

Issues: Group III Written Notice (falsifying documents), Group III Written Notice (abusing an inmate) and Suspension; Hearing Date: 09/22/09; Decision Issued: 10/02/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9169; Outcome: Partial Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9169**

Hearing Date: September 22, 2009  
Decision Issued: October 2, 2009

**PROCEDURAL HISTORY**

On April 21, 2009, Grievant was issued a Group III Written Notice of disciplinary action with a ten workday suspension for physical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of offenders. Grievant was also issued a Group III Written Notice of disciplinary action with a ten workday suspension for falsifying records.

On May 20, 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 September 2, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 22, 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 Notices?

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 employs Grievant as a Corrections Officer Senior at one of its Facilities. The purpose of his position is:

To provide security over inmates at the institution and while in transport. Supervises their daily activities, and observes and records their behavior and movement to ensure their safe and secure confinement.<sup>1</sup>

No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On November 12, 2008, Grievant was in the chow hall observing inmates. He looked through a window and observed the Inmate approximately 40 feet away leaving the H-1 basement. The Inmate looked and stared directly at Grievant and then used his hand to form the shape of a gun. The Inmate moved his hand upward and downward slightly as if he were shooting a gun towards the ground. Grievant observed the Inmate's mouth and the Inmate appeared to be saying "pow, pow, pow". Grievant interpreted the Inmate's behavior as a threat to shoot Grievant.

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<sup>1</sup> Agency Exhibit 4.

Grievant walked outside of the chow hall and called the Inmate towards Grievant. The Inmate refused and said for Grievant to come to the Inmate. Grievant used his radio to call an officer at the segregation unit and asked if a cell was available. Grievant wanted to communicate to the Inmate that the Inmate was at risk of being put in the segregation unit. The Inmate observed Grievant calling on the radio and approached Grievant. The Inmate said "I'm not scared of you [Grievant] because you're big." Grievant began to tell the Inmate that his actions were inappropriate. The Inmate became uncooperative as if he was not listening to what Grievant was saying. Grievant attempted to grab the Inmate's arm to escort him to the segregation unit but the Inmate pulled his arm away. Two other officers joined Grievant as they attempted to put the Inmate in handcuffs. Grievant got behind the Inmate and had the back of the Inmate's head against Grievant's chest. Grievant used one hand to hold the Grievant's body while he used the other arm to push against the Inmate's chest. Grievant's fist was higher than his elbow so that his arm was angled towards the Inmate's neck and head. The Agency described Grievant's hold as a "choke hold" but the evidence suggests that Grievant was not actually choking the Inmate by cutting off his air intake. As Grievant was attempting to hold the Inmate, the Inmate continued to move abruptly in order to escape from Grievant and avoid being handcuffed by the other two officers. Eventually, handcuffs were placed on the Inmate and he was put into a segregation unit cell. He later complained about injuries and was taken to the hospital. He was diagnosed as having a cervical sprain and that the muscles and ligaments in his neck had been stretched.

Grievant wrote an incident report stating, in part:

On 11/12/08 at approximately 1245 hours, I [Grievant] was observing chow and observed [the Inmate] crossing the yard coming from H-1 basement door. When [the Inmate] observed that I was looking at him, he began to make a motion as if he had a gun he would be shooting me. This gesture was clearly done on my behalf. \*\*\*

When Grievant was interviewed by the Investigator on November 21, 2008, Grievant told the Investigator the Inmate "was pointing towards the ground saying, 'pow, pow, pow'".<sup>2</sup>

## **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>3</sup> Group II offenses "include acts and behavior that are more severe in

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<sup>2</sup> Agency Exhibit 3.

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

nature and are such that an accumulation of two Group II offenses normally should warrant removal.”<sup>4</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>5</sup>

Group III offenses include:

Falsifying any records, including but limited to all work and administrative related documents generated in the regular and ordinary course of business, such as court sheets, vouchers, reports, insurance claims, time records, leave records, and other official state documents.<sup>6</sup>

Incident reports are official state documents that may not be falsified. “Falsifying” is not defined by DOC Operating Procedure 135.1, 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 a Group III Written Notice. This interpretation is less rigorous but is consistent with the definition of “Falsify” found in Blacks Law Dictionary (6<sup>th</sup> 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*.

“[P]hysical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of offenders” is a Group III offense.<sup>7</sup>

The Agency contends Grievant falsified his incident report because he led the Agency to believe that the Inmate was pointing his “gun” at Grievant instead of pointing it down towards the ground. The Agency argues that because the Inmate was pointing his finger downward and not directly at Grievant, the Inmate’s gesture was not sufficiently offensive to justify Grievant confronting the Inmate. Grievant argues that he intended to convey in the incident report that the Inmate was suggesting he would shoot Grievant. The Inmate did this by staring at Grievant while gesturing with his hand and saying pow pow pow. When Grievant spoke with the Investigator he was able to clarify

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

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(2).

<sup>7</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(17).

his statement and had anyone asked him what he meant in his statement he would have so clarified.

The Hearing Officer finds that Grievant did not have the intent to falsify his incident report. Grievant's statement states the Inmate "began to make a motion as if he had a gun he would be shooting me." Grievant does not say "he would be shooting at me." By staring at Grievant, the Inmate conveyed the message that the Inmate wanted to shoot Grievant if the Inmate had a gun. Grievant's incident report could have been drafted more carefully, but it is not sufficiently ambiguous or incorrect as to justify the conclusion that he intended to falsify the incident report. Accordingly, the Group III Written Notice with suspension for falsification of an official state document must be reversed.

"[P]hysical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of offenders" is a Group III offense. Grievant had received training regarding how to hold inmates in order to control their movement. The hold that Grievant used on the Inmate was not one taught to him by the Agency. How an inmate is held could constitute maltreatment of an offender, but merely because Grievant did not hold the inmate using an Agency approved technique does not establish maltreatment. Grievant's objective was to hold the Inmate while other officer placed him in handcuffs. There is no reason to believe that Grievant's hold was intended by Grievant to harm the Inmate. Although the Inmate suffered neck injuries, those injuries could be explained by the Inmate's abrupt movements. Had he complied with Grievant's instructions and not resisted, he would not have suffered injury.<sup>8</sup> The Agency has not established a Group III offense for abuse or maltreatment of an offender.

The Agency expected Grievant to engage the Inmate using restraint techniques taught by the Agency. In this case, Grievant did not use one of those techniques. He did not attempt to use one of those techniques. By failing to attempt to restrain the Inmate in accordance with the Agency's training, Grievant's work performance was inadequate or unsatisfactory. Inadequate or unsatisfactory job performance is a Group I offense. Accordingly, the Group III Written Notice with suspension must be reduced to a Group I and the suspension must be reversed.

The Agency argued that it was unnecessary for Grievant to approach the Inmate and had Grievant not approached the Inmate, the conflict would not have arisen. Based on the facts of this case, it appears that Grievant's decision to approach the Inmate was appropriate. By staring at Grievant while pretending his hand was a gun, the Inmate was attempting to communicate a threat to Grievant. It was appropriate for Grievant to inform the Inmate that communicating threats to officers was not appropriate behavior at the Facility.

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<sup>8</sup> One of the officers who attempted to restrain the Inmate wrote that the Inmate "was extremely aggressive and hostile and made every attempt to fight the three officers."

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>9</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 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 further 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 for falsification of an official State document is **rescinded**. The Group III Written Notice of disciplinary action for abuse or maltreatment of an offender is **reduced** to a Group I Written Notice for inadequate or unsatisfactory job performance.

The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the two periods of suspension and credit for leave and seniority that the employee did not otherwise accrue.

## 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:

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<sup>9</sup> Va. Code § 2.2-3005.

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>10</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>10</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.