

Issues: Group III Written Notice with termination (falsifying a State document);
Hearing Date: 01/18/07; Decision Issued: 04/02/07; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 8491; Outcome: Agency upheld in full.

Administrative Review: HO Reconsideration Request received 04/17/07;

Reconsideration Decision issued 04/25/07; Outcome: Original decision affirmed;

Judicial Review: Appealed to Circuit Court in Campbell County (05/25/07);

Outcome: Remanded to AHO (Case No. CL07000216 00, issued 08/02/07)



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8491

Hearing Date: January 18, 2007
Decision Issued: April 2, 2007

PROCEDURAL HISTORY

On September 1, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying State documents. On September 12, 2006, 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 December 14, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 18, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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. The purpose of his position was, "Provide security and supervision of adult offenders."¹ Grievant's work schedule was from 6 p.m. until 6 a.m. He was employed by the Agency for more than 13 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

One of Grievant's most important duties was to provide a physical count of inmates. Under the Facility's Local Procedure 410.2, *Count Procedures*, the, "accuracy of maintaining a reliable count is of such importance that it supersedes all other institutional functions." This procedure also states:

All formal counts and intermediate counts shall be conducted by two (2) Certified Correctional Officers. The count sheet will be verified and signed by both counting officers upon completion of the physical count.²

¹ Grievant Exhibit 13.

² Local Directive 410(IV)(D).

In order to conduct a count, the “counting officers must actually see an offender’s flesh, observe movement, or hear the offender speak.”³ “To the greatest extent possible, counting officers should ... not know the assigned number of inmates prior to counting.”⁴

Inmate counts were to be conducted every hour. Security checks were to be conducted every half hour.

The Facility consists of several buildings. Inmates reside in Dorm A and Dorm B. Two officers are needed to properly enter the dorm. One officer cranks the door open to enable the second officer to enter the dorm. A segregation unit is attached to one of the dorm buildings. One officer can use a key to enter the segregation unit without the assistance of another officer. The Facility also has a kitchen where inmates work to prepare meals. Inmates working in the kitchen are supposed to be supervised while working.

On August 30, 2006 at 2:20 a.m., the Superintendent arrived at the Facility. He entered his office at 2:23 a.m. and began watching a security monitor enabling him to see several posts of the Facility compound. He observed Grievant sitting at the dorm post. While sitting at the dorm post, Grievant could see partially into each dorm.

Lieutenant H, Officer S, and Officer M were at the front gate post.

At 2:33 a.m., Grievant wrote in the log book that “Rounds made all appears ok.” Grievant did not make any rounds at that time. At 3:00 a.m., Grievant wrote in the log book that “Rounds made all appears ok.” Grievant had not made any rounds at that time.

At 3:05 a.m., Officer S left the front gate post and walked to the dorm post where Grievant was working. At 3:12 a.m., Grievant let Officer S into Dorm A to wake up an inmate cook for duty in the kitchen. Officer S completed that task in less than a minute. At 3:30 a.m., Officer S let the rest of the inmate workers out of their dorms to work in the kitchen. At 3:30 a.m., Officer S wrote in the log book that, “Rounds were made all ok [inmate] in kitchen.” Grievant and Officer S had not made rounds at that time.

At 4 a.m., Grievant and Officer S were completing count sheets but no count was made. Officer S wrote in the log book at 4 a.m., “Count started by [Officer S] [Grievant]

A Dorm 65
B Dorm 71
Kitchen 01
Jail 00
137 total”

³ Local Directive 410(IV)(5).

⁴ Local Directive 410(IV)(G).

At 4:05 a.m., Grievant went to the front gate post and left the inmates locked in the kitchen. Officer S remained in the hill post but did not make rounds. At 4:05 a.m., Officer S wrote in the log book, "Count cleared."

At 4:40 a.m., Grievant left the front gate post and went to the kitchen.

At 4:45 a.m., the Superintendent entered the dorm post. He observed four count sheets already prepared in anticipation of the 5 a.m. count. Officer S had written on the form the date, area counted, number of inmates present, and then signed each count sheet. Grievant also had signed the count sheets. The only blank space unfilled on each count sheet was the time. The Superintendent collected and kept the count sheets. Officer S and Grievant used other count sheets to complete the 5 a.m. count.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."⁵ Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."⁶ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁷

"[F]alsifying any records, including but not limited to vouchers, reports, insurance claims, time records, leave records, or other official state documents" is a Group III offense.⁸ Count sheets are official State documents upon which the Agency relies to accurately calculate the number of inmates inside the Facility and determine whether any inmates have escaped.

"Falsifying" is not defined by Virginia Department of Corrections Operating Procedure 135.1, 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:

⁵ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁶ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁷ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁸ Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(2).

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*.

When Grievant signed count sheets, he was representing to the Agency that he had counted a specific number of inmates (in accordance with Agency policy) at a specific location, and at a specific time of day. On August 30, 2006, Grievant signed four count sheets prior to the time of the count and prior to actually counting the inmates. At the time he signed the count sheets, he did not know the number of inmates who would be present yet he was certifying that he had properly counted the number of inmates.⁹ At the time Grievant signed the count sheets, he misrepresented that he had complied with Agency policy and counted the number of inmates present in Dorm A, Dorm B, the Jail, and the Kitchen. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group III Written Notice for falsification of a State document. The Agency's Standards of Conduct permit the Agency to remove Grievant from employment upon the issuance of a Group III Written Notice. Accordingly, Grievant's removal must be upheld.

Grievant argues the four documents the Superintendent picked up were not official State documents because Grievant and Officer S could not submit them to represent the 5 a.m. count. Grievant and Officer S used four other unfilled forms for the 5 a.m. count. This argument fails because at the time Grievant and Officer S signed the count sheets, those sheets were official State documents. The time Grievant falsified the count sheet is measured at the time he signed each count sheet because his signature represented his certification that he had completed counting the inmates and determined the number of inmates at the time he had supposedly completed a count.

The Agency contends that in addition to the count sheets intended for the 5 a.m. count, Grievant fully completed several count sheets without having actually performed a count. Grievant contends he did not falsify those count sheets since he made "visual rounds." According to Grievant, a visual round is when the officer looks into the building without having actually entered and physically counted the inmates. He argued this practice was common when the Facility was understaffed as it was on August 30, 2006. It is not necessary for the Hearing Officer to address this debate because the Agency has presented sufficient evidence of Grievant's falsification of State documents. Grievant falsified the count sheets intended for 5 a.m. thereby justifying the issuance of disciplinary action.

⁹ Grievant wrote in his grievance, "When I signed the count sheets they were blank, they had no numbers or any other information on them. I signed the count sheets getting organized for the morning."

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution...”¹⁰ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the Agency inconsistently disciplined employees. For example, another corrections officer at the Facility “lost” an inmate for more than an hour. When the count did not clear, the Facility employees began looking for the inmate and found him. The officer was disciplined but not removed from employment. This example, however, is not an example of the inconsistent application of discipline. The corrections officer did not falsify any documents. The inmate was discovered because the count was correctly performed. What this example illustrates is the importance of performing accurate physical counts of inmates.

Grievant contends the Agency failed to discipline a corrections officer who engaged in similar behavior. The officer filled out count sheets prior to completing the count. He was discovered by an auditor who witnesses his behavior. Grievant contends the Agency inconsistently disciplined its employees because this employee did not receive any disciplinary action. This is not an example of the inconsistent application of discipline because the reason the Agency did not discipline the employee is that he resigned from the Agency before discipline could be taken. The Superintendent was prepared to take disciplinary action but the employee resigned shortly after his behavior was discovered.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: “Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. ‘whistleblowing’).” To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹¹ (2)

¹⁰ *Va. Code § 2.2-3005.*

¹¹ See *Va. Code § 2.2-3004(A)(v)*. Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a

suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant contends the Agency retaliated against him because on March 27, 2006 he met with the Agency's Regional Director to discuss the Superintendent. On April 21, 2006, Lieutenant H filed an EEO complaint against the Superintendent alleging discrimination based on race, color and religion. Lieutenant H named Grievant as a witness in his complaint.

Grievant has established that he engaged in a protected activity and that he suffered a materially adverse action because of his job loss. Grievant has not established a connection between the protected activity and the adverse action. The Agency issued disciplinary action against Grievant because he falsified State documents and not in order to retaliate against Grievant.

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:

violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

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 all of your appeals to the other party and to the EDR Director. 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.¹²

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8491-R

Reconsideration Decision Issued: April 25, 2007

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.¹³

“[F]alsifying any records, including but not limited to vouchers, reports, insurance claims, time records, leave records, or other official state documents” is a Group III offense.¹⁴ This request for reconsideration addresses the issue of what is an official state document.

The Department of Corrections Standards of Conduct regarding falsification of documents mirrors the Department of Human Resource’s Standards of Conduct for State Government.

The word “other” in the phrase “other official state documents” refers to documents other than “vouchers, reports, insurance claims, time records, [and] leave records”.

The word “official” refers to the use of the document. If a document is used in State business, then it is an official document.

¹³ Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.

¹⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(2).

The word “State” refers to a document owned by the Commonwealth of Virginia or a document within the dominion and control of the Commonwealth such that it should be considered the owner. For example, an application for employment may be originally owned the applicant but once it is submitted to the Commonwealth as part of the employment process, the Commonwealth exercises sufficient control over the application that the application would be considered a State document even if ownership of the document is in dispute.

The word “document” refers to whether information is being conveyed. For example, a blank piece of paper might not be a document, but a piece of paper constituting a pre-printed form, would be a document. This is true even if all of the blanks in the form have not yet been filled.

Grievant took a pre-printed form owned by the Commonwealth of Virginia and used by the Agency in its business operations. Grievant added to the content of the form by writing information on the form. He did so as part of his employment duties. Thus, the Agency’s count sheets were official State documents written on by Grievant.

When the Superintendent picked up the count sheets, he was picking up official State documents. Although all of the blanks in the count sheets had not been completed, the documents were official State documents.

At the time Grievant wrote information on the Agency’s count sheets he knew his writing was false. His writing served as his representation to the Agency that certain facts had occurred when actually the facts expressed by the count sheet had not yet occurred. Thus, Grievant falsified an official State document as alleged by the Agency.

Grievant contends the document was not an official State document because it was not an Official Count Sheet as defined by DOC Operating Procedure 410.2. The Agency’s policy governing what constitutes an official count sheet is separate from and independent of the Agency’s Standards of Conduct (DOC Operation Procedure 135.1) referring to an official State document. Whether a document is an “official” count sheet has no bearing on whether or not it is an “official” State document. These policies do not use the word “official” in the same manner. Use of the word “official” does not link the policies. A document may be an official State document under the Standards of Conduct but not an official count sheet under the Agency’s Count Procedure policy.

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant simply restates the arguments and evidence presented at the hearing. For this reason, Grievant’s request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer