and the evidence educed during the hearing appears to support this statement. There is no evidence that grievant had anything other than a normal working relationship with the female corrections officer whom he has known for about four years. No other factors that might have provided grievant with a motivation to be untruthful appear in the record. Nonetheless, the undisputed evidence is that grievant was not truthful when he first spoke with the superintendent. Moreover, grievant stated on multiple occasions that he had lied to the superintendent. Most people do not casually admit to a superior that they have lied unless they have, in fact, lied. If, as he now contends, he had only forgotten about the DUI charge, there was no reason for grievant not to have stated that he forgot, rather than admit that he lied. Therefore, more evidentiary weight must be assigned to what grievant said at the time, rather than to a subsequent, self-serving rationalization. As the noted English jurist Sir John Powell said, "We can judge of the intent of the parties only by their words."[15]

Thus, it appears more likely than not that, when the superintendent first asked grievant about the traffic violations, grievant realized that he should have personally reported his conversation to the Chief of Security. In fact, during the hearing, grievant forthrightly acknowledged that he should have done this. However, because he had not done so, grievant's reaction was to deny any knowledge of the charges in the hope that the investigative spotlight would be placed back on the female corrections officer. Later, when he realized that the corrections officer was going to be unfairly disciplined, grievant had a pang of conscience and decided to tell the superintendent the truth.

Grievant points out that he was not the female corrections officer's direct supervisor. This is an irrelevant red herring. When grievant asked the officer about her emotional state, he was acting in his capacity as a lieutenant. As such, he had a duty and obligation to report what she told him about her traffic violations because he knew that the agency was concerned about employee driving records.

Finally, although grievant acknowledges that some discipline is warranted, he feels that the discipline he received is too harsh. The undisputed evidence established that, at this small corrections facility, a lieutenant is often the highest ranking person at the facility, particularly on night shift. Accordingly, the agency must be able to rely on lieutenants to be completely truthful. Under these circumstances, grievant's falsification of a record is an offense that would normally warrant removal from employment – the definition of a Group III offense.

[15] *Idle v. Cooke* (1704), 2 Raym. 1149

Thus, the issuance of a Group III Written Notice was appropriate and commensurate with the offense. The agency determined that grievant's length of service and his extraordinary performance rating are mitigating circumstances that justify retaining him in state employment. In lieu of termination, the agency demoted grievant.

A Group III Written Notice is a very serious disciplinary step, even with no other sanctions applied, because it means that even a minor infraction in the next four years could result in termination of employment. It appears that grievant failed to tell the truth because he hoped to avoid criticism or discipline for failing to report what the corrections officer told him. While this was a very serious offense that merits a Group III Written Notice, a demotion of two grades does appear unnecessarily harsh. Under the unique circumstances of this case, grievant should be given an opportunity to reconsider whether to accept a sergeant's position at another facility within reasonable commuting distance.

DECISION

The disciplinary action of the agency is affirmed, with addendum.

The Group III Written Notice issued on May 5, 2003 for falsifying official state records is hereby UPHELD. However, grievant should be given an opportunity, in writing, to accept a demotion to sergeant (with only a five-percent pay reduction) at a corrections facility located within reasonable commuting distance. If grievant declines such offer, the Written Notice and demotion to corrections officer senior (with ten-percent pay reduction) will be UPHELD.

The disciplinary action shall remain active pursuant to the guidelines in Section 5-10.19 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]

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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, 39 Va. App. 439, 573 S.E.2d 319 (2002). *See also* Virginia Department of Agriculture and Consumer Services v. Tatum, 2003 Va. App LEXIS 356, which holds that Va. Code § 2.2-3004(B) grants a hearing officer the express power to decide de novo whether to mitigate a disciplinary action and to order reinstatement.

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