

Issues: Group III Written Notice (falsifying records) with Suspension, and Group III Written Notice (fraternization) with Termination; Hearing Date: 05/24/07; Decision Issued: 05/29/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8583/8584; Outcome: No relief – Agency upheld in full on all issues.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8583 / 8584

Hearing Date: May 24, 2007
Decision Issued: May 29, 2007

PROCEDURAL HISTORY

On December 2, 2006, Grievant was issued a Group III Written Notice of disciplinary action with suspension for falsifying records. On December 22, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal effective February 6, 2007 for fraternization.

Grievant timely filed grievances 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 30, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 24, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
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 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 actions against the Grievant were 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 Agency since February 25, 2005. The purpose of his position was to "provide security and supervision of adult offenders". He received a favorable performance evaluation on October 8, 2006.

On December 2, 2006, Grievant was working in Building 2. He reported to the Sergeant who was also working that night. Grievant was obligated by his post orders to make cell checks within every 30 minutes. At 7:57 p.m., the Sergeant entered the building and looked at Grievant's logbook for the jail. Grievant had written, "8:09 [p.m.] Jail checked 1 inmate present, all appears normal. [Grievant's initials]." Grievant also wrote, "8:37 [p.m.] Jail checked 1 inmate present, all appears normal. [Grievant's initials]." Although Grievant wrote that he had checked the cell at those times, he had not done so.

On December 12, 2006, Grievant was working with Officer L in the Building. Officer L left the building to take a 30 minute meal break. She went to be with the

Lieutenant. She was with the Lieutenant for approximately 1.5 hours. When she returned to the building, Grievant was upset with her lengthy absence. Her delay in returning delayed the beginning of his break. Officer L said she was in the Watch Commander's office speaking with the Lieutenant. Grievant asked Officer L what she was speaking about with the Lieutenant. Grievant's demeanor was to demand information from Officer L. Grievant suggested that Officer L and the Lieutenant were alone having sex because there were rumors among staff that Officer L and the Lieutenant were in a relationship.

Officer L became upset with Grievant's questioning. She called the Lieutenant and asked to speak with him. She told him what Grievant said to her. At approximately 11:30 p.m., the Lieutenant called the Grievant to the Watch Commander's office. Grievant and the Lieutenant spoke in the Watch Commander's office all alone. The inmates were asleep in another building and no one could over hear their conversation. The Lieutenant told Grievant his questioning of Officer L was inappropriate and that the Lieutenant's conversation with Officer L was of no concern to Grievant. The Lieutenant stated that he was in charge, not Grievant.

On December 22, 2006, Officer L called the Lieutenant asking him to come to Building 2. When the Lieutenant arrived, Officer L told the Lieutenant that Officer M told her that the Inmate had spoken with Officer M and asked why Grievant had been removed from the dorm. The Inmate told officer M that Grievant told the Inmate that Grievant was called to the Watch Commander's office and jumped onto because Grievant and Officer L had gotten into an argument because Officer L left Grievant alone in the control room for an hour and a half. The Inmate also said that Grievant said Officer L and the Lieutenant were having an affair and they were going to the guard's quarters at night and having sex during her break.

The Lieutenant called the Inmate to the Watch Commander's office at 3:10 AM to question him. The Inmate told the Lieutenant that Grievant was mad because the Lieutenant had jumped onto him about confronting Officer L. According to the Inmate, Grievant told the Inmate that the Lieutenant said he ran things around here and that Officer L was of no concern to him. The Lieutenant concluded from his conversation with the Inmate that the Inmate had recounted almost word for word the conversation Grievant and the Lieutenant had on December 12, 2006. The Lieutenant had not told anyone about his conversation with Grievant on December 12, 2006. The Lieutenant concluded that Grievant disclosed the conversation to the Inmate as the Inmate claimed.

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.”¹ 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.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

Fraternization

Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(25), *Standards of Conduct*, states that Group III offenses include “[v]iolation of DOC Procedure 130.1, *Rules of Conduct Governing Employees’ Relationships with Offenders*.

Fraternization is defined as:

The act of, or giving the appearance of, association with offenders, and/or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include excessive time and attention given to one offender over others, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing staffs’ personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.⁴

On December 12, 2006, the Lieutenant counseled Grievant regarding his work behavior. That discussion was of a personal nature relating to Grievant’s work and should not have been discussed with the Inmate. Grievant fraternized or gave the appearance of fraternizing with the Inmate. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for fraternizing with the Inmate.

Grievant contends he did not tell the Inmate of his dispute with the Lieutenant. Only two people knew of the contents of their discussion in the Watch Commander’s office on December 12, 2006 -- Grievant and the Lieutenant. No one else could have over heard the conversation. The Lieutenant did not tell anyone else about the contents of the conversation. Grievant must have been the source of the Inmate’s knowledge of the conversation. The Inmate’s written statement confirms Grievant was the source of information.

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

² Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

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

⁴ Virginia Department of Corrections Operating Procedure 130.1(III), *Rules of Conduct Governing Employees’ Relationships with Offenders*.

Grievant contends the Inmate had a motive to lie about Grievant because Grievant charged the inmate with gambling a few days prior to the Inmate's statement to Officer M. Inmates are often untrustworthy. Once Grievant filed charges against the Inmate, the Inmate had a motive to seek revenge against Grievant. By revealing Grievant's comments to him, the Inmate could have obtained revenge against Grievant without lying. There is no reason to believe the Inmate lied, other than his status as an inmate. The Inmate was asleep at the time Grievant and the Lieutenant spoke in the Watch Commander's office located in a different building. The Inmate could not have learned the details of the conversation by overhearing it. No evidence was presented that other security staff knew of the contents of the conversation and could have told the Inmate. Thus, sufficient evidence exists to believe the Inmate was telling the truth that he learned of the private conversation from Grievant.

Falsification of documents

"[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. Logbooks are official State documents upon which the Agency relies to accurately verify the status and location of inmates.

"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*.

Before 7:57 p.m., Grievant wrote in a logbook that he had checked the number of inmates in the jail at 8:09 p.m. and at 8:37 p.m. He had not conducted the checks at the time he wrote he had completed the checks. Grievant knew or should have known that he was misrepresenting the duties he had performed. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group III Written Notice for falsifying the logbook.

Grievant contends he incorrectly looked at his watch when he wrote the times he conducted checks. The argument is not supported by the evidence. Although it is possible Grievant may have misread his watch one time, it is less likely he would have

misread his watch a second time and made that mistake two times in a row. Grievant contends he misread the hour arm of his watch. In other words his entry at 8:09 p.m. was actually for a jail checked at 7:09 p.m. His entry at 8:37 p.m. was made at 7:37 p.m. This contention was not supported by the evidence. Grievant made a cell check at 7:12 p.m. If the 8:09 p.m. entry was for a check actually done at 7:09 p.m., Grievant would have made two jail checks within a 3 minute period. Grievant made a cell check at 7:40 p.m. If the 8:37 p.m. entry was for any check actually done at 7:37 p.m., Grievant would have made two jail checks within a 3 minute period. It is not likely Grievant made two cell checks within a 3 minute period.

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....”⁵ 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 disciplinary action should be mitigated because he was not notified he would be receiving the first Group III Written Notice until after the Agency decided to issue the second Group III Written Notice. Agencies are not obligated to refrain from giving disciplinary action because prior disciplinary action has not yet been issued. 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 for falsification is **upheld**. The Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for fraternization 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:

⁵ *Va. Code § 2.2-3005.*

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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer