

Issue: Group III Written Notice with termination (falsification of records); Hearing Date: 08/22/05; Decision Issued: 08/29/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8147



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8147

Hearing Date: August 22, 2005
Decision Issued: August 29, 2005

PROCEDURAL HISTORY

On February 22, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Falsifying any Records, Including but are not Limited to Vouchers, Reports, Insurance Claims, Time Records, Leave Records or Other Official State Documents. Specifically and by your own admission, on February 9, 2005, you failed to conduct security checks of your area in accordance with established post orders; however, you documented in the log book that you, did in fact, perform these security checks. This constitutes falsification of records.

On February 28, 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 July 19, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 22, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

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 his removal. The purpose of his position was to:

Provide security over inmates at the institution and while in transport; supervise their daily activities and observe and record their behavior and movement to ensure their safe and secure confinement.¹

On February 22, 2005, Grievant received a Group II Written Notice with suspension for failure to follow a supervisor's instructions for events occurring on February 9, 2005.² Grievant did not appeal that Written Notice. Grievant's work performance was satisfactory to the Agency prior to the disciplinary action.³

On February 9, 2005, Grievant worked a 12 hour shift beginning at 18:00 hours (Military time). Grievant's Post Order required him to:

¹ Grievant Exhibit 2.

² Agency Exhibit 6.

³ Grievant Exhibit 2.

Make observation checks of the area, wings, cells, dayrooms, entrance at irregular intervals, not to exceed a thirty minute time lapse.⁴

Grievant kept a log book in which he wrote events occurring during his shift. The Agency presented evidence of a video tape showing a housing unit floor with four wings with cells where inmates lived. The video tape showed Grievant's activities during his shift including the time that those activities occurred. The Hearing Officer viewed the tape and focused on the time period beginning ten minutes prior to a log book entry through ten minutes after a log book entry.

In order to indicate he had performed a cell check and that all of the cells were secure, Grievant wrote the time of his check and "s/c all secure" in the log book. Grievant wrote he had performed a cell check at 18:45 hours. At approximately 18:45, Grievant and a Sergeant performed a cell check by walking down all four wings and looking into the cells. Grievant wrote he had performed a cell check at 19:15 hours. Grievant did not perform a cell check at that time. Grievant wrote he had performed a cell check at 20:33 hours. No cell check was performed at 20:33 hours since Grievant was not on the floor from 20:07 until 20:49.⁵ Grievant wrote that he had performed a cell check at 21:15 hours. No cell check was performed. Grievant wrote that he had performed a cell check at 21:45 hours. No cell check was performed. Grievant wrote that he had performed a cell check at 22:22 hours. Grievant walked through all four wings in order to complete a cell check. Grievant wrote that he had performed a cell check at 22:45 hours. No cell check was performed. Grievant wrote that he had performed a cell check at 00:01 hours. No cell check was performed.

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 are not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents" constitutes a Group III offense.⁶ "Falsifying" is not defined by the DOC Standards of

⁴ Agency Exhibit 4.

⁵ Inmates were locked in their cells during this time.

⁶ DOCPM § 5-10.17(B)(2).

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*.

A log book maintained within a correctional institution to verify cell checks made by corrections officers is an official State document. Grievant knew or should have known that he was falsifying the log book by writing that he had conducted a cell check when he had not conducted a cell check. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice. Removal from employment is warranted based on the issuance of a Group III Written Notice.⁷

Grievant argues that he made visual inspections of the wings by looking down the halls while he was in the dayroom. The video tape does not show Grievant making visual checks down the halls each time Grievant recorded a security check. For example, Grievant claimed to have made a security check at 20:33 hours but he was not present on the floor at or near that time.

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.

⁷ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.