

Issues: Two Group II Written Notices (failure to follow instructions, Group III Written Notice (falsifying a State document) and Termination; Hearing Date: 10/14/09; Decision Issued: 11/13/09; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 9191; Outcome: Partial Relief; **Administrative Review:** **AHO Reconsideration Request received 11/25/09;** **Reconsideration Decision issued 12/08/09; Outcome: Original decision affirmed;** **Administrative Review:** **EDR Ruling Request received 11/25/09;** **EDR Ruling #2010-2474 issued 05/20/10; Outcome: Remanded to AHO;** **Remand Decision issued 06/04/10; Outcome: Original decision affirmed;** **Administrative Review:** **DHRM Ruling Request received 11/25/09; DHRM ruling issued 05/12/10; Outcome: Declined to review.**

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 9191

Hearing Date: October 14, 2009
Decision Issued: November 13, 2009

APPEARANCES

Grievant
Grievant Counsel
Agency Representative
11 Witnesses for Agency
2 Witnesses for Grievant

ISSUES

"Was the Group II Written Notice issued to Grievant on June 12, 2009 for violation of Employee Standards of Conduct 135.1 - Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy by not performing a formal inmate count at 8:30 a.m. and 1:30 p.m. on May 8, 2009, in C Building proper?"

"Was the Group II Written Notice issued to Grievant on June 12, 2009 for violation of Employee Standards of Conduct 135.1 - Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy by not performing security checks every 30 minutes on May 8, 2009, proper?"

"Was the Group III Written Notice issued to Grievant on June 12, 2009 for violation of Employee Standards of Conduct 135.1 - Falsification of state documents by documenting security checks in the log book, where after review it was found that Grievant had failed to make several of the checks documented in the log book on May 8, 2009, with termination proper?"

FINDINGS OF FACTS

1. On May 8, 2009, Grievant, a Corrections Officer, was working as a Floor Officer in the institution's C Building. As Floor Officer on May 8, 2009, Grievant was required to perform formal inmate counts at 8:30 a.m. and 1:30 p.m. On that date Grievant was also required to comply with written policy by performing security checks every thirty (30) minutes.

2. Grievant admitted that he did not make the formal count he logged in the official log book.

3. From the evidence, Grievant did not make all of the required security checks that he documented.

4. Grievant, while admitting not making formal counts and security checks which he documented, maintained that he was in an understaffed area and had other duties which kept him from making the counts and checks he logged as having been made.

5. He did not log that he had been unable to comply with written procedures, post orders and instructions of his post assignment.

6. Grievant, as Floor Officer, had various duties; i.e. supervising feedings, escorting inmates to other areas, inmate recreation ..., which interfered with his performing his security checks and count duties. He and other witnesses testified that it was a long-standing custom to get the paper work done and the count cleared, whether such had been done or not.

7. Rapid eye video footage for May 8, 2009, 4:00 a.m. through 4:15 p.m., for C Building showed no security rounds made by Grievant between 6:00 a.m. and 12:00 p.m., and 12:00 p.m. and 4:16 p.m. on May 8, 2009.

8. On the day in question, a Counselor was interviewing inmates in the pod office, and Grievant had been told not to leave the female Counselor by herself during these interviews.

9. Testimony from a Corrections Officer who had been a Field Training Officer for five (5) years, was that the facility was short handed and Corrections Officers could not do all that Post Orders required, as well as the paper work, and assignments from supervisors.

10. In addition to having been told not to leave the Counselor alone with the inmates in the pod office, Grievant admitted to having trouble with his girlfriend and talking with the Counselor about this while on duty.

11. The facility has just had a Security Assessment and passed with a good rating.

12. Grievant was afforded full due process.

APPLICABLE LAW OR POLICY AND OPINION

For state employees subject to the Virginia Personnel act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable

statutes and to the policies and procedures promulgated by DHRM, or the employing agency.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

Virginia Department of Corrections Facilities Order No. 67 for C-1 Population Floor Officer, Specific Post Duties No. 3 states, "During all Formal Counts, all inmates must stand in their assigned cell for counts. Inmates must stand at their cell door or beside bed on the floor for all formal counts. Before starting to count in each pod, you will give the inmates an audible warning (blow a whistle, etc.) that you are starting to count in that pod. The Counting Officer and Checking Officer will count the entire pod before moving on to the next pod. The Counting Officer will count the first five (5) cells, then the Checking Officer will begin to count. The Checking Officer will follow behind the Counting Officer, maintaining a distance of at least five (5) cells apart. Upon completion of counting, the Counting and Checking Officers will compare count sheets to ensure that the counts match. If the counts match, then each Officer will sign the count sheet and give it to the Control Room Operator for the count to be called in; and assure that the Count Sheets are taken over to the Count Officer. If counts do not match, then notify your Sergeant and await instructions. "

Virginia Department of Corrections "Operating Procedures", Number 135.1 "Standards of Conduct", Section XI, B.1., "Group II offenses include, but are not limited to: 1. Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy; ..."

Virginia Department of Corrections Operating Procedure 410.2 "Count Procedure" Section IV, Procedures – Formal Counts, requires "Formal Standing Counts" at 8:30 a.m. and 1:30 p.m.

DECISION

Grievant clearly violated Department of Corrections Operating Procedure 135.1 by failing to follow a supervisor's instructions as charged in each of the Group II Written Notices. He also violated 135.1 by falsifying official records.

There was clear evidence and an admission of the violations. There was also clear evidence that the Grievant was in an understaffed position as Floor Officer, could not do the security checks in a timely manner from where he was ordered to serve and was under pressure to get the paper work done and the count cleared. He did not protest or document his lack of time to accomplish the duties of his post.

From the testimony, it appears that the supervisor did know or realize that “keeping the log books” up-to-date and “clearing the counts” was logged to do just that, whether the action occurred or did not. For this reason, I find that the policy was unevenly applied due to the facility being short staffed while accomplishing all requirements by pushing lower ranking Corrections Officers to finish the paperwork regardless of whether the duties were performed. For this reason, I sustain the two Group II Written Notices and reduce the Group III to a Group II without termination as being within the realm of reason and with deference to the agency. I would suggest that Grievant’s time off be the discipline for the three Written Notices and that Grievant be reinstated.

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, Main Street Centre, 600 East Main, Suite 301, Richmond, Virginia, 23219 or faxes 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.

Thomas J. McCarthy, Jr.
Hearing Officer

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
RECONSIDERATION OF DECISION OF HEARING OFFICER

In re: Case Number 9191

Hearing Date: October 14, 2009
Decision Issued: November 13, 2009
Reconsideration Date: December 8, 2009

Grievant, requested this Hearing Officer to reconsider and change the decision in the above matter. The matter has been reviewed by this Hearings Officer.

The record shows that the Agency's Warden, a Major (Chief of Security) and a Captain, all testified that there was no staff shortage. Lower ranking Corrections Officers, including the Grievant, testified that they could not get all assigned duties done and as required by the Post Order, and they were pushed to get paper (log) work done and the count cleared. Even lines were left blank in the log to facilitate this. From the evidence, every effort was demanded at the Corrections Officer level to make the Supervisors and higher-ups look good. When such actions were deemed to involve falsification of logs and reports, the Grievant was given two Group II Written Notices, one for failure to follow Supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy; i.e. two formal inmate counts and the second one for the same type of violation for not doing security checks every thirty minutes. Grievant was also given a Group III Written Notice with termination for "... falsification of state documents" by documenting the security checks he had not done.

Reconsidering the discipline of termination, from the evidence presented and giving the Agency deference as presented in upper level administrators testimony which was contradicted by testimony from employees at Grievant's level which even with deference to the Agency's positions, I found of greater weight, the Group III with termination exceeded the limits of reasonableness. If the Grievant had not attended to his assigned duties other than the counts and checks, he would have been subject to discipline for not following Supervisor's instructions.

For the above reasons, having reconsidered my opinion, I decline to change my decision.

Thomas J. McCarthy, Jr., Esquire
Hearing Officer

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

RECONSIDERATION OF DECISION OF HEARING OFFICER

In re: Case Number 9191

Hearing Date: October 14, 2009
Decision Issued: November 13, 2009
Reconsideration Date: December 8, 2009
Reconsideration Date/
Grieved Discipline: June 7, 2010

The Department of Corrections requested, and the Director of Employment Dispute Resolution asked this Hearing Officer to reconsider the decision in the above matter. The matter has been reviewed by this Hearings Officer.

The record shows that the Agency's Warden, a Major (Chief of Security) and a Captain, all testified that there was no staff shortage. Lower ranking Corrections Officers, including the Grievant, testified that they could not get all assigned duties done and as required by the Post Order, and they were pushed to get paper (log) work done and the count cleared. Even lines were left blank in the log to facilitate this. From the evidence, every effort was demanded at the Corrections Officer level to make the Supervisors and higher-ups look good. When such actions were deemed to involve falsification of logs and reports, the Grievant was given two Group II Written Notices, one for failure to follow Supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy; i.e. two formal inmate counts and the second one for the same type of violation for not doing security checks every thirty minutes. Grievant was also given a Group III Written Notice with termination for "... falsification of state documents" by documenting the security checks he had not done.

From the record, the Grievant engaged in the behavior described in the Written Notice. Under normal circumstances behavior constituted misconduct and the agency's discipline was consistent with law and policy. However, the violations though they occurred, were done to get the paperwork cleared in his shift under duress to keep midlevel supervisors clear. To terminate an employee for following implied orders, I find exceeds the limits of reasonableness.

Reconsidering the discipline of termination, from the evidence presented and giving the Agency's actions deference as presented in upper level administrators testimony which was contradicted by testimony from employees at Grievant's level which even with deference to the Agency's positions, I found of greater weight, the Group III with termination exceeded the limits of reasonableness. If the Grievant had not attended to his assigned duties other than the counts and checks, he would have been subject to discipline for not following Supervisor's instructions.

For the above reasons, having reconsidered my opinion, I decline to change my decision.

Thomas J. McCarthy, Jr., Esquire
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections

May 12, 2010

The agency has requested an administrative review of the hearing officer's decision in Case No. 9191. The agency is challenging the hearing officer's decision on the basis that the decision permits the hearing officer rather than management to determine staffing patterns for the prisons and the decision is inconsistent with the expectations of the Standards of Conduct. For reasons stated below, this Agency will not disturb the hearing officer's decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has asked that I respond to this request for an administrative review.

FACTS

The Department of Corrections employed the grievant as a Corrections Officer until he was issued two Group II Written Notices and one Group III Written Notice and dismissed for violating Department of Corrections' Standards of Conduct Policy 135.1. In his **Findings of Facts**, the hearing officer listed, in part, the following:

1. On May 8, 2009, Grievant, a Corrections Officer, was working as a Floor Officer in the institution's C Building. As Floor Officer on May 8, 2009, Grievant was required to perform formal inmate counts at 8:30 a.m. and 1:30 p.m. On that date, Grievant was also required to comply with written policy by performing security checks every thirty (30) minutes.
2. Grievant admitted that he did not make the formal count he logged in the official log book.
3. From the evidence, Grievant did not make all of the required security checks that he documented.
4. Grievant, while admitting not making formal counts and security checks which he documented, maintained that he was in an understaffed area and had other duties which kept him from making the counts and checks he logged as having been made.
5. He did not log that he had been unable to comply with written procedures, post orders and instructions of his post assignment.
6. Grievant, as Floor Officer, had various duties; i.e. supervising feedings, escorting inmates to other areas, inmate recreation ..., which interfered

with his performing his security checks and count duties. He and other witnesses testified that it was a long-standing custom to get the paper work done and the count cleared, whether such had been done or not.

7. Rapid eye video footage for May 8, 2009, 4:00 a.m. through 4:15 p.m., for C Building showed no security rounds made by Grievant between 6:00 a.m. and 12:00 p.m., and 12:00 p.m. and 4:16 p.m. on May 8, 2009.

8. On the day in question, a Counselor was interviewing inmates in the pod office, and Grievant had been told not to leave the female Counselor by herself during these interviews.

9. Testimony from a Corrections Officer who had been a Field Training Officer for five (5) years, was that the facility was short handed and Corrections Officers could not do all that Post Orders required, as well as the paper work, and assignments from supervisors.

10. In addition to having been told not to leave the Counselor alone with the inmates in the pod office, Grievant admitted to having trouble with his girlfriend and talking with the Counselor about this while on duty.

11. The facility has just had a Security Assessment and passed with a good rating.

12. Grievant was afforded full due process.

APPLICABLE LAW OR POLICY AND OPINION

For state employees subject to the Virginia Personnel act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM, or the employing agency.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

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Virginia Department of Corrections Facilities Order No. 67 for C-1 Population Floor Officer, Specific Post Duties No. 3 states, "During all Formal Counts, all inmates must stand in their assigned cell for counts. Inmates must stand at their cell door or beside bed on the floor for all

formal counts. Before starting to count in each pod, you will give the inmates an audible warning (blow a whistle, etc.) that you are starting to count in that pod. The Counting Officer and Checking Officer will count the entire pod before moving on to the next pod. The Counting Officer will count the first five (5) cells, then the Checking Officer will begin to count. The Checking Officer will follow behind the Counting Officer, maintaining a distance of at least five (5) cells apart. Upon completion of counting, the Counting and Checking Officers will compare count sheets to ensure that the counts match. If the counts match, then each Officer will sign the count sheet and give it to the Control Room Operator for the count to be called in; and assure that the Count Sheets are taken over to the Count Officer. If counts do not match, then notify your Sergeant and await instructions. “

Virginia Department of Corrections “Operating Procedures”, Number 135.1 “Standards of Conduct”, Section XI, B.1., “Group II offenses include, but are not limited to: 1. Failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy; ...”

Virginia Department of Corrections Operating Procedure 410.2 “Count Procedure” Section IV, Procedures – Formal Counts, requires “Formal Standing Counts” at 8:30 a.m. and 1:30 p.m.

In his original **DECISION**, the hearing officer stated in part, the following:

Grievant clearly violated Department of Corrections Operating Procedure 135.1 by failing to follow a supervisor’s instructions as charged in each of the Group II Written Notices. He also violated 135.1 by falsifying official records.

There was clear evidence and an admission of the violations. There was also clear evidence that the Grievant was in an understaffed position as Floor Officer, could not do the security checks in a timely manner from where he was ordered to serve and was under pressure to get the paper work done and the count cleared. He did not protest or document his lack of time to accomplish the duties of his post.

From the testimony, it appears that the supervisor did know or realize that “keeping the log books” up-to-date and “clearing the counts” was logged to do just that, whether the action occurred or did not. For this reason, I find that the policy was unevenly applied due to the facility being short staffed while accomplishing all requirements by pushing lower ranking Corrections Officers to finish the paperwork regardless of whether the duties were performed. For this reason, I sustain the two Group II Written Notices and reduce the Group III to a Group II without termination as being within the realm of reason and with deference to the agency. I

would suggest that Grievant's time off be the discipline for the three Written Notices and that Grievant be reinstated.

In his **Reconsideration Decision**, the hearing officer stated, in part, the following:

Reconsidering the discipline of termination, from the evidence presented and giving the Agency deference as presented in upper level administrator's testimony, which was contradicted, by testimony from employees at Grievant's level which even with deference to the Agency's positions, I found of greater weight, the Group III with termination exceeded the limits of reasonableness. If the Grievant had not attended to his assigned duties other than the counts and checks, he would have been subject to discipline for not following Supervisor's instructions.

For the above reasons, having reconsidered my opinion, I decline to change my decision.

We note that the DOC also filed a request for an administrative review by the Department of Employment Dispute Resolution (EDR). The DOC submitted identical requests to EDR and DHRM. This Agency has determined that the issues of concern are evidentiary and mitigation issues and are beyond the authority of this Agency to address. Rather, these issues more appropriately should be addressed by the Department of Employment Dispute Resolution. Thus, this Agency has no basis to interfere with the application of this decision.

Ernest G. Spratley