

Issue: Group III Written Notice with termination (providing false statements during an Internal Affairs investigation); Hearing Date: 12/20/04; Decision Issued: 02/03/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 7919



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7919

Hearing Date: December 20, 2004
Decision Issued: February 3, 2005

PROCEDURAL HISTORY

On August 1, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Providing False Information to an Internal Affairs Agent During the Course of a Formal Investigation. Specifically, on May 12, 2004 you adamantly denied that you entered cell D309 or adjusted your clothing after exiting the cell. However, on May 28, 2004, during posttest phase of a polygraph examination, you advised [Special Agent Mc] that you in fact, did enter cell D309 and when called to the control booth, you did adjust your clothing by tucking your shirt in your pants. In addition, two other staff members observed you exiting cell D309 and adjusting your clothing.

On September 27, 2004, Grievant 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 November 15, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 20, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for providing false statements during an Internal Affairs investigation.

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 at one of its facilities until her removal effective August 11, 2004.

On May 12, 2004, Grievant met with Special Agent M to discuss allegations of inappropriate behavior on her part that may have occurred on September 20, 2003. Special Agent M questioned Grievant and then drafted an Investigative Interview statement based on Grievant's comments. He presented the statement to Grievant for her review. Grievant read the statement and then wrote the date and her signature. A portion of her statement reads:

The allegation that I was tucking my shirt in my pants or that I had a funny look on my face when I approached the booth is false and without merit. Upon my return to the building I went back to my floor and conducted my duties without incident. I probably stopped by cell 309 and talked with the inmates for a moment as I did all the cells but, I never entered any of the cells. ***

I HAVE READ THIS ONE-PAGE STATEMENT, INITIALED ALL CORRECTIONS, AND SIGNING IT BECAUSE IT IS TRUE AND ACCURATE.¹

On May 28, 2004, Grievant met with Special Agent Mc to discuss the allegations against her. He questioned Grievant and then asked her to write a statement. A portion of her statement reads:

As I was walking by, they asked me to look at the book they were all looking at. I stepped inside but not completely out of sight to look at the book. I never disappeared inside cell 309 nor have I ever been completely inside a cell without another Officer present. When they showed me what they had to show me I stepped back out. As I was walking toward the booth after being called on the radio I was adjusting my shirt as I always do in habit and was told to take a break.²

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.

On May 12, 2004, Grievant stated that she "probably stopped by cell 309 and talked with the inmates." On May 28, 2004, Grievant was certain she talked to the inmates about a book they had. On May 12, 2004, Grievant said "the allegation that I was tucking my shirt in my pants ... is false and without merit." On May 28, 2004, Grievant said "I was adjusting my shirt as I always do in habit". On May 12, 2004, Grievant said "I never entered any of the cells." On May 28, 2004, Grievant said, "I stepped inside but not completely out of sight to look at the book. *** When they showed me what they had to show me I stepped back out." Grievant's statement made on May 12, 2004 conflicts with her statement on May 28, 2004. One of those statements is materially false.

"[F]alsifying any records, including but are not limited to ... reports ... or other official state documents" is a Group III offense.³ "Falsifying" is not defined by the

¹ Agency Exhibit 2.

² Agency Exhibit 2.

³ DOCPM § 5-10.17(B)(2).

Standards of Conduct, 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*.

In this case, Grievant knew she was being asked questions about an ongoing investigation. She knew it was important to give accurate answers. She reviewed her answers prior to them becoming a part of an official Agency investigation. Based on the evidence presented, the Agency has proven by a preponderance of the evidence that Grievant falsified an official State document by signing a document containing false information. Accordingly, the Agency's issuance of a Group III Written Notice must be upheld. When a Group III Written Notice is sustained, an Agency may remove an employee from employment.

DECISION

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

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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

[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

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