

Issues: Group II Written Notice (failure to follow policy), Group III Written Notice (falsifying records), and Termination; Hearing Date: 04/23/09; Decision Issued: 05/07/09; Agency: DOC; AHO: Jane E. Schroeder, Esq.; Case No. 9061; Outcome: Full Relief; **Administrative Review: EDR Ruling Request received 05/21/09; EDR Ruling #2009-2325 issued 08/04/09; Outcome: AHO's decision affirmed. Addendum Decision addressing Attorney's Fees issued 05/27/09.**

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

**DECISION OF HEARING OFFICER**

In the matter of Case Number 9061

Hearing Date: April 23, 2009

Decision Issued: May 7, 2009

**PROCEDURAL HISTORY**

At the time this case was initiated by the Grievant, the Grievant was employed by the agency as a correctional officer. On December 8, 2008, the agency issued three Written Notices to the Grievant: A Group I Written Notice was issued for abuse of state time. A Group II Written Notice was issued for failure to comply with procedure 5-45.6.B. A Group III Written Notice was issued for falsifying a record. The Grievant initiated the Employee Grievance Procedure on December 29, 2008 to dispute the Group Two and Group Three Written Notices. The grievance was not resolved during the management resolution steps and the grievance was subsequently qualified for hearing on March 11, 2009. On April 2, 2009, the hearing officer was assigned to hear the case.

Two telephonic pre-hearing conference were held. The first telephonic pre-hearing conference was held on April 8, 2009. The hearing date was set for April 23, 2009. A second telephonic pre-hearing conference was held on April 15, 2009. At that time, newly retained counsel for the Grievant requested more time to prepare for the hearing. This request was denied. The hearing was held on April 23, 2009. Eight witnesses testified. Each party's entire exhibit notebooks were entered into evidence without objection. The Agency's exhibits were identified as Exhibits A-Q. The Grievant's exhibits were identified as Exhibits 1-10.

**APPEARANCES**

Grievant

Counsel for Grievant

Agency Representative

Witnesses for Agency:

Warden

Assistant Warden

Special Investigator for the agency

Major, Correctional Officer

Witnesses for Grievant:

Human Resources Administrator

Human Resources Assistant  
Lieutenant, Correctional Officer  
Grievant

### **ISSUES**

Whether the Group II Written Notice given on December 3, 2008 for failure to comply with procedure 5-45.6.B. should be affirmed or rescinded. The Agency alleges that the Grievant has failed to report 2/11/07 warrant issued for worthless check in S\*\*\*\* County as required by policy.

Whether the Group III Written Notice given on December 3, 2008 for falsifying any record should be affirmed or rescinded. The Agency alleges that the Grievant submitted a written statement to a Special Agent which contained a material false statement.

### **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 sought to be proved is more probable than not. (Grievance Procedure Manual)

### **FINDINGS OF FACT**

The Grievant worked for the agency and for other agencies as a correctional officer at several different times in the past. In Spring, 2006 he was hired as a correctional officer at the correctional center in this dispute. He remained employed there until he was terminated on December 3, 2008, as a result of the offense named in the Group III Written Notice.

An internal investigation of the Grievant was initiated by a former warden in January, 2008. The report from this investigation was submitted to the present warden in June, 2008<sup>1</sup>. The report included many incidents of violations of standards of conduct, and misdemeanor and felony charges against the Grievant. The Warden testified that the information he relied on for the two Written Notices was based entirely on the investigation report. Although there were several founded violations of policies in the investigation report, the Warden only cited the two incidents in the two written notices which are the subject of this grievance. Both of the incidents occurred prior to the Warden's tenure. He made no independent investigation, and spoke to no witnesses regarding the facts in either Written Notice. The Warden took no action on the report until December 3, 2008 when he issued the Group II and III Written Notices to the Grievant for two specific incidents from

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<sup>1</sup>Agency Exhibit B

the report. The former warden and former assistant warden who were at the correctional center when the two incidents occurred did not testify.

### **Group II Written Notice**

On February 11, 2007, the Grievant was arrested on a Class 1 Misdemeanor in S\*\*\*\* County for writing two checks with insufficient funds in the checking account.

The agency Procedures Manual in effect at that time includes a procedure section 5-45.6. Notifications. Subsection “B” states:

“Employees charged with a criminal offense either on or off the job, or a moving traffic violation which occurs on the job or in a state vehicle, shall inform their organizational unit head immediately if received during normal working hours. The organizational unit head shall immediately notify the next management level (Regional Director, Administrator or Deputy Director). The Inspector General’s Office will be informed if the criminal offense is a felony charge, a result of actions taken on state property, or in the line of duty.”<sup>2</sup>

According to the testimony of the warden, the organizational unit head is the warden, and the employee must inform the warden directly. Because the warden believed that the Grievant had not notified the warden immediately, the warden issued a Group II Written Notice on December 3, 2008, for “failure to comply with procedure 5-45.6.B: Inspector General investigation #2800056COF documents that you did not report 2/11/07 warrant issued for worthless check in S\*\*\*\* County as required by policy.”<sup>3</sup>

The present warden has been the warden in this correctional center since March 25, 2008. The prior warden, who was warden in February 2007, did not testify. The Grievant in a written statement and in his testimony stated that he informed his supervisor, the Major on February 11, 2007. When the Major was asked in February of 2008 whether he had been informed of the bad check charge by the Grievant one year earlier, he signed a written statement that he was never informed. When testifying at the hearing in April, 2009, the Major testified that the Grievant had reported a bad check charge to him, but he did not recall the date. He remembered the Grievant being arrested for a bad check charge in the warden’s office on one occasion.

The Major further testified that under the policy, the employees under him would report offenses to him and he would write a report to the warden, after getting the court paperwork. He testified that this happen often. He testified that, when an employee reported offenses to him, he did not tell the employees that they needed to tell the warden directly. Instead the Major would inform

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<sup>2</sup>Agency Exhibit G

<sup>3</sup>Agency Exhibit E

the Warden. The Major testified that he believed this followed the procedure correctly.

Another correctional officer also testified that he understood the policy was followed when his staff reported tickets or other crimes to him and he reported it up the chain of command.

The present Assistant Warden (“AW”) testified that he became AW of this correctional center on July 25, 2007. He testified that on September 28, 2007, the Grievant came to his office to report some bad check charges. The same day the AW was informed by a deputy in S\*\*\*\* County of the bad check charges, and later that day, the deputy informed the AW that the checks had been paid. The AW did not tell the Grievant to inform the warden, nor did the AW inform the warden about the bad checks. In January 2008, the AW wrote a letter to the then warden to tell the warden about the bad checks in September 28, 2007.<sup>4</sup> The AW testified that he wrote the letter because the bad check charges had not been paid, as he previously thought, but were being pursued by the Commonwealth Attorney. The Grievant then spoke to the former warden about the bad check charge and other issues. This conversation resulted in an Internal Affairs investigation of the Grievant which was initiated by the former warden in January 2008.<sup>5</sup>

The Special Agent who investigated the Grievant conducted interviews with the Grievant, and several correctional officers, including the major, the now assistant warden who testified at this hearing and two other correctional officers who did not testify. No interviews were conducted of the former warden or the former assistant warden.

In the interview statement of the Grievant, he outlines several bad check charges and other legal charges he received while employed as a correctional officer in the correctional center. He outlines in his statement to whom he notified of these charges. In one case he notified his direct supervisor, who is now the assistant warden. In another case, he notified the then assistant warden. In another case he notified to a captain. In still another case he directly notified the then warden. At no time was he ask to submit this notification in writing.<sup>6</sup>

In February 2008, as a direct result of the notification problems in this case, a new policy was initiated by the then warden regarding the notification of employees of charges or arrests. The new policy requires the employee to notify their supervisor and the supervisor is to inform the warden. A new form was implemented which the employee was instructed to complete to facilitate notification.<sup>7</sup> This new policy was in effect when the present warden started in his position in March, 2008.

### **Group III Written Notice**

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<sup>4</sup>Agency Exhibit Q

<sup>5</sup>Agency Exhibit B, Exhibit C, Attachment A

<sup>6</sup>Agency Exhibit C, Attachment B

<sup>7</sup>Grievant Exhibit 10

On August 30, 2007, the Grievant received a certified letter from \*\*\*\*\* Auto Parts at an auto repair business owned by the Grievant. When he was asked in February, 2008, if he had signed for that letter, he said that his son, who on occasion would sign for letters for the Grievant must have signed for it. On February 13, 2008, the Grievant signed a statement prepared by the Special Agent which included the statement, “. . .I was sorting through my mail, which I keep on top of my refridgerator (sic). I noticed a certified letter addressed to me but that had been signed for by my son.”<sup>8</sup> After signing the statement, the Special Agent showed the Grievant a copy of the certified letter from the post office. The Grievant identified the signature as his own, and stated that it was his signature. He acknowledged that he must have signed for the letter when it was received six months earlier.

On December 2, 2008, the warden issued a Group III Written Notice to the Grievant for “falsifying any record: you submitted a written statement to SIU Special Agent []. This statement contained a material false statement. This fact was reported in inspector general investigation 2800056COF.”<sup>9</sup>

The warden testified that the record to which he was referring was the investigation interview statement prepared by the special agent and signed by the Grievant. The false statement was the statement that Grievant’s son had signed for the letter, when it discovered in the investigation that the Grievant had signed for the letter. When asked if he thought the Grievant may have forgotten who had signed for the letter six months prior, the Warden testified that it was not credible that a person could receive a notice of a bad check and forget that he had signed for it versus it being placed on the refrigerator by the son. The Warden considered this false statement a breach of public trust. As to the Group II Written Notice, the warden relied entirely on the Major’s statement in the investigation report to determine that the Grievant had not reported the charges.

### **APPLICABLE LAW AND OPINION**

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions 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 government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

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<sup>8</sup>Agency Exhibit B, Attachment B

<sup>9</sup>Agency Exhibit H

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. 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 that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

**Policy Number 1.60: Standards of Conduct.**

Policy 1.60 provides a set of rules governing the professional 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.

Offenses are grouped by levels, from Group I to Group II.. Group I Offenses generally includes offenses that have a relatively minor impact on agency business operations but still require management intervention. Group II Offenses include acts of misconduct of a more serious nature that significantly impact agency operations. Group III Offenses generally include acts of misconduct of a most serious nature that severely impact agency operations.

The warden issued a Group II Written Notice to the Grievant for failure to comply with procedure 5-45.6.B. The Agency alleges that the Grievant has failed to report 2/11/07 warrant issued for worthless check in S\*\*\*\* County to the organizational unit head as required by policy.

Although the Warden identified the “organizational unit head” as the warden, he was not the warden when the Grievant had allegedly not notified the organizational unit head of the bad check charge that is the basis for the Group II Written Notice. It is clear from the exhibits and the testimony of the Agency’s own witnesses that the correctional officers at the time of the offense did not think that organizational unit head was the warden, but the employee’s supervisor.

The only statement to the contrary was the major statement when asked one year after the alleged offense. The Major’s statement that he was not notified of this one incident could be very self-serving if he knew of the charge and had not turned the information over to the then warden. The Warden testified that he relied entirely on the Major’s statement a year later to decide that the Grievant had not reported the charges.

The evidence clearly shows that the Grievant did report charges to his supervisor. The policy regarding notification of charges was changed one month after the investigation in this case was

begun to include written notification. It is clear from the evidence that supervisors were notified of charges and the supervisors did not always inform the warden of the charges. I find that the evidence of the one statement by a supervisor made one year after the incident that this was charge was not reported is not sufficient evidence to sustain the Group II Written Notice.

The warden issued a Group III Written Notice to the Grievant for falsifying any record. The Agency alleges that the Grievant submitted a written statement to a Special Agent which contained a material false statement.

Under the Group III Offenses listed in the Standards of Conduct is V.B.3.b., “Falsifying any records, including, but not limited to vouchers, reports, insurance claims, time records, leave records, other official state documents.”<sup>10</sup> In this case the false statement was that the Grievant had signed a statement in January, 2008, that his son had signed for a letter that the Grievant had received at his auto shop business in August, 2007.

This statement was proven to be inaccurate. In fact, the Grievant had signed for the letter. When he was shown the post office receipt in January, 2008, he agreed that his signature was on the receipt and he must have signed for the letter. But is an inaccurate statement made about who signed for a letter six months prior a *false* statement?

“Falsify: in the Black’s Law Dictionary is defined as “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.”<sup>11</sup>

A false statement, in the opinion of this hearing officer, must include the *intent* to falsify in order to be included under the Group III Offenses, to justify termination.

In this case, the Grievant testified that he was mistaken when he stated that he had signed for a letter. Given that he was not asked about the letter until six months later, that his son did often sign for letters for him, and that he acknowledge his signature when shown the receipt, I find it is more likely than not that he made a mistake, and did not deliberately give a false statement.

## **DECISION**

The Agency has not sustained its burden of proof for the Group II and Group III Written Notices. The Group II and Group III Written Notices given to the Grievant on December 3, 2008 by the agency are hereby rescinded. The Agency is directed to reinstate the Grievant to his former position or to an objectively similar position in another facility within a reasonable distance, to award the Grievant back pay minus any interim earnings or unemployment benefits, and to award

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<sup>10</sup>Agency I, page 7

<sup>11</sup>Black’s Law Dictionary, 6<sup>th</sup> Edition



the Grievant attorney's fees.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject 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 office to revise the decision to conform it to written policy. Requests should be made 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, 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.

May 7, 2009

Date

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Jane E. Schroeder, Hearing Officer

cc: Agency Representative  
Employee, by Counsel

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

**DIVISION OF HEARINGS**

**ADDENDUM TO DECISION OF HEARING OFFICER**

In the matter of: Case # 9061

Original Decision Issued: May 7, 2009  
Addendum Issued: May 27, 2009

**APPLICABLE LAW**

Under the Virginia Grievance Procedure, a hearing officer may order appropriate remedies in a decision after a hearing. In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. The agency from which the grievance arises shall bear the costs for the grievant's attorneys' fees that the hearing officer may award.<sup>1</sup>

**FINDINGS AND DISCUSSION**

The decision in the case rescinded the Group II and Group III Written Notices given to the Grievant. The Agency was directed to reinstate the Grievant to his former position or to an objectively similar position. The hearing officer finds that the Grievant substantially prevailed on the merits of the grievance, and the Grievant is entitled to recover attorneys' fees. The hearing officer further finds that there are no special circumstances that would make an award of attorneys' fees unjust.

Grievant's attorney submitted a petition for attorneys' fees on May 20, 2009. Attached were two affidavits delineating the attorneys' fees for 46.10 hours of attorney time, which I find are reasonable for this case.

**AWARD**

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<sup>1</sup>Code of Virginia §2.2-3005.1 A,B&C.

The Grievant is awarded attorneys' fees for 46.10 hours at \$131.00 per hour for a total of \$6,039.10.

### **APPEAL RIGHTS**

Within 10 calendar days of the issuance of this addendum, either party may petition the EDR Director for a decision solely addressing whether this fees addendum complies with the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by the EDR, the hearing officer has issued a revised fees addendum, the original decision becomes "final" as described in §7.2(d) and may be appealed to the Circuit Court in accordance with §7.3(a). The fees addendum shall be considered part of the final decision.

May 27, 2009

Date

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Jane E. Schroeder, Hearing Officer

cc: Agency Representative  
Employee, by Counsel  
EDR