

Issue: Group III Written Notice with suspension (falsification of state documents);
Hearing Date: 10/28/04; Decision Issued: 10/29/04; Agency: VDH; AHO:
David J. Latham, Esq.; Case No. 7886



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7886

Hearing Date: October 28, 2004
Decision Issued: October 29, 2004

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Representative for Agency
One witness for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Did the agency discriminate against grievant?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice for falsification of state documents.¹ As part of the disciplinary action, grievant was suspended without pay for 30 work days. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.² The Department of Health (Hereinafter referred to as "agency") has employed grievant as an environmental health inspector for four years.

Grievant conducts inspections of foodservice establishments and, on occasion, other sites such as swimming pools and residences. Grievant and other environmental health inspectors are required to complete a Daily Activity Report that provides a record of: establishments visited, time and duration of the visit, purpose of the visit, and other information required by management.³ Inspectors also complete an inspection report for each foodservice establishment visited; this form also requires the entry of the start and stop time of each visit.⁴ In the fall of 2002, grievant's immediate supervisor directed grievant (and all inspectors) to complete all blanks on the daily activity reports "including start time, ending time, and total time."⁵ The following month, the supervisor directed inspectors to note time in/time out on field inspection reports and stressed that the times must match the times noted on the daily activity report.⁶

During the fall of 2003, grievant's immediate supervisor was on medical leave for an extended period of time. The environmental health manager assumed supervisory oversight of the inspectors during this time. He noted that grievant did not always record the time spent on daily activity reports, and did not always log the time in/time out on inspection reports. In reviewing grievant's daily activity reports, he felt that grievant's reporting was inconsistent and decided to check behind grievant. He began visiting some of the establishments that grievant had inspected, usually within two or three days after grievant's visit. During the period between October 28 and December 18, 2003, the manager checked behind grievant at approximately 30 different establishments. When foodservice establishment personnel reported different times and or duration of visit, the environmental health manager had them attest in writing to the actual time and duration of the inspection.

In early January 2004 grievant's supervisor and the environmental health manager discussed their findings with the facility director. The facility director

¹ Exhibit 1. Written Notice, issued August 11, 2004.

² Exhibit 1. *Grievance Form A*, filed August 17, 2004.

³ Exhibits 3-26. *Daily Activity Reports* for selected dates from October 2003 through June 2004. [NOTE: Some Senior Environmental Health Inspectors were given permission by their supervisor to utilize a different activity form because of the nature of their work. See Exhibit 30 for an example of the form used by these senior inspectors.]

⁴ Exhibits 3-26. *Foodservice Establishment Inspections Reports* for selected dates from October 2003 through June 2004.

⁵ Exhibit 2. Memorandum from supervisor to inspectors, September 17, 2002.

⁶ Exhibit 2. Memorandum from supervisor to inspectors, October 10, 2002.

was scheduled to be absent until May 2004 due to a military obligation. He directed that no action be taken on the matter until his return to work. In April and June 2004, the manager checked behind approximately 10 more of grievant's inspections and found the same types of discrepancies noted in late 2003. Specifically, the times grievant recorded on his daily activity report were not the same as the times he recorded on the inspection reports in approximately 25 percent of the cases. About 67 percent of the establishment personnel stated that grievant conducted his inspections at different times from the times grievant listed on his reports. Similarly, about 67 percent of the establishment personnel stated that the duration of grievant's visit was different from what grievant indicated on his reports. Of the establishment personnel who disagreed with grievant on the time and duration of his inspection, 100 percent indicated that grievant had been at their establishment *earlier* in the day than grievant reported. Similarly, 100 percent stated that the duration of the inspection was significantly *less* than grievant reported.

The manager also uncovered two other discrepancies during his review. First, grievant stated on his daily activity report that he was performing data entry work on certain dates. A computer-generated log of those persons performing data entry work reveals that on those dates, grievant either performed no data entry or entered data for significantly less time than he recorded on his daily activity report.⁷ Second, grievant reported conducting inspections at four establishments for which no reports can be found.⁸ In one of these cases, the establishment was closed on the day grievant claimed to have conducted an inspection.

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).

⁷ Grievant suggests that his name may not appear on the log because others might have subsequently amended or deleted data he entered. However, the log is simply a register that lists all those who have used the system. Even if grievant's data was later deleted, the log would nonetheless continue to show that he had used the system to enter data.

⁸ The dates involved were November 14, 2003, November 18, 2003, December 8, 2003, and December 10, 2003.

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. In all other actions, such as claims of discrimination, the grievant must present his evidence first and prove his claim by a preponderance of the evidence.⁹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management 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 of the Commonwealth of Virginia's Department of Personnel and Training Manual *Standards of Conduct* Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹⁰ Falsifying any records including reports, time records, or other official state documents is one example of a Group III offense.

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. The agency has borne the burden of proof to show that grievant knowingly recorded information he knew to be untrue. Grievant contends that the agency has not shown intent to falsify. The element of intent may be inferred when a misrepresentation is made with reckless disregard for the truth. *Haebe v. Department of Justice*, 288 F.3d 1288, 1306 Fn. 35 (Fed. Cir. 2002).

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

¹⁰ Exhibit 29. Section V.B.3, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

Grievant argues that certain discrepancies were attributable either to misunderstanding or to unintentional errors. For example, he believed other functions he performs could legitimately be included under the umbrella term of "data entry." Data entry is a term in widespread use and is generally accepted as meaning the entry of data into a computer system. Grievant's suggestion that he could include other functions under this term appears self-serving. Nonetheless, the agency did not rebut grievant's contention. Since it is possible that grievant misunderstood this term, and since there were only three incidents cited during the five months investigated, the hearing officer will view grievant's argument in the light most favorable to him.

Grievant maintains that some of the differences in time recorded in the daily activity reports versus the inspection reports were attributable to carelessness or simple error. While it is entirely possible that simple error can occasionally cause such differences, grievant had differences in 25 percent of the examples provided. Such a large percentage of error is more than mere occasional error; it constitutes unsatisfactory job performance.

However, the inescapable conclusion from the balance of the evidence is that grievant knowingly, regularly, and with intent, misstated the times and duration of a significant number of inspections. Grievant pointed out problems with certain aspects of some of the agency's evidence. However, even when such evidence is discounted, the majority of the evidence supports a conclusion of falsification. Without exception, all establishment personnel agreed that grievant's inspections occurred *earlier* in the day, and were of significantly *shorter duration*, than grievant stated in his reports. If half of the personnel had said that the inspections were later in the day, or that inspections were longer in duration, one could attribute the differences to faulty memories. However, the fact that many different establishment personnel were unanimous in their recollections evinces a clear pattern in grievant's documentation.

By stating that inspections took longer, and occurred later in the day, grievant made his daily activity reports appear that he was working for a full day. In reality, grievant was conducting briefer inspections, and finishing them earlier in the day. It is unknown what grievant did with the remainder of his time but he was not in the office, and he was not making inspections for the full workday.

Grievant said that he had questioned establishment personnel in September 2004 about their recollections and that most were unable to remember specifics about the inspections. However, grievant did not submit any written statements from these persons. When one weighs grievant's hearsay evidence against the signed statements of the same personnel obtained within days of the event, the contemporaneous statements must be given significantly more evidentiary weight.

Grievant testified that he may have copies of the missing inspection reports at home.¹¹ However, grievant has known since August 2004 which reports are missing and he failed to submit any pink copies as evidence during the hearing.

Discrimination

Grievant claimed that he was discriminated against but did not identify any protected classification as the basis for such a claim. From the language of his grievance and the testimony at the hearing, it appears that grievant was, in reality, alleging that he was subjected to disparate treatment. Grievant cited two reasons for his claim. First, he pointed out that a senior inspector is not required to complete a daily activity report. In addition to performing some inspections, the senior inspector performs planning duties that grievant does not. The senior inspector spends a larger proportion of his time in the office. Accordingly, his supervisor exempted him from keeping the same kind of daily activity report required of inspectors. In any case, this is a red herring because the fact remains that grievant and other non-senior inspectors are required to complete the form. The reason for discipline was not whether grievant filled out the form, but the fact that he falsified the form by knowingly stating times he knew were not true. The fact that the senior inspector was not required to fill out this form is not relevant to grievant's falsification of the form.

Second, grievant alleged that another inspector failed to fill in some time-out blocks on her inspection reports and much later had added the times to the reports. That inspector testified that she had not retroactively added missing time data to her reports. In a recent audit of her reports, it was found that she had failed to fill in time on less than 5 percent.¹² She was adamant, direct, and credible in denying any misconduct. Grievant produced no evidence to support his allegation that he had earlier seen the reports with blank time-out blocks. Grievant has not borne the burden of proof to prove disparate treatment or discrimination.

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.¹³ Management should issue a written notice as soon as possible after an employee's commission of an

¹¹ The inspection form is a snap-out form with multiple copies. Because the pink copy is not used by the agency, grievant claims that he keeps pink copies of the inspections at home.

¹² Unrebutted testimony was that of 370 reports audited, the time-out block was blank on 17.

¹³ Exhibit 29. Section VI.A. *Ibid.*

offense.¹⁴ One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless a detailed investigation is required, most disciplinary actions are issued within one or two weeks of an offense.

When an agency delays the issuance of discipline for an inordinate amount of time after the commission of the offense, it suggests that the agency does not consider the offense to be as severe as it would be if discipline were issued promptly. In this case, the agency issued discipline in August 2004 for offenses that occurred primarily in late 2003. Moreover, the agency knew about the alleged offenses within a few days after each occurrence because the agency monitored grievant's activities on almost a daily basis from October 28 through December 18, 2003. However, the agency did not notify grievant that he would be disciplined until August 2004. Grievant's primary mode of defense lies in examining the recollections of restaurant owners and employees. The memories of such people about the exact duration of inspections that occurred months earlier is understandably much less clear, and in most cases nonexistent, months after the fact.

Accordingly, the agency's lengthy delay in issuing discipline deprived grievant of an opportunity to defend himself as fully as he might otherwise have been able to. The agency's reason for delaying discipline (the absence of one person) is not sufficient justification for such a delay. In a case such as this, prompt corrective action should have been initiated in order to prevent the inappropriate behavior from continuing. Instead, the agency put the matter on the back burner for several months, during which time grievant presumably continued to falsify reports and abuse state time.

Summary

The agency's inordinate delay in disciplining grievant does not negate the preponderant evidence of grievant's falsification of state documents. Therefore, grievant's offense warrants discipline. However, the delay in issuing discipline compels a modification of the discipline in the interest of fairness and objectivity.

DECISION

The disciplinary action of the agency is modified.

The 30-day suspension is RESCINDED. The agency shall reimburse grievant for any pay and restore any benefits withheld during the period of suspension.

¹⁴ Exhibit 29. Section VII.B.1. *Ibid.*

The Group III Written Notice for falsification of documents 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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.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.