

Issues: Group III Written Notice (weakening of security), Group III Written Notice (falsifying records), Termination; Hearing Date: 05/01/07; Decision Issued: 06/11/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8569/8670; Outcome: Partial Relief (one Written Notice upheld, one Written Notice rescinded, Termination upheld)



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8569 / 8570

Hearing Date: May 1, 2007
Decision Issued: June 11, 2007

PROCEDURAL HISTORY

On December 7, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for weakening of security. On December 7, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying State records that involved the counting of inmates and serving disciplinary charges on inmates.

On January 5, 2007, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On April 4, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 1, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 actions, 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. Grievant had been employed by the Agency for at least ten years prior to his removal effective December 7, 2006. No evidence of prior active of disciplinary action against Grievant was introduced during the hearing.

On September 25, 2006, Grievant was working as a floor control officer at one of the housing units. His post job summary read:

Responsible for observing all floor activity and reporting any unusual activity to a floor supervisor. Maintain control of all access doors. Coordinate floor movements to and from housing unit and record all scheduled, normal and unusual activities in appropriate log book. To know, understand and follow the procedures set forth in IOPs related to inmate movement, institution control room, and emergency procedures.¹

¹ Agency Exhibit 5.

One of Grievant's specific post duties was to, "[e]nsure only one access door is opened at any time. The pod door is to be secured when not in use."²

One of the doors at the facility did not close properly. When a person opened and closed the door, it remained unsecured because the upper right hand corner of the door remained slightly ajar. On September 26, 2006, at 12:52:38 a.m. and at 3:30:59 a.m. the control booth door was closed but not secured because the upper right hand corner of the door was slightly ajar. Grievant open the door and closed it behind him. The door remained unsecured because it did not close properly. When Grievant left the control booth he opened and closed the door but the door remained unsecured because of the door not close properly.

Two inmates complained to an Agency manager that they had not been properly served with charges against them. The inmates complained that the written charges had been dropped in their cells while they were sleeping and the inmates did not have a sufficient opportunity to respond. The Agency began an investigation.

Grievant was responsible for serving four disciplinary charges against inmates. Agency investigators reviewed the video camera recordings to determine who entered the inmates' housing unit and when they did so. Agency investigators concluded Grievant did not serve the disciplinary charges as he wrote on the charge forms and that Grievant did not conduct the 3 a.m. count has he reported.

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."³ 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."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

Group III Written Notice – Security

The Agency contends Grievant should receive a Group III Written Notice for being involved in the weakening of security by leaving the control room door open. The Agency has not presented sufficient evidence to support the issuance of a Group III

² Agency Exhibit 5.

³ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

Written Notice. Virginia Department of Corrections operating procedure 135.1(XII) (B) (16), states that Group III offenses include, “refusal to obey instructions that could result in a weakening of security”. Grievant was not given an instruction. He did not engage in a Group III offense.

Grievant’s post orders required that he, “[e]nsure only one access door is opened at a time.” Grievant did not leave the control booth door open. When he entered and exited the control booth, he closed the door behind him. The door remained unsecured because the door was defective. Grievant and several other employees had reported the defect but the Agency did not correct the problem.⁶ Grievant is not responsible for the malfunctioning door. Accordingly, the Group III Written Notice for weakening of security must be reversed.

Group III Written Notice -- Falsification

“[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:

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*.

Disciplinary Offense Reports are forms used by the Agency to notify inmates of charges against them. They are official State documents. Corrections Officers must serve the charges on the inmates in order to inform the inmates of the pending charges.

⁶ Although Grievant did not file an incident report, he properly reported the matter to his supervisor. Several other employees entered and exited the door and left it ajar. No evidence was presented showing they were disciplined for failing to file incident reports or for weakening security.

⁷ Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(2).

The Officer serving the charge must write the date and time of the charge and sign that he or she served the charge.

Grievant was responsible for serving four inmates with disciplinary offense reports. He signed each report and wrote that he had served one report at 1:00 a.m., second report at 1:10 a.m., a third report at 1:18 a.m., and the fourth report at 2:00 a.m. Grievant did not serve the inmates at those times. This conclusion is supported for three reasons. First, the corrections officer responsible for recording persons entering the housing unit where the inmates resided did not make an entry in the September 26, 2006 logbook to show that Grievant entered the housing unit between approximately 1:00 a.m. and 2:00 a.m. Second, the Agency investigators reviewed the video camera for the housing unit and did not see Grievant enter or exit the housing unit between approximately 1:00 a.m. and 2:00 a.m. Third, Grievant did not offer any witness testimony to establish that he entered the housing unit as he wrote on the charges.⁸

The Agency contends Grievant falsified an official State record because he falsely wrote that he conducted a count of inmates at 3:00 a.m. The Agency did not submit a copy of the document allegedly falsified.⁹ It is not necessary for the Hearing Officer to address whether Grievant falsified the 3:00 a.m. count because there is sufficient evidence to show that Grievant falsified the four inmate disciplinary offense reports.

Grievant contends the disciplinary action should be mitigated. *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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁸ Grievant did not testify or call any other witnesses at the hearing.

⁹ The Agency presented an investigator’s report but omitted an attachment showing the logbook entry.

¹⁰ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for weakening security is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for falsification of State records is **upheld**. Grievant's removal from employment 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.¹¹

[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

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.