

Issues: Group III Written Notice (falsifying records and abuse of employment status), and Demotion; Hearing Date: 06/07/07; Decision Issued: 06/11/07; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 8608; Outcome: Agency Upheld in Full; **Judicial Review: Appealed on 07/09/07 to the Circuit Court in Botetourt County; Outcome pending.**

**Commonwealth of Virginia  
Department of Corrections**

**DECISION OF HEARING OFFICER**

**In the matter of: Case No: 8608**

Hearing Date: June 7, 2007  
Decision Issued: June 11, 2007

**PROCEDURAL HISTORY**

On February 26, 2007 Grievant was issued a Group III Written Notice with disciplinary action Role Change to lower pay band with 10% disciplinary pay reduction for:

Falsifying any records, including but not limited to vouchers, reports, insurance claims, time records, leave records or other official state documents.

and

Abuse of employment status (130.1) - *Employees shall not use their official status as employees of the DOC as a means to establish social interactions or business relationships not directly related to Department business.*<sup>1</sup>

On March 14, 2007, Grievant timely filed a grievance to challenge the disciplinary action. The grievance proceeded through the resolution steps and when the parties failed to resolve the grievance the agency head qualified the grievance for a hearing.<sup>2</sup> On May 1<sup>st</sup> 2007, the Department of Employment Dispute Resolution assigned this matter to the Hearing Officer.

Grievant retained counsel after the first pre-hearing conference and the hearing date being set by agreement. This matter was re-set, upon agreement of the parties, to a hearing date of June 1, 2007, at 2:30 P.M. with the written decision due by June 5, 2007. Prior to this hearing date certain issues arose. Grievant's attorney, Agency presenter, and hearing officer held a second pre-hearing conference (via telephone) on June 1, 2007, concerning the availability of a witness and concerning certain matters related to Agency's witness list. With the written agreement of both parties, for just cause the 35 day period was extended from June 5, 2007 to June 11, 2007 and the grievance hearing continued from June 1, 2007 to June 7, 2007. An extension and continuance was granted in order for both parties to have a full and fair hearing of issues, a full and fair presentation of evidence, and to resolve the grievance on the merits of the substantive issues qualified.

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<sup>1</sup> Agency Exhibit 1 and Grievant Exhibit A. Written Notice.

<sup>2</sup> Agency Exhibit 2 and Grievant Exhibit B. Grievance Form A.

## **APPEARANCES**

Grievant's Attorney  
Grievant (also testified as witness)  
Grievant's Wife  
Captain (testified via telephone)  
Sergeant (testified via telephone)  
Agency Presenter (advocate)  
Agency Party Designee (also testified as witness)  
    Warden  
    Major  
    Captain  
    Accountant/LSA

## **ISSUES**

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

## **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. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.<sup>3</sup>

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant has over 18 years service with the Virginia Department of Corrections (hereinafter referred to as "Agency"). From December 2005 to February 26, 2007, Grievant was employed at Correctional Center as a Corrections Lieutenant. Subsequently he has been employed as a Corrections Officer. Grievant has an active Group I Written Notice issued 1/8/07 for failure to follow a supervisor's instructions.<sup>4</sup>

Grievant desired to apply for a Corrections Sergeant Position within the D.O.C. involving

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<sup>3</sup> Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8 and 9.

<sup>4</sup> Agency Exhibit 8. Group I Written Notice issued 1/8/07.

investigation duties and which was not located at Correctional Center. On January 24, 2007 an appointment was set for February 2, 2007 to discuss the vacancy with Grievant. Qualifications for this position included being "VCIN certified" ("Virginia Crime Information Network").<sup>5</sup>

Grievant discuss VCIN training with a number of people in attempting to obtain the training/certification he desired. Grievant discussed VCIN training with Captain, Treatment Program Supervisor, Accountant/LSA, Academy, and others.<sup>6</sup>

Between 1/8/07 and 2/19/07 Grievant contacted Accountant/LSA concerning VCIN training. Grievant asked her how to get registered for VCIN training and she told Grievant she did the registering for VCIN training at the Correctional Center with the Warden's approval. She told Grievant she couldn't approve the training without the Warden's consent. She did not tell Grievant that he could enroll himself in the VCIN training.<sup>7</sup>

On 1/29/07 Grievant contacted Academy concerning enrolling in VCIN class. When Grievant called the Academy he was asked by the Academy what agency he was with and Grievant indicated "D.O.C."<sup>8</sup> The Academy requested a fax containing certain information for enrollment. Grievant's wife, at Grievant's request, faxed from the Department of Corrections - Regional Office (which was wife's place of employment) to Academy a letter dated 1/29/07. While this fax transmittal was typed out on plain paper the transmitting fax machine printed out line at the top of the page of "VDOC" with an abbreviation for the regional office and with other transmission data. The letter sent to Academy stated that Grievant was a Lieutenant at Correctional Center, his work e-mail address, home e-mail address, work phone number, and home number and requested enrollment in the class offered on February 19, 20, and 21 of 2007. The fax cover sheet transmitted indicated it was "To" the Academy and in the space following "From" Grievant's, rank, name, and the name of the facility were indicated.<sup>9</sup>

On the 19<sup>th</sup> of February, 2007, as a result of Grievant's contact with Academy and the fax from his wife Grievant was enrolled in and was attending the VCIN certification class. Grievant did not have the authorization or approval of the Warden to attend VCIN training. Upon Major being informed on 2/09/07 that Grievant was in the VCIN training he was ordered out of class. Grievant acknowledged in a written document he wrote as part of the investigation of matters that he should have asked and that he went outside the guidelines and rules for training.<sup>10</sup>

VCIN training was not open to the general public; non-law enforcement personnel were not eligible for VCIN training. VCIN was not necessary for Grievant's position at the

Correctional Center.<sup>11</sup> The Academy and the Trooper who conducted the VCIN training were

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<sup>5</sup> Grievant Exhibit C. Letter and Position announcement.

<sup>6</sup> Agency Exhibit 2. Grievant Form B, 2nd Resolution Step Response, Att. #1 to Grievance Form A.; testimony.

<sup>7</sup> Agency Exhibit 4.; testimony.

<sup>8</sup> Agency Exhibit 3. Written Statement of Grievant.

<sup>9</sup> Agency Exhibit 2. Tx Report/Fax Sheet; Fax Sheet.

<sup>10</sup> Agency Exhibit 3. Written Statement of Grievant.

<sup>11</sup> Agency Exhibit 2. Grievance Form A.

contacted during the Agency's investigation of matters and both indicated anyone participating in the VCIN would have to have supervisor's permission and meet certain requirements.

### **APPLICABLE LAW AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code Section 2.2-3000(A) sets forth the Virginia grievance procedure and provides, in part: "It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints .... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

The Department of Corrections (D.O.C.), pursuant to Va. Code Section 53.1-10, has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section XII of the DOC Standards of Conduct address Group III offenses. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. Group III offenses include, "falsifying any records, including but not limited to vouchers, reports, insurance claims, time records, leave records, or other official state documents".<sup>12</sup> The Standard of Conduct also states:

The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these Standards of Conduct and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.<sup>13</sup>

The Agency additionally raises allegations of abuse of employment status alleging that

Grievant used his affiliation with D.O.C. and the Correctional Center along with his wife's affiliation with D.O.C. Regional office to gain access to training that he would not have been

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<sup>12</sup> Agency Exhibit 7. Section XII.(B)(2) VDOC Standards of Conduct, No. 135.1, effective September 1, 2005.

<sup>13</sup> Agency Exhibit 7. Section IV. C , VDOC Standards of Conduct No. 135.1, effective September 1, 2005.

approved to go.

Grievant desired to apply for an investigative position opening within the D.O.C. but not at the Correctional Center. On January 24, 2007 Grievant received an appointment for a job interview to be held on February 2, 2007. VCIN certification was listed in as a qualification for the job. Grievant was not VCIN certified but wanted to be so certified.

VCIN involves access to confidential information, is overseen by the Virginia State Police, and VCIN training is not open to the general public. Individuals seeking VCIN training/certification are required, with very few statutory exceptions, to be a representative of a law enforcement agency that has a VCIN station. Correctional Center has a VCIN station however VCIN training/certification was not required for Grievant's duties at Correctional Center.

Prior to 1/29/07 Grievant had contacted staff at the Correctional Center concerning VCIN certification training. In January he mentioned to Captain he wanted to go to VCIN training and Captain referred him to Accountant/LSA. Accountant/LSA had signed up others at Correctional Facility for the training but only with the approval of the Warden. She told Grievant he needed the Warden's approval. Additionally, Grievant had received training that all non-mandated training required a supervisor's approval.

On 1/29/07 Grievant contacted Academy by telephone concerning VCIN training. The Academy asked which agency he was with and he told the Academy he was with the Correctional Center. The Academy then requested a fax confirming certain information to enroll him in the training. Grievant had his wife fax the information for enrollment. It is of significance that the fax was sent at Grievant's direction by Wife from her place of employment, a D.O.C. regional office.

The fax Grievant had his wife send from the D.O.C. Regional Office gave a false appearance to the application that it was generated by the D.O.C. The transmitting fax machine identity printout line ("VDOC" with initials for the Regional Office) was a material consideration to the Academy in the application process and for its acceptance by Academy. The Grievant's rank as a Lieutenant at Correctional Center was a consideration in the Academy accepting Grievant for class enrollment. Timing is another consideration in this matter. All these actions were presented by the Grievant for consideration after he was made aware of policy requirements for approval of training and after he was informed specifically that the Warden had to approve VCIN training for all personnel at Correctional Center.

"Falsifying" is not defined by the Virginia Department of Corrections Operating Procedure 135.1. Blacks Law Dictionary defines "falsify" as, "To counterfeit or forge; to make something false; to give a false appearance to anything." The hearing officer interprets this to require proof of an intent to falsify in order for the falsification to rise to a level justifying the

disciplinary action. Grievant knew or should have known that his faxed application was misleading and giving a false appearance to matters. He knew or should have known the letter

was being interpreted by the Academy as indicative of agency knowledge and approval of his actions. Grievant knew that as a Lieutenant at Correctional Center Warden approval was necessary to attend VCIN training. Academy required a supervisor's endorsement for applications unless the applicant was a supervisor. Indicating his rank of Lieutenant conveyed the false appearance that the agency supervisor endorsement normally needed by Academy to accept a person for VCIN training was not needed as "Lieutenant" indicated Grievant was himself a supervisor.

Grievant contends there is no intent to falsify and the information he gave as the information his wife faxed was correct. However, the actions and events must be viewed in their totality. The information Grievant gave by phone and fax indicated the application was misleading and presented a false appearance of matters. In response to the Academy's question on the telephone of what agency he was with the Grievant indicated Correctional Center. This gave the appearance to the Academy that Grievant was applying for training as a representative of Correctional Center and taking the training with the agency's consent and knowledge. Grievant's methodology of transmitting that information by fax from the D.O.C. regional office provided a false appearance that D.O.C. was officially involved in the matter. He gave a false appearance to his application for VCIN training making it appear that he was receiving the training with the knowledge of D.O.C. and/or Correctional Center. He used his official status as a Lieutenant at a VCIN station to access training which he was not entitled to as a private person and not entitled to as an employee of Correctional Center who did not have the Warden's consent to the training.

In the Second Resolution Step Response, Attachment #1 to Grievance Form A of 3/28/07 Warden indicates during his interview with Grievant on 3/21/07 that Grievant made the statement on no less than two occasions during the interview, "I was going to do whatever it took to get the training".<sup>14</sup> In the Qualification for Hearing/Agency Head, Attachment #1 to Grievance Form A. dated March 31, 2007 Grievant indicated this statement Warden attributed to him is false and noted that in response to the question of "Why I went through so many people to get in training" Grievant's reply was, "I was trying to do whatever I could to ensure that I could get in this class". Grievant's presentations and actions were intended to secure admission to VCIN training without obtaining the consent of the Warden to attend the class. Grievant knew or should have known he was presenting a false appearance of matters in his faxed letter and oral contact with the Academy and that he was using his position to gain access to training he would not be entitled to.

Grievant contends that Accountant/LSA at no time told him that the only people she could sign up for the VCIN training had to be approved by Warden. He contends also that she told him that if he wanted to take the VCIN training he should call the Academy and sign up on

his own.<sup>15</sup> He contends he did not obtain authorization to attend the VCIN training on 2/19/07 because he did not believe permission was necessary as the training was on his own time. Accountant/LSA specifically stated she did not tell Grievant he could enroll himself in VCIN

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<sup>14</sup> Agency Exhibit 2.

<sup>15</sup> Grievant Exhibit F.

training. Accountant/LSA indicated that between 1/8/07 and 2/19/07 she did tell Grievant she needed Warden's approval to register people for VCIN training. Major has conducted training with Grievant on the need to get approval for all non-mandated training and Grievant was aware of the training requirement. Warden testified he has to approve all VCIN training and he has always specifically reserved to himself the right to approve personnel for VCIN training due to the nature of the training. He did not approve Grievant for VCIN training.

Grievant, in his 2/20/07 written statement stated that he went to the VCIN class "without permission from my supervisors". He additionally acknowledged he was wrong, should have asked, went outside the guidelines and rules for training and acted independently without supervisor's approval.<sup>16</sup> In testimony Grievant indicated he was ordered to give this written statement and that the statements in it were not true. Major, who investigated this incident, acknowledges giving an order for a statement to be written by Grievant for the investigation but he did not instruct Grievant as to content of the statement. Grievant contended he had just been counseled concerning these matters and he wrote down the substance of his counseling. Grievant contends that the facts Grievant himself wrote in the written statement were not true.

Grievant asked an individual to ask the Accountant/LSA to sign him up for the training. This same individual was in the VCIN Class on 2/19/07 that Grievant was in. Major, in a cell telephone conversation with Grievant after he had been pulled out of the class, asked Grievant if he knew the individual was in the class. Grievant replied no she was not in the class. Major learned she was scheduled to attend the class and verified she was there. When the Major contacted the Academy a secretary at the Academy informed him that both left the class together. Later it was determined that the individual returned to the class and completed the class. The next day when Major talked to him of the incident, Grievant said he was a few minutes late to the class (approximately 16 to 18 people in the class). He further stated to Major when he initially talked to Major he did not know she was in the class but later knew she was.

Consideration is given to incidents in which Grievant and/or other witnesses differ as to what was said or done and when statements made were changed or modified. Consideration is given also to the testimony and evidence concerning the circumstances of these incidents.

Upon reviewing the facts de novo (afresh and independently, as if no determinations had yet been made) it is determined that (i) Grievant engaged in the behavior described in the Written Notice; (ii) The behavior constituted misconduct; (iii) the Agency's discipline was consistent with law and policy; and (iv) the agency's discipline did not exceed the limits of reasonableness.

The normal disciplinary action for a Group III offense is a Written Notice and removal from state employment. The policy provides for reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) and employees long service or otherwise

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<sup>16</sup> Agency Exhibit 3.



satisfactory work performance. The agency took into considerations mitigating factors and the reduced the Grievant's discipline from termination of employment to a Written Notice and Role Change to lower pay band with 10% disciplinary pay reduction (New Role Title: "Correctional Officer"). The agency's decision was within the limits of reasonableness. Under the *Rules for Conducting Grievance Hearings*, Section VI, B, 1, 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.

The Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group III Written Notice and disciplinary action taken in issuing Written Notice of Role Change to lower pay band with 10% disciplinary pay reduction was warranted and appropriate under the circumstances.

### **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant on February 26, 2007 of a Group III Written Notice with disciplinary action taken in addition to issuing written notice of Role Change to lower pay band with 10% disciplinary pay reduction (New Role Title: Corrections Officer) is hereby UPHELD.

### **APPEAL RIGHTS**

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

#### **Administrative Review:**

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

**1. A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.

**2. A challenge that the hearing decision is inconsistent with State or agency policy** is made to the Director of the Department of Human Resources Management. This request must

cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to: Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219.

**3. A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to: Director, Department of Employment Dispute Resolution, One Capitol Square, 830 East Main, Suite 400, Richmond, VA 23219.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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. You must give a copy of your notice of appeal the Director of the Department of Employment Dispute Resolution.

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Lorin A. Costanzo  
Hearing Officer