

Issues: Group III Written Notice (falsifying a State document) and termination; Hearing Date: 02/01/07; Decision Issued: 02/05/07; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 8508; Outcome: No relief on either issue; Agency upheld in full; **Administrative Review: HO Reconsideration Request received 02/09/07; Reconsideration Decision 8508-R issued 02/14/07; Outcome: Original decision affirmed; Second Reconsideration Request received 02/20/07; Second Reconsideration Decision 8508-R2 issued 02/21/07; Outcome: AHO has no jurisdiction; Administrative Review: EDR Ruling Request received 02/21/07; Second EDR Admin Review Request received 02/23/07; Third EDR Admin Review Request received 04/12/07; Fourth EDR Admin Review Request received 05/16/07; EDR Ruling No. 2007-1556 issued 04/10/07 addressing the 02/21/07 request; Outcome: Remanded to AHO; Third Reconsideration Decision 8508-R3 issued 05/10/07; Outcome: Original decision affirmed; EDR Ruling #2007-1563, 2007-1637, 2007-1691 issued 06/29/07 addressing the 02/23/07, 04/12/07, and 05/16/07 requests; Outcome: Remanded to AHO; Fourth Reconsideration Decision 8508-R4 issued 07/11/07; Outcome: Original Decision Affirmed; Fifth EDR Admin Review Request received 07/19/07; EDR Ruling #2008-1740 issued 08/17/07; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8508

Hearing Date: February 1, 2007
Decision Issued: February 5, 2007

PROCEDURAL HISTORY

On November 27, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to count but signing a count sheet indicating he had conducted a physical count. On November 30, 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 January 9, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 1, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate

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 at one of its Facilities. He had been employed by the Department for over eight years. The purpose of his position was to, "[p]rovide security and supervision of adult offenders."¹

One of Grievant's most important duties was to provide a physical count of inmates in the kitchen of the Facility. 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

In order to conduct a count, the "counting officers must actually see an offender's flesh, observe movement, or hear the offender speak."³

¹ Agency Exhibit 5.

² Local Directive 410(IV)(D).

³ Local Directive 410(IV)(5).

On November 9, 2006, several inmates were working at the Facility's kitchen. Grievant was responsible for conducting the count of inmates at the kitchen. At 6 a.m., the Kitchen Supervisor noticed that no Corrections Officers had counted the inmates working in the kitchen. She reported the matter.

The Major spoke with Grievant about whether he had counted the inmates in the kitchen and he admitted he had not done so. Although Grievant had not conducted a physical count of the inmates in the kitchen, he signed a Count Sheet containing the date of November 9, 2006, the time of 5:46 a.m., the area counted as the kitchen and the number of inmates present as seven. The Count Sheet for the kitchen was used by the Facility managers to conclude that all of the inmates were accounted for as expected.

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."⁴ 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."⁵ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁶

"[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.⁷ 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:

⁴ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

⁷ 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*.

Grievant knew he had not conducted a physical count of inmates. Grievant knew a completed count sheet was a record of the number of inmates at a specific location within the Facility based upon a physical count of those inmates. By writing that there were seven inmates in the Kitchen even though Grievant had not physically counted those inmates, Grievant intentionally created a document falsely portraying the number of inmates counted. Accordingly, Grievant falsified an official State document, namely the count sheet. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group III Written Notice. An agency is permitted to remove an employee upon the issuance to that employee of a Group III Written Notice.

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...."⁸ Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy."

Grievant contends the disciplinary action should be mitigated because the level of discipline taken is too harsh. The question before the Hearing Officer is not what level of discipline the Hearing Officer would impose in his opinion. This is because the *Rules* prevent the Hearing Officer from deciding cases as a "Super-personnel officer." The Agency's action was consistent with its *Standards of Conduct* and, thus, was not beyond the bounds of reasonableness. Grievant was honest when responding to the Agency's allegations against him. Although his honesty reflects his honorable character, it does not by itself constitute a mitigating circumstance. Grievant argued that his actions were a regular practice among corrections officers at the Facility. Insufficient evidence was presented to support this conclusion. Grievant argues his lengthy record of good service should reduce the level of discipline. An employee's

⁸ *Va. Code § 2.2-3005.*

length of service by itself is not a sufficient basis for the Hearing Officer to mitigate disciplinary action. Based on the standard set forth in the *Rules*, there are no mitigating circumstances justifying a reduction in the disciplinary action.

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 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.⁹

[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

⁹ 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: 8508-R

Reconsideration Decision Issued: February 14, 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.¹⁰

On November 27, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to count but signing a count sheet indicating he had conducted a physical count. The evidence showed Grievant was keeping a “running count” of the inmates entering the kitchen. When the count was supposed to be performed, he relied on his running totals rather than actually going to the kitchen to physically count the inmates there. The hearing decision upheld the Agency’s removal because Grievant did not conduct a physical count but wrote on a document the results of a physical count.

Grievant contends the Warden admitted that his behavior was common practice among corrections officers. Contrary to Grievant’s assertion, the Warden testified that keeping a running number of inmates moving to the kitchen was a good practice, but that relying on a running count to serve as a formal count was not common practice. The Warden testified that conducting a formal count involved an officer directly observing each inmate counted.

Grievant now offers written statements from two corrections officers to support his contention that his method of counting was common practice at the Facility. Grievant received in December 2006 but decided not to present them to the Hearing

¹⁰ 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.

Officer during the hearing. Hearing decisions are based on the evidence presented during the hearing. Grievant should have presented those statements to the Hearing Officer during the hearing. The statements are not new evidence because Grievant knew of them at the time of the hearing. The Hearing Officer will not consider after the hearing what should have been presented during the hearing.

Grievant argues that counting inmates already outside the Facility by corrections officers at the front gate was the same procedure he followed when counting inmates for the kitchen. Insufficient evidence was presented during the hearing to support Grievant's assertion.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. 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.

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8508-R2

Reconsideration Decision Issued: February 21, 2007

RECONSIDERATION DECISION

Grievant seeks administrative review of the February 14, 2007 Reconsideration Decision. The Grievance Procedure Manual does not authorize the Hearing Officer to provide administrative review of a Reconsideration Decision. Upon issuance of the Reconsideration Decision on February 14, 2007, the Hearing Officer no longer has jurisdiction of the grievance. Accordingly, Grievant's request is denied.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8508-R3

Reconsideration Decision Issued: May 10, 2007

RECONSIDERATION DECISION

On April 10, 2007, the EDR Director issued Ruling #2007-1556 referring this case to the Hearing Officer for further consideration.

Grievant contends that, "our supervisor knew about this before hand and took no action to correct the shift and therefore was accepting the fact that we were counting in this manner." Grievant submitted a letter from Corrections Officer M who had worked at the facility for over 3.5 years. Corrections Officer M was not at work on the day Grievant failed to conduct an inmate count. Corrections Officer M noticed that the kitchen had not been counted on November 5, 2005 and reported the matter to Lieutenant D. Lieutenant D said that it was a "big deal" and that "they were supposed to come into the kitchen and count whenever there were inmates present and that he would 'take care of it.'" Corrections Officer M worked on November 6, and 7th, 2006 but his supervisor did not mention problems with the count procedures during briefings. Corrections Officer M believes that Grievant should have not have been removed from employment but instead receive "time on the street".

Grievant's letter from Corrections Officer M does not change the outcome of this case. Grievant should not have needed to be reminded that he should only write that he had conducted a count when he had actually performed a count. Grievant knew what the Agency meant by the word "count" and that he was obligated to conduct and report his count numbers. Grievant received training at the DOC Academy and on-the-job training at the Facility regarding how to conduct counts and when to report count information. Grievant knew he should not have reported that he completed a count when in fact, he merely made an estimate. Lieutenant D was not obligated to notify Grievant that other employees failed to properly count. Lieutenant D's failure to notify

Grievant that other employees¹¹ at the Facility failed to properly count is not a mitigating circumstance.

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:

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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

¹¹ Corrections Officer M does not name the employees. Whether Grievant was one of those employees, is not known.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8508-R4

Reconsideration Decision Issued: July 11, 2007

RECONSIDERATION DECISION

On June 29, 2007, the EDR Director issued Ruling #2007-1563, 2007-1637, 2007-1691 referring this case to the Hearing Officer for further consideration regarding whether Officer M's statement constitutes "newly discovered evidence" and, if so, to consider the Grievant's argument regarding management's acquiescence to improper counting at the Grievant's facility prior to the November 9th incident on mitigation and determine based on those factors, whether the discipline i.e. termination, exceeded the limits of reasonableness.

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. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material; and
- (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

The evidence at issue is the testimony of Officer M. Grievant submitted a letter from Corrections Officer M who had worked at the facility for over 3.5 years. Corrections Officer M was not at work on the day Grievant failed to conduct an inmate count. Corrections Officer M noticed that the kitchen had not been counted on November 5, 2005 and reported the matter to Lieutenant D. Lieutenant D said that it

was a "big deal" and that "they were supposed to come into the kitchen and count whenever there were inmates present and that he would 'take care of it.'" Corrections Officer M worked on November 6, and 7th, 2006 but his supervisor did not mention problems with the count procedures during briefings. Officer M described Grievant's behavior as a "serious mistake". Corrections Officer M believes that Grievant should have not have been removed from employment but instead receive "time on the street".

Grievant discovered the evidence after the date of the Hearing Decision. Grievant is deemed to have exercised due diligence because Officer M withheld the information from Grievant. The evidence is not merely cumulative or impeaching. The evidence is material. The evidence is not likely to produce a new outcome if the case was reheard. The evidence is not such that would require the Hearing Decision to be amended.

Grievant's letter from Corrections Officer M does not change the outcome of this case. Grievant should not have needed to be reminded that he should only write that he had conducted a count when he had actually performed a count. Grievant knew what the Agency meant by the word "count" and that he was obligated to conduct and report his count numbers. Grievant received training at the DOC Academy and on-the-job training at the Facility regarding how to conduct counts and when to report count information. Grievant knew he should not have reported that he completed a count when in fact, he merely made an estimate. Lieutenant D was not obligated to notify Grievant that other employees failed to properly count. Lieutenant D's failure to notify Grievant that other employees¹² at the Facility failed to properly count is not a mitigating circumstance.

One could argue that the letter from Corrections Officer M may change the outcome of this grievance because it shows management's alleged acquiescence to the incorrect counting procedures employed by its staff could constitute a mitigating circumstance. This argument fails. Lieutenant D indicated that he would "take care of it" and that he would "talk to them". This suggests that the Lieutenant intended to speak with the corrections officers responsible for conducting the physical count and either counsel or discipline them. Taking disciplinary action against staff engaged in this behavior is not acquiescence by management.¹³ Grievant had adequate notice of the proper procedure to conduct physical counts. He received this notice through his training to become a corrections officer and to the Agency's policies governing count procedures.

For the above reasons, Grievant's request for reconsideration is **denied**.

¹² Corrections Officer M does not name the employees. Whether Grievant was one of those employees, is not known.

¹³ In addition, it is not clear that a lieutenant holds sufficient rank such that his actions were deemed to be actions of "management".

APPEAL RIGHTS

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

5. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
6. 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