

Issues: Group III Written Notice (falsifying documents), Suspension, Demotion & Transfer; Hearing Date: 07/07/08; Decision Issued: 07/08/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9112; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9112**

Hearing Date: July 7, 2009  
Decision Issued: July 8, 2009

**PROCEDURAL HISTORY**

On February 10, 2009, Grievant was issued a Group III Written Notice of disciplinary action with seven day suspension, transfer, demotion, and disciplinary pay reduction for misfeasance, falsification of records, and failure to follow a supervisor's instructions and comply with written policy.

On March 12, 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 he requested a hearing. On June 8, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 7, 2009, a hearing was held at the Agency's regional office. Grievant did not appear at the hearing.<sup>1</sup>

**APPEARANCES**

Agency Party Designee  
Agency Advocates

**ISSUES**

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<sup>1</sup> The Hearing Officer spoke with Grievant the day before the hearing and Grievant indicated was willing to go forward with the hearing and would attend.

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 Corrections employed Grievant as a Corrections Sergeant until his demotion to Corrections Officer effective February 28, 2009. Grievant has been employed by the Agency for approximately 15 years. No evidence of prior active disciplinary action was introduced during the hearing.

On March 19, 2008, Sergeant D and Grievant were to escort the Inmate from his cell in the Special Management Unit to the medical unit for a scheduled appointment. After putting the Inmate in hand and leg restraints, Sergeant D became aggressive with the Inmate. When the Inmate questioned Sergeant D about his unnecessary actions, Sergeant D refused to take the Inmate to his medical appointment. Sergeant D reported falsely that it was the Inmate who did not wish to go to the medical appointment. Sergeant D then aggressively led the Inmate back into his cell. Sergeant D pushed the Inmate into his cell while the Inmate was still wearing restraints. The Inmate fell and suffered a bruise on his eye as he fell against the wall. Sergeant D and Grievant entered the cell and removed the Inmate's leg restraints. The Inmate resisted removal of his hand restraints so Sergeant D and Grievant let the Inmate remain in hand restraints for approximately 2.5 hours until another officer removed the hand restraints. Later that night, the Inmate was escorted to the medical unit for treatment for his injuries. The Inmate complained to the Agency and an investigation began.

Grievant wrote an incident report stating that the Inmate refused medical treatment. Grievant later admitted to the Investigator that his statement in the incident report was not correct. Grievant wrote that the Inmate was disruptive and fighting, but later admitted to the Investigator that the Inmate was not disruptive and fighting. Grievant admitted to the Investigator that he observed Sergeant D being unnecessarily aggressive with the Inmate.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”<sup>2</sup> Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”<sup>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</sup>

Falsifying official State documents is a Group III offense.<sup>5</sup> Incident reports are official State documents maintained and used by the Agency in its daily operations. Grievant falsely wrote on an incident report that the Inmate refused to go to the medical unit and that the Inmate was disruptive and fighting. Grievant falsified his incident reports thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may remove an employee. In lieu of removal, the Agency may suspend, demote, transfer and impose a disciplinary pay reduction. In this case, the Agency suspended Grievant for seven workdays, demoted him with a disciplinary pay reduction, and transferred him. These actions are authorized by the Standards of Conduct and must be upheld.

*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....”<sup>6</sup> 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

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>5</sup> See Department of Corrections Policy 135.1(XII)(B)(2).

<sup>6</sup> *Va. Code § 2.2-3005.*

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. In light of this standard, 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 suspension, demotion, disciplinary salary action, and transfer 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>7</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.