

Issue: Group III Written Notice with 8-day suspension (falsification of records);
Hearing Date: 08/21/03; Decision Issued: 08/22/03; Agency: DJJ; AHO:
David J. Latham, Esq.; Case No. 5783; **Administrative Review: HO
Reconsideration Request received 09/29/03; Reconsideration Decision
issued 10/16/03; Outcome: No basis to reopen hearing or change original
decision.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5783

Hearing Date:	August 21, 2003
Decision Issued:	August 22, 2003

APPEARANCES

Grievant
Assistant Superintendent
Chief of Security
Two witnesses 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.¹ He was suspended for eight days as part of the disciplinary action. Following failure by the parties to resolve the grievance, the agency head qualified the grievance for a hearing.² The Department of Juvenile Justice (Hereinafter referred to as agency) has employed grievant for four years; he is a Senior Juvenile Corrections Officer (JCO).

Beginning at 1900 hours on the night of June 11-12, 2003, grievant was assigned as a floater in a housing unit. At 2230 hours, an officer assigned to one of the four pods in this building ended her shift.³ Grievant was then assigned to that officer's pod from 2230 hours to 0630 hours the following morning.⁴ During that eight-hour period grievant completed and signed an Informal Count Sheet certifying that checks had been made on all 12 wards every 15 minutes.⁵ Review of the pod's surveillance videotape revealed that neither grievant nor any other corrections officer entered the pod during the entire eight hours.⁶

After 2230 hours, there were four officers in the building, each assigned to one of the four pods. Grievant and one other officer were the two Senior JCOs in the building. Two other JCOs were still in their first year of employment and therefore were still on probation. Review of the surveillance videotapes for all four pods revealed that neither grievant nor the other Senior JCO ever entered the pods to which they were assigned. Apparently they both stayed in the central control booth for the entire time. The two probationary JCOs did make sporadic checks of the pods to which they were assigned but did not make checks every 15 minutes as required by policy.⁷

The agency disciplined grievant with a Group III Written Notice and eight-day suspension for falsifying the Informal Count Sheets, the building Count Sheet, and for failing to physically check whether the wards were actually in their rooms every 15 minutes. Grievant admitted all of the charges. The other Senior JCO was also disciplined with a Group III Written Notice. However, because he had other prior disciplinary action, that Senior JCO was removed from

¹ Exhibit 2. Written Notice, issued June 26, 2003.

² Exhibit 3. Grievance Form A, filed June 30, 2003.

³ Exhibit 6. Daily Duty Roster, June 12, 2003.

⁴ Each pod houses up to 12 wards (juveniles).

⁵ Exhibit 4. Informal Count Sheet, signed June 12, 2003.

⁶ Exhibit 9. Review of the videotapes had been prompted by an unrelated investigation of an allegation that two wards had been engaged in sexual activity while a JCO was asleep. The Chief of Security reviewed several surveillance videotapes and during that investigation, he uncovered the fact that officers had not made the mandatory cell checks on June 11, 2003.

⁷ Exhibit 8, p. 5. Security Post Order 28, August 20, 2002. From 2130-0600, "Visually check every cell a minimum of every 15 minutes. Check to ensure the ward is in the room, safe, and that the cell door is locked. Log all checks in the log book and on the informal count sheet."

employment. The two probationary JCOs were given Notices of Improvement Needed/Substandard Performance.⁸

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 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.⁹

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. One example of a Group III offense is falsifying any records,

⁸ Exhibit 10. Notice of Improvement Needed/Substandard Performance, issued June 25, 2003.

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

including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents.¹⁰

The underlying facts in this case are undisputed. Grievant has candidly admitted that he falsified both the Informal Count Sheets and the building Count Sheet, and that he did not make any checks to ascertain whether the wards were in their rooms. Therefore, the preponderance of evidence establishes that grievant committed offenses that are subject to discipline under the Standards of Conduct. Grievant understands that discipline is warranted but argues that his discipline was unfair because others who committed the same or similar offenses were disciplined differently from grievant.

Of the four officers involved in the falsification on the night of June 11-12, 2003, grievant and one other officer were both Senior JCOs. Both officers had significant experience and knew that their actions constituted offenses. The agency issued both officers the same discipline – Group III Written Notices. Pursuant to the Standards of Conduct, a Group III Written Notice is the appropriate disciplinary action for the offense of falsification of records. The only difference between the discipline given to grievant and the other Senior JCO was that the other officer had accumulated a previous disciplinary action. Pursuant to the Standards, removal from employment is the appropriate action for an employee who has accumulated both a Group II and a Group III disciplinary action. The agency mitigated grievant's discipline by considering his previous good work record and the fact that he had received a very upsetting telephone call regarding his grandmother. Therefore, the agency elected not to remove grievant from employment but to suspend him for eight days in lieu of removal.

The two other JCOs were still within the first year of employment on the date of the offense and were therefore still serving their 12-month probationary period.¹¹ The Standards of Conduct does not apply to employees serving their probationary period.¹² The agency could have terminated the two JCOs since they were still within their probationary period. However, the agency took into consideration that they had made at least some checks of the wards. It also took into account that the behavior of grievant and the other Senior JCO influenced these probationary employees. Since the agency had already invested significant time and money in their training, it was felt that they could still be salvaged as JCOs. Therefore, the agency issued Substandard Performance Notices to the officers. Given the totality of the circumstances, the agency's decision was not inappropriate.

¹⁰ Exhibit 1. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹¹ See DHRM Policy No. 1.45 *Probationary Period*, effective September 25, 2000. The normal probationary period for employees of the Commonwealth is 12 months. Probationary employees do not have access to the grievance procedure.

¹² Section I, DHRM Policy No. 1.60 *Standards of Conduct*, effective September 16, 1993.

Finally, grievant pointed out that another JCO had been given a Notice of Improvement Needed/Substandard Performance for an offense on June 6, 2003.¹³ In that case, the 15-minute checks of wards were made. However, an officer other than the officer who signed the Informal Count Sheet made the checks. The agency deemed this a less serious offense than grievant's offense because the checks were, in fact, made by an officer. Since the checks were actually made, there was no potential threat to safety or security. While the officer who actually made the checks should have signed the count sheet, the sheet did correctly reflect that the checks were made. The officer who did sign the count sheets incorrectly inferred that he had made the checks when in actuality another officer made the checks. Although this incorrect documentation could have been addressed as either a disciplinary or performance matter, the agency concluded that it was more of a performance issue that would be best addressed through the Substandard Performance document. In view of the fact that security and safety were not compromised, the agency's decision was not unreasonable.

Moreover, the JCO in question had been working for only one year. Grievant had four years experience and as a Senior JCO, he is expected to set an appropriate example for probationary employees. By failing to make any checks during the entire eight-hour period, grievant set a very poor example for the probationary employees.

Grievant argued that his offense was only a Group II offense because the description on the Written Notice includes the fact that he failed to follow the instructions of his supervisor. The Written Notice mentions this as a lesser-included offense that the agency elected not to discipline separately. Rather, grievant was disciplined with only one Written Notice that includes both the Group III offense of falsification and the Group II offense of failing to follow supervisory instructions.¹⁴

Grievant also contends that he was denied the due process opportunity afforded by the Standards of Conduct. However, grievant's reliance on the due process requirement is misplaced. Section IV of the Standards addresses removal from employment due to circumstances that prevent an employee from performing his job. Section IV.C provides that, *prior to removal from employment*, employees shall be given a reasonable opportunity to respond to the charges. In this case, grievant was not removed from employment and therefore Section IV.C is not applicable. In any case, during the hearing, grievant acknowledged that the superintendent had given him an opportunity to verbally respond to the charges.

Grievant objected to the fact that the Written Notice does not cite a specific IOP number violation. However, grievant was unable to identify any

¹³ Exhibit 10, p. 2. Notice of Improvement Needed/Substandard Performance, June 25, 2003.

¹⁴ The Written Notice describes both the Group III and the Group II offenses.

agency policy or procedure that requires the citation of specific IOP numbers. The Written Notice form requires only that the issuer “briefly describe the offense and give an explanation of the evidence.” The agency did provide sufficient information on the Written Notice to comply with this requirement.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and eight-day suspension issued on June 26, 2003 for falsifying official state records is hereby UPHELD.

The disciplinary action shall remain active pursuant to the guidelines in 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.¹⁵ 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.¹⁶

[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

¹⁵ 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).

¹⁶ 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: 5783

Hearing Date:	August 21, 2003
Decision Issued:	August 22, 2003
Reconsideration Received:	September 29, 2003
Reconsideration Response:	October 16,

2003¹⁷

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. A copy of all requests must be provided to the other party and to the EDR Director. 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.¹⁸

OPINION

Grievant called the Hearing Division on September 16, 2003 inquiring about the status of the Decision in his case. When advised that the Decision had

¹⁷ The hearing officer was on annual leave for two weeks beginning on September 29, 2003.

¹⁸ § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

been mailed to him via certified mail on August 22, 2003, grievant averred that he had not received it. A second copy of the Decision was mailed to him on September 16, 2003. Accepting grievant's statement that he did not receive the initial Decision, the initial 10-day appeal period is waived. Subsequently, grievant submitted a letter to the hearing officer dated September 26, 2003 but not received until September 29, 2003. Grievant's letter was received more than 10 days after a second copy of the decision was issued.

Thus, grievant failed to submit his request within the second 10-day appeal period. Moreover, grievant failed to submit a copy of his request to the opposing party and to the EDR Director. In addition, grievant's letter does not request a reopening or a reconsideration but rather complains of an alleged factual error in the hearing decision. Despite grievant's failure to comply with the procedural requirements and the timeliness requirement, the Hearing Officer will respond to grievant's request because the issue he raises may be addressed in a succinct manner.

Grievant contends that the JCO referred to on page 5, paragraph 2 of the decision has been employed for six years, not one year. The evidence elicited during the hearing about this point was confusing but appeared to indicate that the JCO had been employed for only one year. Grievant submitted a leave register that appears to support his contention. Therefore, the Hearing Officer accepts grievant's assertion that the number of years of employment was in error. Nonetheless, this error does not alter the Decision. For all of the other reasons stated on pages 4 & 5 of the Decision, the agency's action must be affirmed.

DECISION

Grievant has not proffered any newly discovered evidence that would affect the Decision in this case, or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's argument and concludes that there is no basis to change the Decision issued on August 22, 2003.

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.¹⁹

David J. Latham, Esq.
Hearing Officer

¹⁹ 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).