

Issues: Group II Written Notice (falsifying an official document) and suspension;
Hearing Date: 03/20/07; Decision Issued: 03/26/07; Agency: Department of
Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 8546; Outcome: Group II –
Partial relief, reduced to Group I; Suspension – Full relief, suspension rescinded.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8546

Hearing Date: March 20, 2007
Decision Issued: March 26, 2007

PROCEDURAL HISTORY

On September 7, 2005, Grievant was issued a Group III Written Notice of disciplinary action with suspension for "permitting an inmate to falsify a state document by adding your initials to a commissary receiving report."

On October 4, 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. The Agency delayed Grievant's request for the appointment of a hearing officer without explanation. On February 27, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 20, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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 employs Grievant as a Corrections Officer B at one of its Facilities. He began working for the Agency on January 25, 1998.

Inmates at the Facility can purchase, order, and receive goods from a private vendor. Inmates make their requests. The vendor assembles each inmate's order into plastic bag and places several inmate orders into boxes. The boxes are shipped to the Facility. The boxes are placed inside a store room called the commissary. The commissary has a "teller window" to permit an officer inside the commissary room to hand out goods to inmates. The commissary room is approximately 8 feet wide and 16 feet long. An officer looking out the commissary room window, has a bench between him or her and the window. The bench is almost as high as the bottom of the window. To the officer's left side is a door permitting entry into and exit from the commissary room.

On March 3, 2005, Grievant was working the commissary widow dispensing goods. Inmate D and Inmate H were inside the room helping to open boxes and hand

him plastic bags of goods for inmates. Inmate P was helping take empty boxes outside of the room and towards the trash area.

A long line of inmates formed in front of the commissary window in order to receive their goods. Grievant placed his pen on the bench in front of the window. As an inmate would approach the window, Grievant would open the plastic bag intended for that inmate and mark off the items on a "spend sheet" to show that the items were given to the inmate. The inmate would borrow Grievant's pen and sign the spend sheet.

Inmates working inside the commissary would borrow Grievant's pen to strike through names on the outside of boxes as the bags inside the boxes were removed and given to Grievant.

Without Grievant's knowledge, Inmate P would hand out some commissary goods to inmates through the side door.¹ Without Grievant's knowledge, Inmate P would sign Grievant's initials on the spend sheet and have the inmate sign the spend sheet. Without Grievant's knowledge, Inmate P removed the commissary goods for three inmates who did not appear in line that day and kept the goods for himself. He signed Grievant's initials to the spend sheets to make it appear that the goods had been issued properly.² When the three inmates later sought their commissary goods, the Agency began an investigation.

Agency policy provides, "[n]o Inmate Help will be used at the Commissary window or in the inventory-taking process."³ Grievant also received on September 7, 2005 a Group I Written Notice for permitting inmates to assist him.⁴ He did not appeal that notice and it is not before the Hearing Officer.

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

¹ If the corrections officer working the basement floor post was sitting in his chair outside the commissary, he would have observed Inmate P handing out commissary goods through the side door. The basement floor post officer, however, sometimes walked to other areas of the basement and might not have seen Inmate P's actions.

² It is not clear whether Inmate P forged the signatures of the three inmates because the Agency redacted the writing appearing where inmate's signatures would have appeared on the spend sheets.

³ Agency Exhibit 2.

⁴ Agency Exhibit 5.

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

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

The Agency contends Grievant “permitted an inmate to falsify a state document by adding your initials to a commissary receiving report.” In order to establish a Group III level offense in this case, the Agency must show that Grievant knew or should have known that Inmate P was signing Grievant’s initials to spend sheets as Inmate P handed out commissary goods.

Grievant denied giving his pen to Inmate P with the knowledge that Inmate P would write Grievant’s initials on spend sheets. Grievant’s denial was credible. The Agency has not established that Grievant knew Inmate P was signing Grievant’s initials.

The Agency has established that Grievant permitted Inmate P to use his pen. This is insufficient to support a Group III offense. Grievant permitted Inmate P and at least two other inmates to use his pen as well as the inmates appearing at his window to use his pen. Most inmates did not carry pens. Inmates receiving goods through the window had to sign their names to acknowledge receipt of the goods. There is no reason to believe Grievant engaged in inappropriate behavior by permitting inmates to use his pen. Grievant did not observe each inmate using his pen and know what the inmate was writing because he was busy performing other duties. Thus, there is no basis to conclude that Grievant should have known that Inmate P was forging his initials.

The Agency argues Grievant gave tacit permission to Inmate P by letting Inmate P hand out commissary goods to other inmates and then failing to closely scrutinize what Inmate P was doing. The Agency relies on the written statements of several inmates in order to show that Grievant should have known Inmate P was signing his initials to spend sheets.

When the Hearing Officer is faced with credible testimony from a corrections officer and written hearsay statements from inmates or officers who are not before the Hearing Officer, the Hearing Officer must give greater weight to the testimony of the corrections officer who appeared at the hearing. The Hearing Officer cannot rely solely on written hearsay statements of inmates because inmates (1) are typically convicted felons and unworthy of trust, (2) have substantial free time to develop and coordinate rumors, and (3) often have reason to harm those who control them.

Based on the evidence presented, it is most likely that Grievant did not know that Inmate P was handing out commissary goods through the side door and signing Grievant’s initials. Thus, the Agency cannot establish a Group III level offense.

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

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

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was responsible for supervising the inmates he let inside the commissary. Inmate P was one of those inmates. Inmate P handed out goods through the side door and forged Grievant’s signature on the spend sheets without Grievant realizing what Inmate P was doing. Had Grievant been more attentive to his surroundings, he would have realized what Inmate P was doing. The Agency has presented sufficient evidence to support the issuance to Grievant of a Group I 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 *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.

The Agency required an unusually lengthy period of time to bring this matter to a Hearing Officer even though Grievant asked for the immediate appointment of a Hearing Officer. The testimony of witnesses did not appear to be adversely affected by the delay. Accordingly, there is no basis to mitigate the disciplinary action because of the Agency’s delay. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce 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 suspension is **reduced** to a Group I Written Notice. Because the normal disciplinary action for a Group I offense is issuance of a Written Notice, Grievant’s suspension is **rescinded**. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during

⁸ *Va. Code § 2.2-3005.*

the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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