

Issue: Group III Written Notice with suspension (falsification of records); Hearing Date: 06/02/04; Decision Issued: 06/04/04; Agency: DOC: AHO: Carl Wilson Schmidt, Esq.; Case No. 716



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 716

Hearing Date: June 2, 2004
Decision Issued: June 4, 2004

PROCEDURAL HISTORY

On March 10, 2004, Grievant was issued a Group III Written Notice of disciplinary action with ten workday suspension for:

On February 28, 2004, you documented that you made 15 minute checks on death row [Inmate C] at 2232 hours and again at 2245 hours. Records indicate that these checks were never made on [Inmate C]. Your falsification of the documentation is a serious violation of the standards of conduct and one that cannot be tolerated at a level-5 maximum-security prison. Your actions were a serious breach of security. Therefore, your employment is being terminated effective March 12, 2004.

On March 29, 2004, Grievant timely filed a grievance to challenge the Agency's action. During the step-process, the Agency reduced the disciplinary action to a Group III Written Notice with ten workday suspension. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 6, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 1, 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 falsification of any records.

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 employed Grievant as a Corrections Officer Senior. The purpose of his position was to "[p]rovide security and supervision of adult offenders."¹ No evidence of prior disciplinary action against Grievant was introduced at the hearing. Grievant received favorable evaluations during his tenure and was a member of the strike force.

Inmates scheduled for execution are located in Housing Unit 4, pod B at the Facility. An inmate committed suicide on February 22, 2004. Agency staff learned that other death row inmates intended to commit suicide. Based on this information, Agency staff increased the number of death row watch checks from every 30 minutes² to every 15 minutes. To complete a check, a corrections officer must walk to the inmate's cell door, look into the cell through a window approximately two feet tall and 8 inches wide,

¹ Agency Exhibit 5.

² Grievant's post order lists one of his specific duties as "conducting half hour checks of each inmate in the unit to see that he is safely confined." Grievant is also responsible for "ensuring all individual inmate log sheets are properly maintained and that all necessary entries are made on time."

see the inmate's flesh, observe what the inmate is doing, and write down the time of the check and what was observed on a logbook located in a file hung from the cell door.

On February 28, 2004, Grievant entered Housing Unit 4B, walked to an inmate's cell door, picked up the logbook, turned his back to the cell window, and wrote:

2232 lying on floor talking through air vent
2245 lying on floor talking through air vent [initials]

Grievant was not in the pod at 22:32. When he wrote the 22:45 entry, he did not look into the cell and could not have known that the inmate was lying on the floor talking through the air vent.

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.

"[F]alsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents" constitutes a Group III offense. DOCPM § 5-10.17B)(2). "Falsifying" is not defined by DOCPM § 5-10.17B)(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 (6th 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*.

The death row watch logbook is used by Agency staff to provide security at the Facility. The purpose of the logbook is to document when staff perform visual checks of inmates on death row and the condition of the inmate at the time of the check. No

check had been made at 22:32. Grievant wrote in the logbook that a check had been made at 22:32 and that the inmate was observed lying on the floor talking through the vent. By making this entry, Grievant falsified the logbook. Grievant also made an entry showing that at 22:45 the inmate was lying on the floor talking through the vent. Grievant did not look into the cell to determine the inmate's activity. By recording that the inmate was lying on the floor talking through the vent when Grievant did not observe this, Grievant falsified the logbook. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice. A ten workday suspension is within the discipline appropriate for a Group III Written Notice.

Grievant argues that because he did not initial the 22:32 entry, he did not falsify the logbook. This argument fails because regardless of whether Grievant initialed the logbook entry, the entry left a reader with the impression that an event occurred that did not actually occur. Grievant cannot escape liability for his actions simply because he did not initial an entry.

Grievant argues that the Facility was understaffed and that affected his performance. Grievant is correct that the Facility was understaffed but the evidence showed that the Facility is always understaffed. Staffing problems did not cause Grievant to write something that did not occur at 22:32 in a logbook. If Grievant had time to make an entry at 22:45, he also had time to look into the cell window to see flesh and determine what the inmate was doing.

Grievant contends the Agency inconsistently disciplined its employees.³ He points out that the Control Booth Officer received a Group III without suspension for incorrectly documenting the times Grievant entered the pod. The evidence is insufficient to show that Grievant was disciplined inconsistently. The Control Booth Officer was not responsible for monitoring the activities of death row inmates.

Grievant asks the Hearing Officer to reinstate him to his position. The Hearing Officer cannot order the Agency to reinstate him since the disciplinary action before the Hearing Officer, as amended in the step-process, does not provide for removal from employment. On April 2, 2004, Grievant met with the Warden regarding the disciplinary action. The Warden decided to reinstate Grievant as a Corrections Officer with the understanding that the Group III Written Notice would remain in Grievant's personnel file, he would be suspended for ten workdays, Grievant would return to work no later than April 15, 2004, his failure to return to work would be considered as having resigned from State employment, and Grievant's return to work would not affect his right to continue his grievance. No evidence was presented regarding the circumstances of whether Grievant returned to work. Whether Grievant should be "considered resigned from State employment" is not an issue before the Hearing Officer.

DECISION

³ Grievant Exhibit 1.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld**.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th 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.⁴

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer