

Issues: Two Group II Written Notices (failure to follow instructions), Group III Written Notice (falsifying records) and Termination; Hearing Date: 10/28/09; Decision Issued: 11/24/09; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 9192; Outcome: No Relief – Agency Upheld in Full.

DECISION OF HEARING OFFICER

In Re: Case #9192

Hearing Date: October 28, 2009

Decision Issued: November 24, 2009

PROCEDURAL HISTORY

This offense is related to failure to perform shift duty activities on May 8, 2009, including falsifying state documents. Grievant filed his grievance in a timely fashion after he had exhausted first stage (6-30-09), second stage (7-15-09) and third stage (8-17-09) Grievant procedures. The matter was qualified for hearing on August 28, 2009. In a letter dated September 11, 2009, the Hearing Officer received appointment from the Department of Employment Dispute Resolution (EDR). The matter was scheduled for hearing during a pre-hearing conference on October 1, 2009, at which time the case was set for October 28, 2009, at 10:00 a.m. at the location of Grievant's employment. Grievant and Agency were represented by attorneys, both of whom were present at the hearing. All documents that were submitted as evidence by Agency and Grievant were marked as exhibits as they were presented. Testimony was taken in person. Each witness was sworn and the matter was completed on the October 28 date.

APPEARANCES

Grievant as witness

Three (3) witnesses for Grievant

Advocate for Agency

Representative for Agency as witness

Four (4) witnesses for Agency

ISSUES

1. Was the Agency's discipline consistent with policy?
2. Did the Agency's practice of understaffing contribute to Grievant's behavior?
3. Were there mitigating circumstances that would justify a change in the disciplinary action?
4. Should Grievant be reinstated to his position?

The Grievant asserts that the conduct of which he is accused does not justify termination.

BURDEN OF PROOF

The burden of proof is on the Agency in this case as it is a disciplinary action involving termination. The Agency must prove by a preponderance of the evidence that the action taken was warranted and appropriate under the circumstances.

APPLICABLE LAW

The Virginia Department of Corrections Operating Procedure No. 410.2 effective October 1, 2008 states, "The facility shall comply with Directive 410 regarding [inmate] counts," is relevant to this case. The Procedure requires proper record keeping of all inmate counts as well as frequency of counts to be conducted. Virginia Department of Corrections No. 135.1, Standards of Conduct, Effective April 15, 2008 is applicable to this case as well. Standards of conduct state, with regard to Group III offenses, "Group III offenses include, but are not limited to...falsifying any records, including but not limited to all work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports, insurance claims, time records, leave records, or other official state documents".

Mitigating Circumstances

Under the *Rules for Conducting Grievance Hearings*, Section VI, B, I, a hearing officer must give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). EDR's Hearing Rules provide in part:

The Standards of Conduct allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or...an employee's long service, or otherwise satisfactory work performance."

FINDING OF FACTS

An allegation was made that the facility was chronically understaffed. Witnesses for both Agency and Grievant testified that the facility often did not have the required number of officers in each cell block (pod) to complete the duties required for the job. It was also alleged that superior officers would leave spaces in log books for floor officers to "fill in" their log entries. Most testimony would support this allegation. Grievant also alleged that superior officers told floor officers to falsify their log entries. This allegation was not supported by the majority of the evidence.

Grievant was aware of the duties he was to perform. Grievant admitted he did not perform all the duties and admitted he falsified the log book (a state record) by making entries regarding cell checks which he did, in fact, not do. It was stipulated that Grievant had a good previous work record.

Grievant had been employed at the facility for five (5) years. Grievant was issued a Group II disciplinary action¹ on 6-1-09 in violation of Employee Standards of Conduct 135.1 for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. Disciplinary action states that while on duty Grievant failed to make several required security checks. Grievant was issued a Group II disciplinary action² on 6-1-09 in violation of Employee Standards of Conduct 135.1 for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. Disciplinary action states that Grievant failed to perform a formal inmate count. On 6-1-09 Grievant was issued a Group III disciplinary action³ and terminated for violation of Employee Standards of Conduct 135.1 for falsification of state documents. The evidence would show that while Grievant had documented security checks in the logbook, the security checks were in fact not performed by Grievant. All three disciplinary actions were in regard to May 8, 2009. Agency produced a daily duty roster for May 8, 2009⁴. Post Order #67 effective February 2008⁵ and Virginia Department of Corrections No. 410.2 Count Procedures, effective October 1, 2008⁶ develop "an effective mechanism for formal and informal counts in order to determine the total number of and location of assigned offenders at all times."

Group III offenses include behavior of such a serious nature that it normally warrants discharge.

Grievant alleges that "normal practice" is different that that which is on paper, the facility is understaffed and that mitigating circumstances warrant reinstating him to his position.

¹ Agency exhibit H, page 1

² Agency exhibit H, page 2

³ Agency exhibit H, page 3

⁴ Agency exhibit A

⁵ Agency exhibit B

⁶ Agency exhibit D

OPINION

The Agency contributed to the poor work environment on May 8, 2009 by being understaffed. This caused a difficult employment situation and a danger to the public. However, rather than honestly report that tasks hadn't been completed and reason given for the failure, Grievant chose to falsify state records, which further endangered inmates, coworkers and the public. Even if Grievant had been able to prove every one else was following the same unlawful practice and he was the only one that got caught, the argument does not justify the behavior.

MITIGATION

Disciplinary actions should be fair and objective. The Grievant's previous record of performance should be considered. The disciplinary action should not be overly harsh when considering the severity of the offense.

Notwithstanding the two (2) Group II's issued to Grievant for failure to follow policy, he was also issued 1 (one) Group III for falsifying state records. This Group III alone is sufficient to terminate Grievant from employment and is within the bounds of actions expected for a serious Group III offense.

SPECIAL ISSUE

It was reported that after testifying, one of the Agency's witnesses, although warned not to, did discuss his testimony with other potential witnesses. This hearing officer reviewed the testimony given by the subsequent witnesses after this alleged breach and reached the conclusion the hearing officer's decision was based chiefly on the testimony of Grievant. Even viewing witness testimony as possibly tainted did not affect the hearing officer's decision.

DECISION

For reasons stated herein, the Agency's issuance to the Grievant of a Group III disciplinary action and termination of employment 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 was 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. Address your request to:

Director
Department of Human Resource Management
101 N. 14th St, 12th Floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
600 E. Main Street, Suite 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 your appeal to the other party. 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.⁷ 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.⁸ [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.

Judicial Review of Final Hearing Decision

Within thirty (30) 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.

Sondra K. Alan, Hearing Officer

⁷ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation, or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.