

Issues: Group III Written Notice (falsifying records) and Termination; Hearing Date: 06/23/09; Decision Issued: 06/24/09; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9106; Outcome: No Relief – Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9106

Hearing Date: June 23, 2009
Decision Issued: June 24, 2009

PROCEDURAL HISTORY

On February 23, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of records.

On March 19, 2009, 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 May 27, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 23, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
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 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.

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 Juvenile Justice employed Grievant as a Juvenile Corrections Officer at one of its Facilities until her removal effective February 23, 2009. Her duties included providing supervision of residents.

On February 18, 2009, Grievant was responsible for supervising residents in a housing unit with several cells. Each cell was to hold one resident. At approximately 9:15 p.m., it was time for the unit to be in lockdown where all of the residents are locked in their cells for the night. Grievant opened the doors to the cells to enable the residents to enter their rooms. She did not properly close each of the doors and ensure they were secure. She failed to observe that each resident entered the cell to which the resident was assigned and expected to sleep.

Resident N was classified as SIB. That means he was likely to engage in self-injurious behavior. Because of Resident N's SIB status, Grievant was expected to conduct cell checks every ten minutes and record her observations. Resident N was assigned to Cell 12. When Resident N was supposed to enter his cell on February 18, 2009 for lockdown, he instead went to Cell 4 where Resident H resided. Resident H was a sex offender and was supposed to be monitored to make sure he did not prey on other residents.

Grievant had been trained and understood that the proper way to conduct a cell check was to look inside the cell window and look at the resident and observe the resident's flesh and that the resident was breathing.

Grievant was responsible for filling out a Confinement Monitoring Form for Resident N to document her ten minute checks. Grievant wrote on the Form that at 9:30 p.m. she observed Resident N standing at the door of his cell. She wrote that Resident N was on his bunk at 9:40 p.m. She wrote that Resident N was on his bunk at 9:50 p.m. Resident N was not in his cell at the times Grievant wrote he was in his cell. Resident N was in another cell. Grievant left the housing unit at 9:51 p.m.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."¹ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Falsification of records is a Group III offense.² "Falsifying" is not defined by DHRM Policy 1.60, 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*.

Confinement Monitoring Forms are official records of the Agency. Grievant knew that in order to conduct a cell check she was supposed to look into the cell and observe the resident's flesh and that he was breathing. On February 18, 2009, Grievant wrote in the Confinement Monitoring Form for Resident N that she had observed him in his cell.

¹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

² See Attachment A, DHRM Policy 1.60.

Resident N was not in his cell and Grievant could not have observed him standing or on his bunk as she wrote. Grievant knew or should have known that her entries regarding Resident N were false. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may remove Grievant from employment.

Grievant contends the Agency's discipline was too harsh. Absent mitigating circumstances, the harshness of the discipline is not in itself a basis to reduce the level of discipline once the Agency has established its prima facie case.

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...."³ 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 other officers made false cell check entries but were not disciplined. The Agency discovered that Resident N was in another resident's cell at 12:15 a.m. According to Grievant, these other officers would have made false entries in Resident N's Confinement Monitoring Form.

Insufficient facts were presented to establish whether other officers falsified documents as opposed to merely failing to follow policy. In Grievant's case, a video showed that Grievant did not approach the cell door of Resident N until approximately 9:46:50. Grievant's 9:30 p.m. and 9:40 p.m. entries were made without her even approaching the door and looking inside. Resident N had placed his clothing on his bunk and covered his clothing with a blanket in order to make it appear that someone was sleeping on the bunk. If the other two officers actually looked inside Resident N's cell door they could have believed that Resident N was asleep on his bunk. Their entries that Resident N "appears asleep" and "resting" would not be a falsification of documentation because based on the observations they actually believed Resident N was asleep. Grievant did not look inside Resident N's door. She was not misled by Resident N's bundled clothing. In addition, Resident N did not do anything that would make it appear he was standing in his cell and then moved to his bunk. Grievant made up this information without any factual basis for doing so. Grievant has not established

³ *Va. Code § 2.2-3005.*

that the Agency inconsistently disciplined its employees. 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 removal 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:

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
600 East Main St. STE 301
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.⁴

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.