

Issue: Group III Written Notice with suspension (falsifying a document and gross negligence); Hearing Date: 03/16/04; Decision Issued: 03/18/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 604



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 604**

Hearing Date: March 16, 2004  
Decision Issued: March 18, 2004

**PROCEDURAL HISTORY**

On September 11, 2003, Grievant was issued a Group III Written Notice of disciplinary action with a 40 hour suspension for:

*On September 3, 2003, while assigned to Master Control, you failed to issue ammunition for the 12 gauge shotgun to a transportation officer and you failed to report the incident to the Shift Commander. In addition, you signed the log indicating that you had in fact issued the buckshot rounds, which constitutes Falsification of a State Document. Your lack of attentiveness was a serious breach of security, which could have cause serious harm to other staff and inmates and you Falsified a State Document. Your actions warrant two Group III Written Notice[s]. One Group III for Gross Negligence, which resulted in the weakening of Security and a second Group III for falsifying a State document (log). However, at this time I am opting to combine both charges into one Group III Written Notice and I am suspending you for 40 hours.*

On October 10, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On February 18, 2004, the Department of Employment

Dispute Resolution assigned this appeal to the Hearing Officer. On March 16, 2004, a hearing was held at the Agency's regional office.

### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Advocate  
Witnesses

### **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with suspension for falsifying state documents and gross negligence.

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employs Grievant as a Corrections Officer Senior. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

When items are checked out of the armory, the Armory Officer or Master Control Room Officer completes a log showing the time out, person to whom the items are given, the equipment issued, and the officer issuing the items. When the equipment is returned, the log shows the time the items are returned, the person who received the items, and the type of ammunition returned.

On September 3, 2003, Grievant was working as the Master Control Room Officer. Officer C was going to be one of three officers involved in transporting inmates from the Facility to the Bullpen, a central location where many correctional institutions

exchange inmates. At approximately 6:50 a.m., Officer C went to the Armory to obtain the necessary equipment for his transportation run. The Armory Officer was not available so Grievant provided assistance to Officer C. Officer C checked out a shotgun, .38 pistol and ammunition, vest, and OC spray. Grievant was distracted during this process and failed to provide Officer C with ammunition for the shotgun.

Although both parties agree that Grievant is the one who gave Officer C the equipment, the log presented at the hearing shows another correctional officer filled in the log to show that Officer C received a shotgun with ammunition and OC spray. The log does not show Officer C having received the .38 pistol and ammunition and a vest.

Officer C took his equipment and boarded the rear of the bus carrying inmates. A partition located in the back of the bus separated inmates from Officer C sitting in the back. Another partition located in the front separated the inmates from the officer driving the bus. A telephone in the back of the bus was connected with a telephone in the front so that the two officers could speak when necessary. While the bus was near the Facility, Officer C realized he had not received the shotgun ammunition. He used his cell phone to call Grievant. She told him to return to obtain the shotgun ammunition. Officer C was unable to return to the Facility because he was unable to contact the driver of the bus. The telephone connecting the back and front of the bus was not working.

When Officer C returned to the Facility, he returned his equipment. The Armory Officer received Officer C's equipment. Although the log showed he received shotgun ammunition, he did not have any ammunition to return. The Armory Officer spoke with Officer C and then contacted Grievant. Since the log showed that the shotgun ammunition had been checked in but in fact there was no ammunition to check in, the Armory Officer instructed Grievant to place her initials next to the entry showing that the shotgun ammunition had been received.<sup>1</sup> Although someone other than Grievant had written incorrectly that the shotgun ammunition had been received, Grievant placed her initials next to that entry in order to comply with the instruction of the Armory Officer.

## **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

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<sup>1</sup> The Armory Officer wanted Grievant to initial the log because otherwise "something could come back and bite someone in the butt."

## Falsifying State Documents

“[F]alsifying any records, including but are not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents” constitutes a Group III offense.<sup>2</sup> “Falsifying” is not defined by DOCPM 5-10.17(B)(2), but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of “Falsify” found in Blacks Law Dictionary (6<sup>th</sup> Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. \*\*\*

The Hearing Officer’s interpretation is also consistent with the New Webster’s Dictionary and Thesaurus which defines “falsify” as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

Grievant did not falsify a State document. She did not write on the log that the buckshot had been issued. She did not write on the log that the buckshot had been returned. All Grievant did was to write her initials next to an entry in the log. That entry showed that the buckshot had been returned, but Grievant did not make that entry. Grievant’s objective in writing her initials was to comply with the instruction of the Armory Officer who did not wish to be faced with a log which showed the return of buckshot that had not actually been issued. The Armory Officer wanted Grievant to initial the log in order to correct the log, not to falsify the log. Although the log was not actually corrected because Grievant placed her initials on the log, Grievant’s objective and intent is what determines whether she falsified a document as opposed to incorrectly filling out the document.<sup>3</sup>

## Gross Negligence

DOCPM § 5-10.7(C) 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 this procedure.”

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<sup>2</sup> DOCPM 5-10.17(B)(2).

<sup>3</sup> The Hearing Officer also has concerns about the log upon which the Agency contends Grievant falsified. The log shows one employee issuing Officer C a shotgun and OC spray but that employee never issued these items to Officer C. In addition, Officer C testified he received a .38 handgun and vest, yet the log does not reflect these items being given to Officer C.

In the Agency's judgment, Grievant engaged in behavior constituting gross negligence in the performance of her duties and that such behavior rises to the level of a Group III offense. The Hearing Officer believes that the Agency has presented sufficient facts to support its judgment and that a Group III Written Notice is appropriate.

Because Grievant failed to issue Officer C ammunition for his shotgun, Officer C was unable to fully protect members of the public, other correctional officers, and inmates in the event of a disturbance caused by some inmates during the transportation run. Grievant's actions created a breach of security sufficient to constitute gross negligence in the performance of her duties.

Grievant argues that Officer C could have avoided traveling without ammunition had he checked his ammunition at the Armory before boarding the bus or contacted the bus driver using a radio and had the driver return to the Facility. While this may be true, it does not erase Grievant's failure to provide Officer C with ammunition.

### Suspension

The Agency offered two reasons to support its disciplinary action (falsification and gross negligence). The Agency has not established that Grievant falsified an official state document. When an agency fails to establish all of the elements upon which it based its disciplinary action, the Hearing Officer has the discretion to determine the appropriateness of the disciplinary action. Based on the evidence presented, the Hearing Officer finds that Grievant should receive a Group III Written Notice with a 24 hour suspension<sup>4</sup> rather than a 40 hour suspension.

## **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a 40 hour suspension is **reduced** to a Group III with 24 hour suspension. The Agency is directed to provide the Grievant with **back pay** for 16 hours of suspension less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3).

## **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:

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<sup>4</sup> This is consistent with the relief the Second Step respondent was willing to grant Grievant as part of the step process.

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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

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.<sup>5</sup>

[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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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.