

Issue: Group III Written Notice with suspension (falsification and violation of agency policy); Hearing Date: 11/01/07; Decision Issued: 11/12/07; Agency: DCE; AHO: John V. Robinson, Esq.; Case No. 8713; Outcome: Partial Relief.

**COMMONWEALTH OF VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

In the matter of: Case No. 8713

Hearing Officer Appointment: September 20, 2007

Continuance Granted: September 21, 2007

Hearing Date: November 1, 2007

Decision Issued: November 12, 2007

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group III Written Notice: Falsification of eight (8) state documents or reports and violations of DCE policy on entering and exiting the work site, issued on May 18, 2007 by Management of the Virginia Department of Correctional Education (the "Department" or "Agency"), as described in the Grievance Form A of June 15, 2007.

The hearing officer was appointed on September 20, 2007. The hearing officer scheduled a pre-hearing telephone conference call at 3:30 p.m. on September 20, 2007. The Grievant, the Department's Director of Legal and Internal Affairs (the "Director") and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant confirmed that she is challenging the issuance of the Group III Written Notice for the reasons provided in her Grievance Form A and is seeking the relief requested in her Grievance Form A, including expungement of the disciplinary action, with restoration of all salary and benefits.

In a decision entered on September 21, 2007, which is incorporated herein by this reference, the hearing officer granted the grievant's motion for a short continuance to allow the grievant to retain an attorney. The Grievant in due course retained her attorney and a second pre-hearing conference call was rescheduled from 3:00 p.m. on September 27, 2007 to 3:30 p.m. on October 1, 2007 to allow the grievant's attorney to participate in such call. The hearing officer noted the agency's objection, by counsel to the rescheduling of the second pre-hearing conference call. The Grievant's attorney, the Grievant, the Director and the hearing officer duly participated in such conference call. The hearing was scheduled for and was duly held on November 1, 2007.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the Agency was represented by the Director, who is an attorney at law and the Grievant was represented by her attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely all exhibits submitted by cover of the Agency's letter dated October 23, 2007 (Exhibits 1-9) and Grievant Exhibits 1 through 20.<sup>1</sup>

At the request of the Grievant, the hearing officer issued several orders for witnesses. No issues concerning non-attendance remained by the conclusion of the hearing.

### APPEARANCES

Representative for Agency  
Grievant  
Witnesses

### FINDINGS OF FACT

1. During the principal period relevant to this proceeding, January 1 – April 30, 2007 (the “Period”), the Grievant was an ABE/GED Academic Teacher employed by the agency teaching adult incarcerated women students at one of its schools (the “School”) located within a prison facility (the “Facility”).
2. The Grievant has approximately 15 years of service with the Commonwealth and prior to the subject offenses (the “Offenses”), she does not have any violations or misconduct reported during her employment. By all accounts, prior to the Offenses, she has been a good teacher and state employee.
3. The Grievant transferred from another state position to the Department on January 10, 2001. The Grievant has been at the Facility since April 25, 2003.
4. During the Period, the Grievant's immediate supervisor was the Regional Principal (the “Principal”) who headed three schools for the Department, including the School.
5. Generally, the Regional Principal travels from his main office at another prison facility in a neighboring county, to the School about once per week.
6. The School is a three-room school which has a small staff, including one other teacher and a secretary who would visit the school infrequently.

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<sup>1</sup> References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number, if any.

7. For purposes of the Fair Labor Standards Act (“FLSA”), the Grievant is a classified and an exempt employee and is excluded from the overtime provisions of the FLSA. The Grievant is required pursuant to the Agency’s applicable written policy to work a 40-hour week and an 8-hour day, exclusive of lunch and other breaks. AE 7. The School schedule provides for 4 classes per day, Monday through Friday: first period is from 7:30 a.m. until 9:00 a.m.; second period is from 9:00 a.m. until 10:30 a.m.; third period is from 12:30 p.m. until 2:00 p.m.; and fourth is from 2:00 p.m. until 3:30 p.m.
8. Agency policy requires maintenance of an accurate log of the presence of the Department’s employees within the Facility to provide notification to the Department for safety procedures. AE 4. The stated purpose of the policy is “to ensure that [the Department’s] staff’s presence and time spent at a facility is properly accounted.” AE 4.
9. Policy 6-17 provides in part as follows:
  - C. Upon entering or exiting the facility, each [Department] employee is required to complete an entry on the log by:
    1. Writing the time when he/she enters or exits the facility,
    2. Printing his/her name, and
    3. Signing the form.

When completing the entry, the employee will fill out the first available, open line on the log sheet. The time recorded on the log is the official time the employee enters the facility.
  - D. Each [Department] employee is responsible for completing a new entry each time he/she enters or exits the facility. It will be presumed that the employee is not present at the facility if he/she has not completed an entry on this log.

AE 4.
10. The Grievant did not comply with such policy on entering and exiting the Facility by not fully signing the log in or out on two different days, March 12 and 26, 2007. The Grievant admits such offenses.

11. When the Principal received an inmate complaint that the Grievant was not attending the class, the Principal decided to look into the matter by examining the sign in and sign out logs for the Facility and the student attendance records submitted by the Grievant to the Department.
12. On January 22, 2007, the Grievant logged in at the Facility at 12:25 p.m. The Grievant also signed two student attendance periods showing her students present for the first two periods of the morning on January 22, 2007, before she ostensibly arrived. AE 2, 3, 9.
13. Similarly on March 28, 2007, the Grievant signed into the Facility at 11:50 a.m. but, again, signed two student attendance reports, marking students present, for the scheduled first and second period classes. AE 4, 5, 15.
14. During the Period, the Grievant also failed to submit four accurate leave reports to compensate the Commonwealth for leave which she took from her employment for hours not worked during her required 8-hour work day. On January 22, 2007, the Grievant did not claim an additional 2 hours of leave necessary to make up an 8-hour work day; on March 15, 2007, an absence of 1.5 hours was not reported; on March 26, 2007, the Grievant did not claim an additional 2.5 hours of leave required to make up an 8-hour work day; and on March 28, 2007, the Grievant did not claim an additional 2 hours of leave necessary to constitute an 8-hour work day.
15. At the request of the Principal, the Director conducted an investigation and issued a Report of Investigation in which the Director concluded that the case for 8 counts of falsification of state documents and records (4 concerning the student attendance reports and 4 concerning the Grievant's leave reports) were founded and also that 2 counts concerning the Grievant's failing to properly log in and out of the Facility were founded. AE 1.
16. Applicable state policy requires state employees to maintain their correct leave balances. See AE 1, Attachment 16.
17. When the discrepancies concerning her leave reports and her student attendance records were called to her attention by Management of the Department, the Grievant freely admitted her errors and offered to take whatever corrective action she could to rectify the situation. The Grievant also professed her regrets concerning her errors: "I am as upset with seeing the whole picture as I am with [the Principal] having to bring it to my attention." AE 1, Attachment 8b.
18. While he was guided by the Director and the Director's Report of Investigation, the ultimate decision concerning the appropriate corrective disciplinary action to be taken against the Grievant resided with the Principal.

19. Because of what the Agency determined were mitigating factors, including her long service without previous disciplinary infractions, recent medical problems discussed in more detail below and because “[Grievant] is a good teacher with good intentions” (AE 1), the Agency collapsed all offenses into a single Group III Written Notice with 10 work days’ suspension. AE 2.
20. The Agency admits that the alleged 8 falsification of state documents or reports offenses (the “Falsification Offenses”) are the extremely serious offenses which caused the Group III Written Notice to be issued.
21. The Agency concedes that the two asserted offenses concerning failure to properly sign in and sign out of the Facility at most constituted two Group I Written Notices. AE 1.
22. The hearing officer hereby decides that based on his lengthy, careful and painstaking observation of the Grievant’s demeanor throughout the entire hearing, the Grievant did not intend to defraud, deceive or mislead the Agency concerning the Falsification Offenses. Indeed, the Grievant was careless but such carelessness does not nearly rise to the level of reckless disregard for the truth.
23. The Principal made his decision concerning what discipline was warranted and appropriate under the circumstances on the foundation that the Grievant’s intent can be proven by the circumstantial evidence of the discrepancies.
24. The Grievant’s testimony is that the Principal believed that the Grievant did not have actual intent to mislead or deceive the Department concerning the 8 Falsification Offenses. The Grievant was asked by her attorney, “When you met with [the Principal], um, and he brought to your attention all of these discrepancies that had gone unaddressed for several months, did he state whether or not he felt that you had actually intended to falsify these documents?” The Grievant responded: “Well he did. Um, I said the same thing to [the Principal] that I said to [the Director]; I would never, ever intentionally submit a false report, fail to submit a leave slip. Um, I am not a dishonest person. None of this was intentional and that is what I told [the Principal], what I told [the Director]. This was not intentional and [the Principal] replied to me: “I tend to believe that.” Tape 4, Side B. This testimony, presented in the Grievant’s case-in-chief, was not impeached or rebutted.
25. When asked on cross-examination whether the Principal thought the Grievant was a dishonest person, the Principal answered: “I think the evidence points that way – yes.” Tape 1, Side B.
26. The Principal was asked the following subsequent question on cross-examination: “Other than the discrepancies in [the Grievant’s] leave and in the sign-in and sign-out log book, do you have any proof that [the Grievant] has intentionally filled out

documents to deceive you or anyone else at the Agency?” The Principal responded: “Uh, no, I do not.” Tape 1, Side B and Tape 2, Side A.

27. The Principal admitted that it was possible the falsifications could have been a mistake, adding that such mistakes would be “terribly careless.” Tape 2, Side A.
28. Contrary to assertions in the Report of Investigation (AE 1), on each occasion which the Grievant left the Facility early, she got prior permission from an appropriate person to do so. Indeed, at the hearing, the Agency conceded this fact and the evidence was unequivocal that she complied with all policies and procedures to ask for time off her job.
29. The Principal had on at least one occasion seen that the Grievant had not signed in at the Facility and had instructed her to sign the log book after the fact.
30. After reviewing her Group III Written Notice, the Grievant examined the Facility’s log book and her unrefuted testimony was that she discovered numerous instances where individuals, including on one occasion the Principal, failed to properly sign-in and sign-out in the log book. Additionally, in her unrefuted testimony, the Grievant stated that over the Period she had worked an aggregate 20 hours over what would have been the applicable required aggregate for the Period pursuant to AE 4. Of course, as discussed in paragraph 7 above, the Grievant is a classified and an exempt employee and this fact in no way diminishes or lessens her failures concerning the alleged Falsification Offenses. However, the hearing officer does find that while not in the least diminishing the seriousness of her failures, it does speak to her intent and her “good intentions,” as described by the Department in AE 1.
31. During the latter part of 2006 and during the Period, the Grievant was suffering from several medical illnesses of which the Department was aware. The Grievant was experiencing severe knee pain and had scheduled knee surgery for early July 2007. The knee pain and the side effects of these numerous health problems compounded during the Period, and while not excusing, contributed to the Grievant being less attentive to her ministerial duties, including her record-keeping and reporting duties, than she should have been. GE 16 and 3; AE 1.
32. The testimony of the Grievant and the two character witnesses called by the Grievant was both credible and consistent on the material issues before the hearing officer. The demeanor of such witnesses at the hearing was candid and forthright.

## APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act*, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. 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 to 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).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent 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 employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the "SOC"). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Pursuant to the SOC, the Grievant's infractions, if proven, can clearly constitute Group I and Group III offenses, respectively, as asserted by the Department.

*Group I* offenses include, but are not limited to:

Abuse of state time, including, for example, unauthorized time away from the work area, use of state time for personal business, and abuse of sick leave.



*Group III .*

These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.

*Group III* offenses include, but are not limited to:

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

SOC Policy No. 1.60.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

"Falsifying" is not defined by the SOC, but for purposes of this proceeding, the hearing officer interprets this provision to require proof of an intent to falsify by the employee. This interpretation is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6<sup>th</sup> Edition) which provides in part 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." Accordingly, the word "falsify" means being intentionally or knowingly untrue.

It is concerning this requisite element of intent that the hearing officer decides that the Department has failed to sustain its burden of proof concerning the Falsification Offenses. In support of his finding that the Grievant was credible concerning the major issues to be decided by him based on the Grievant's demeanor at the hearing, the hearing officer is compelled to point out that the hearing officer found the views or opinions of the Grievant concerning progressive discipline to be taken by Management pursuant to the SOC to be totally misguided and unreasonable. The Grievant was questioned about this subject because, amongst other things, she had some time ago been a supervisor in a different department. While the hearing officer found her views and opinions concerning how discipline should be administered by Management to be very naïve, misguided and unreasonable, the hearing officer did believe they were sincerely held by the Grievant. Fortunately, the Grievant is no longer a supervisor administering discipline for the Commonwealth and because such views were sincerely held and were not materially at issue in this proceeding, after careful consideration, such opinions by the Grievant did not change the hearing officer's finding that the Grievant was credible, based on her demeanor at the hearing, concerning the crucial issue that she did not intend to deceive or defraud the Commonwealth and its taxpayers concerning the discrepancies described in detail above.

The Department has sustained its burden of proof concerning the two remaining Group I Offenses but because of the mitigating factors identified herein and in the Department's own Report of Investigation, including the Grievant's unrefuted analysis of the log book over the Period, the hearing officer hereby decides to reduce the Agency's disciplinary action to a single

Group I Written Notice, as moved for in the alternative by the Grievant, by counsel, at the hearing.

### DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group I Written Notice. The Agency is directed to provide the Grievant with **back pay** for the period of suspension, less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue.

### APPEAL RIGHTS

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 is 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 the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
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 the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

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 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 days; the 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.

ENTER:

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John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).