

Issues: Group III Written Notice (falsifying records) and Termination; Hearing Date: 06/02/08; Decision Issued: 06/06/08; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8841; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 8841

Hearing Date: June 2, 2008
Decision Issued: June 6, 2008

PROCEDURAL HISTORY

On August 30, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal based on “falsifying a security post logbook.” 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 she requested a hearing. On April 10, 2008, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution (“EDR”). On June 2, 2008, the grievance hearing was held at the Agency’s regional office.¹

At the hearing, the parties made the hearing officer aware of a second Group III Written Notice (for “gross negligence” related to an inmate’s attempted escape), issued the same date (August 30, 2007), that also carried termination as the disciplinary action. The parties indicated that the Grievant had also grieved this second Written Notice. Presented with this information, the hearing officer carefully examined the appointment paperwork and found no reference to the second Group III Written Notice for gross negligence. Following the appointment from EDR, the Agency separately provided the hearing officer with copies of the grievance paperwork that included only the Group III Written Notice for falsifying a security post logbook. Before beginning the hearing, the hearing officer telephoned EDR to check on whether there was a second Group III Written Notice as part of Case No. 8841. Information from EDR was that it had no record of a second Written Notice and only the grievance for falsifying the logbook had been referred to the hearing officer. The hearing officer has no authority to expand his appointment to hear and determine a grievance not referred to him by EDR. The procedural status is unknown regarding the grievance of the Group III Written Notice for gross negligence, but both parties at the hearing believed the Grievant had grieved it.

¹ The hearing was scheduled more than once and was continued, for good cause shown, on motions of the parties to the grievance.

APPEARANCES

Grievant
Two witness for Grievant (including Grievant)
Advocate for Agency
Representative for Agency
Three witnesses for Agency (including Representative)

ISSUES

Did Grievant's conduct warrant disciplinary action under the Standards of Conduct and Agency policy? If so, what was the appropriate level of disciplinary action for the conduct at issue?

The Grievant requests rescission of the Group III Written Notice, reinstatement to her position, back pay and benefits. Alternatively, the Grievant seeks a reduction in the level of discipline.

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.

APPLICABLE LAW AND OPINION

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).

Code § 2.2-3000 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. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.²

Department of Corrections (“DOC”) Operating Procedure 135.1(XII) defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. Group III offenses specifically include, “falsifying any records, including but not limited to vouchers, reports, insurance claims, time records, leave records, or other official state documents.

Falsification

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 for just over one year prior to the date of the offense, August 7, 2007. Other than the other Group III Written Notice noted above, no evidence of prior disciplinary action against Grievant was introduced during the hearing. Other than noted, the Grievant testified there were no other prior Group Notices.

On August 7, 2007, for the 0130 inmate count, the Grievant recorded the expected count in the official logbook before she received the count from the officers conducting the inmate count. In conducting the count, the officers discovered a missing inmate, and the search for the missing inmate began immediately. The Grievant testified that there was so much activity in the control booth that she did not have an opportunity to correct the count entry to reflect the missing inmate. Thus, the logbook, an official Agency document used as potential evidence and as its authoritative record, had a falsified count entry.

The Grievant admitted she “anticipated” the correct count and simply wrote it in the logbook before receiving the actual count from the officers conducting the inmate count. The Grievant testified that she had no intent to misrepresent or fabricate the state record. The Grievant also frankly conceded that this was not the first time she had anticipated and recorded the correct inmate count before the count actually was completed. The Grievant testified that she believed the inmates had all been locked in since the prior inmate count earlier in the evening.

² § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

The Agency's witnesses testified that the Grievant was trained on the proper procedure for recording the inmate count, and that pre-entering the count is prohibited; logbook entries are always to be recorded after the event; and that the logbook is a state document that must be accurate as it is the official record and is often the authoritative source of evidence. The Grievant did not challenge the pertinent facts. The assistant warden testified that the Grievant began her employment in July 2006, and that her one-year probationary period had just ended when this offense occurred. Thus, the Grievant did not have tenure in her favor for mitigation. The assistant warden also testified that he considered mitigation but found there were not mitigating circumstances that weighed against the normal discipline of removal for a Group III offense. The assistant warden testified that the Grievant's actions were directly implicated in the documentation of an inmate escape attempt, and that the official record of inmate count was inaccurate having been recorded before completed was an aggravating factor.

The Grievant's witness, now a retired officer, testified via telephone that the Grievant worked well together and that she was conscientious and careful.

"Falsifying" is not defined by DOC Procedure 135.1, but the Hearing Officer interprets this provision to require proof of 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*.

Once the Grievant recorded the inmate count, it was knowingly false because it had not yet occurred. The entry was not a mistaken entry or a scrivener's error. The count was known by the Grievant to have not yet occurred. Regardless of whether this anticipatory count entry was simply sloppy on the Grievant's part, it was still an intentional act, known at the time the record was entered that it was false. While no personal gain or malevolent intent was shown on the part of the Grievant, and none is apparent, I find that lack of a malevolent intent does not defeat the falsification. The anticipatory count entry is a serious matter, recording a false count on an important official record, even without the intention to mislead. The accuracy of the inmate count in a corrections facility is very important.

The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice. Termination is permitted upon issuance of a Group III Written Notice.

Mitigation

The agency has proved (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* (“Hearing Rules”) § VI.B.1 (alteration in original).

Termination is actually the normal disciplinary action for Group III Written Notices unless mitigation weighs in favor of a reduction of discipline. Under the *Rules for Conducting Grievance Hearings*, an employee’s length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action. The Grievant’s explanation of the anticipatory count entry does not excuse it. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution.” Va. Code § 2.2-3005(C)(6). 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.

Under the EDR’s Hearing Rules, the hearing officer is not a “super-personnel officer.” Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In this case, the Agency’s actions in finding a falsification of a very important Agency document are consistent with law and policy. In light of the applicable standards, the Hearing Officer finds no evidence of mitigating circumstances to reduce the disciplinary action.

DECISION

For the reasons stated herein, I uphold the Agency’s Group III Written Notice with termination.

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. 14th Street, 12th 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 Street, Suite 400, Richmond, VA 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 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 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer