

Issue: Group III Written Notice with suspension (falsifying a State document); Hearing  
Date: 06/03/05; Decision Issued: 06/16/05; Agency: DOC; AHO: Carl Wilson  
Schmidt, Esq.; Case No. 8075



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8075**

Hearing Date: June 3, 2005  
Decision Issued: June 16, 2005

**PROCEDURAL HISTORY**

On February 26, 2005, Grievant was issued a Group III Written Notice of disciplinary action with three workday suspension for:

*On November 15, 2004 (although I believe the actual date was the 16<sup>th</sup>), you completed an Incident Report in which you stated that the computer in the lower control booth in Housing Unit 1, froze briefly causing a delay in your response to [Lieutenant's] effort to get you to open the entrance door to the Housing Unit. When the Computer Technician investigated the incident he found that the computer did not freeze and that it was trouble free the entire time. Your actions constitute "Falsifying any record, including but not limited to, vouchers, insurance claims, time records, leave records or other state documents."*

On March 24, 2005, 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 he requested a hearing. On May 9, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 3, 2005, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with three workday suspension for falsifying a state record.

## **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 at one of its Facilities. Grievant did not testify during the hearing.

Grievant was working in the lower control booth of Housing Unit One on November 16, 2004. In order for employees to enter or exit the building, Grievant had to observe the employees and push an icon on a computer screen to open the security door. At approximately 6 a.m., corrections officers working the day shift wished to enter the building to assume their posts. Several officers began beating on the control booth window in order to get Grievant's attention so that he would let them inside the building. They were also pushing a button that would cause a sound to be heard inside the control booth so that the control booth operator would know someone wished to enter the building. As the Lieutenant approached the building he observed the officers beating on the window and pushing the button. He became concerned regarding the reason they could not get into the building. The Lieutenant looked inside the window and observed Grievant seated in front of the computer screen of the computer that must be used to permit entry into the building. Grievant was approximately 15 yards away from the window. The Lieutenant could see Grievant's right side. Grievant was motionless with his head tilted back and his arms hanging straight down. The

Lieutenant did not observe Grievant move for several minutes. Grievant did not respond to the noise created by the officers banging on the window or the sound from the button being activated repeatedly. The Lieutenant contacted another employee and instructed that employee to call Grievant on the telephone located near Grievant. The employee called Grievant and Grievant finally responded to the telephone call. The employee told Grievant that staff wished to enter the building and to let them in. Grievant pushed the icon on the computer and let the employees inside the building.

As Grievant left the control booth to end his shift at approximately 6:15 a.m., he had to pass through the supervisor's office where the Lieutenant was working. The Lieutenant suspected Grievant was sleeping or not alert and wanted to ask Grievant for an explanation of what had happened. As Grievant came out of the control booth, the Lieutenant asked Grievant if he was alert. Grievant said "Do what you have to do, I am going home." The Lieutenant told Grievant "come back over here to me and let me and you discuss this and get it straightened out." Grievant again responded, "Do what you have to do, I'm going home." Grievant left the building. The Lieutenant reported the matter to his superior.

At approximately 6:45 a.m., Grievant wrote an incident report as follows:

On the above date at approximately 0609, I [Grievant] was the booth officer in the lower control booth, Housing Unit One's B Break. [Lieutenant] and 6A – 6P officers arrived at Building One's front entry and because they stood outside the door approximately 3 to 4 minutes, the assumption was made by [Lieutenant] that I was asleep. Once I was relieved from my post at 0615, [Lieutenant] asked me if I [was] sleeping. Because I wasn't asleep, I told him No. The computer froze briefly. When [Corrections Officer E] called the lower control booth, I explained this to [Corrections Officer E] as well. [Lieutenant] told me that I displayed poor work performance. How can this be? I accomplished all of my assigned tasks throughout my shift. Therefore, this report is being submitted for further reviewing.<sup>1</sup>

In the morning on November 16, 2004, the Site Tech examined the computer in the lower control booth that Grievant said malfunctioned. He wrote an incident report:

At approximately 9 a.m., [Lieutenant] came to my office and asked if it were possible for me to tell when the last time the computer in lower 1 locked up. We then proceeded to housing unit one and I was able to examine the Scandisk logs. We found that the last time the computer locked up (so that windows could not properly shut down – therefore requiring Scandisk to run for Windows to start back up) was on 11/12/04 at 4:08 p.m.<sup>2</sup>

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<sup>1</sup> Grievant Exhibit 1.

<sup>2</sup> Grievant Exhibit 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.

Group III offenses include “falsifying any records, including but are not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents.” DOCPM § 5-10.17(B)(2). “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*.

Once Grievant submitted his Incident Report to the Agency, it became a record of the Agency. If Grievant intended to falsify the incident report, then he would have engaged in behavior rising to the level of a Group III offense.

The evidence presented showed that Grievant failed to open quickly the security door because he was not alert. Other than Grievant’s assertion, there is no evidence (Grievant did not testify) supporting the conclusion that Grievant’s computer froze briefly at approximately 6 a.m. Grievant presented evidence that the computer had malfunctioned on several prior occasions. All this evidence shows is that it is possible for the computer to malfunction. It does not show that it malfunctioned on November 16, 2004 at approximately 6 a.m.

An incident report is a State record. The Agency must rely on the accuracy of incident reports in order to properly conduct its business affairs. Grievant knew or should have known that he was falsifying a record when he wrote his computer froze in order to explain why he did not open quickly the security door. The Agency has

presented sufficient evidence to support its issuance of a Group III Written Notice. A three workday suspension is permitted upon issuance of a Group III Written Notice.<sup>3</sup>

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension 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 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 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing

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<sup>3</sup> No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

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