

Issues: Group I Written Notice (excessive tardiness), Group II Written Notice (failure to follow instructions), Group III (falsifying a document), and Termination; Hearing Date: 10/28/09; Decision Issued: 10/29/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No.9206, 9207, 9208; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 11/13/09; Reconsideration Decision issued 11/16/09; Outcome: Original decision affirmed;** **Administrative Review: DHRM Ruling Request received 11/13/09; DHRM Ruling issued 02/16/10; Outcome: AHO’s decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9206 / 9207 / 9208

Hearing Date: October 28, 2009
Decision Issued: October 29, 2009

PROCEDURAL HISTORY

On April 6, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions or policy. Also on April 6, 2009, Grievant was issued a Group I Written Notice for tardiness. On May 28, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying a State document.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On September 18, 2009, the EDR Director issued Ruling Number 2010-2413, 2010-2414, 2010-2423 consolidating the grievances for a single hearing. On September 30, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 28, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
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 actions, 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 actions against the Grievant were 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 Officer at one of its Facilities. He had been employed by the Agency for approximately 2 ½ years prior to his removal effective May 28, 2009. The purpose of his position was:

Maintains security, custody, and control over inmates at the institution and while in transport, by observing and initiating corrective and/or disciplinary action for inappropriate behavior. Supervises inmates' daily activities and observers and records their behavior and movement to ensure their safe and secure confinement.¹

The Agency requires employees to write their signatures legibly. Grievant failed to do so. On May 15, 2008, the Supervisor presented Grievant with a written counseling stating, in part:

¹ Agency Exhibit 5.

On several occasions you have been advised to write your signature in a manner that can be understood. On 5/15/08 while authorizing disciplinary reports I observed again that your signature was again unreadable. You have been advised that official documents must be legible in the signature and in the printed spaces. I am issuing you this performance correction in attempt no further action is necessary.²

Grievant was late reporting to work on December 11, 2008, January 1, 2009, January 6, 2009, February 9, 2009, February 12, 2009, and February 22, 2009.

On March 3, 2009, Grievant was given responsibility to serve a disciplinary charge on the Inmate. The Inmate had engaged in aggravated assault on another inmate. Under the Agency's policy, the Corrections Officer who wrote the charge could not serve the charge. Grievant was instructed to serve the charge that day. Grievant wrote his signature on the charge and gave a copy to the Inmate. Grievant's signature consisted of a squiggly line. It was not legible to other employees. Grievant took the charge but did not put it in a locked box for the institutional hearings officer.

On April 24th 2009, Grievant was responsible for making rounds in a housing pod consisting of two tiers. He was expected walk along a tier and look into each cell to observe the status of the inmate inside the cell. He was expected to make rounds every 30 minutes and record in a log sheet the time he made each round. Grievant wrote that he had made rounds on the top tier at 18:30, 18:59, 19:28, 19:57, and 20:26 in military time. Grievant signed his name on the log sheet after each time he listed. Grievant only performed one round³ on April 24, 2009 even though he wrote that he had performed five rounds.

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."⁴ 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."⁵ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁶

² Agency Exhibit 1.

³ It is possible Grievant performed two rounds. The video of the pod showed that Grievant walked back and forth the top tier and possibly could have made a second round.

⁴ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁶ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

“[E]xcessive tardiness” is a Group I offense.⁷ During the six month period beginning December 11, 2008, Grievant was tardy for work on six occasions. Grievant was issued tardy slips each time he was late for work. Grievant was verbally counseled by a supervisor after receiving his second tardy slip. The Agency’s practice was to refer employees for disciplinary action following the third late arrival in a six-month period. Grievant was aware of this practice. In this case the Agency waited until Grievant accumulated six late arrivals before taking disciplinary action. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for excessive tardiness.

“[F]ailure to follow a supervisor’s instructions” is a Group II offense.⁸ On May 15, 2008, Grievant was instructed by a supervisor to write his signature legibly on official documents. An inmate charge is an official document on which Grievant should have written his signature legibly. On March 3, 2009, Grievant did not write his signature legibly thereby failing to comply with a supervisor’s instructions. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor’s instructions.⁹

“[F]alsifying 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” is a Group III offense.¹⁰

“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 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. ***

⁷ DOC Operating Procedure 135.1(X)(B)(1).

⁸ DOC Operating Procedure 135.1(XI)(B)(1).

⁹ The Agency also alleged that Grievant should receive the Group II Written Notice for failing to deliver the inmate charged to the institutional hearings officer. No evidence was presented showing that a specific supervisor gave Grievant and instruction on a specific date in the nature of that instruction. At most, the agency has presented sufficient evidence to support the issuance of a Group I offense for inadequate job performance regarding delivery of the inmate charge.

¹⁰ DOC Operating Procedure 135.1(XII)(B)(2).

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*.

On April 24, 2009, Grievant wrote in a log sheet that he had completed five rounds in 30 minute intervals. Log sheets are official state documents used by the Agency to document the physical status of inmates at particular times during the day. At the time Grievant wrote he had completed rounds, he knew he had not completed the rounds because the times he wrote were times in the future. For example, when Grievant wrote that he had conducted a round at 20:26, that time had not yet passed. When 20:26 occurred, Grievant had already been relieved by another corrections officer and Grievant was not on the tier at that time. The Agency has presented sufficient evidence that Grievant falsified log sheets thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency was authorized to remove Grievant from employment.

Grievant made several arguments that the Agency was "piling on" with its disciplinary action and that the Agency failed to comply with procedure in the issuance of disciplinary action. Upon consideration of these arguments, the Hearing Officer concludes that the Agency has presented sufficient evidence to support the issuance of its disciplinary action against Grievant.

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...."¹¹ 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 the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for tardiness is **upheld**. The issuance to the

¹¹ *Va. Code § 2.2-3005.*

Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is **upheld**. The issuance to the Grievant of a Group III Written Notice of disciplinary action for falsification of official State documents is **upheld**. Grievant's 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.¹²

[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

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9206 / 9207 / 9208-R

Reconsideration Decision Issued: November 16, 2009

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

(1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

The Hearing Officer reviewed Grievant’s request for reconsideration. Grievant presented documents that either were submitted during the hearing or could have been submitted during the hearing. Grievant restates his arguments from the hearing or makes arguments that could have been made during the hearing.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

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.

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department Corrections
February 16, 2010

The grievant has requested an administrative review of the hearing decision in Grievance Case No. 9206, 9207 and 9208. The grievant is challenging the decision because he there was inconsistent application of policy as related to tardiness and that the agency personnel did not handle his appeals properly. For the reason stated below, the Department of Human Resource Management (DHRM) will not interfere with the hearing decision. The agency head, Ms. Sara R. Wilson, has requested that I respond to this appeal.

FACTS

According to the hearing officer's Finding of Facts, the following occurred:

The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities. He had been employed by the Agency for approximately 2 ½ years prior to his removal effective May 28, 2009. The purpose of his position was:

Maintains security, custody, and control over inmates at the institution and while in transport, by observing and initiating corrective and/or disciplinary action for inappropriate behavior. Supervises inmates' daily activities and observers and records their behavior and movement to ensure their safe and secure confinement.

The Agency requires employees to write their signatures legibly. Grievant failed to do so. On May 15, 2008, the Supervisor presented Grievant with a written counseling stating, in part:

On several occasions, you have been advised to write your signature in a manner that can be understood. On 5/15/08 while authorizing disciplinary reports, I observed again that your signature was again unreadable. You have been advised that official documents must be legible in the signature and in the printed spaces. I am issuing you this performance correction in attempt no further action is necessary.

Grievant was late reporting to work on December 11, 2008, January 1, 2009, January 6, 2009, February 9, 2009, February 12, 2009, and February 22, 2009.

On March 3, 2009, Grievant was given responsibility to serve a disciplinary charge on the Inmate. The Inmate had engaged in aggravated assault on another inmate. Under the Agency's policy, the Corrections Officer who wrote the charge could not serve the charge. Grievant was instructed to serve the charge that day. Grievant wrote his signature on the charge and gave a copy to the Inmate. Grievant's signature consisted of a squiggly line. It was not legible to other employees. Grievant took the charge but did not put it in a locked box for the institutional hearings officer.

On April 24th 2009, Grievant was responsible for making rounds in a housing pod consisting of two tiers. He was expected to walk along a tier and look into each cell to observe the status of the inmate inside the cell. He was expected to make rounds every 30 minutes and record in a log sheet the time he made each round. Grievant wrote that he had made rounds on the top tier at 18:30, 18:59, 19:28, 19:57, and 20:26 in military time. Grievant signed his name on the log sheet after each time he listed. Grievant only performed one round on April 24, 2009 even though he wrote that he had performed five rounds.

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." 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."

It is possible Grievant performed two rounds. The video of the pod showed that Grievant walked back and forth the top tier and possibly could have made a second round.

E]xcessive tardiness" is a Group I offense. During the six-month period beginning December 11, 2008, Grievant was tardy for work on six occasions. Grievant was issued tardy slips each time he was late for work. Grievant was verbally counseled by a supervisor after receiving his second tardy slip. The Agency's practice was to refer employees for disciplinary action following the third late arrival in a six-month period. Grievant was aware of this practice. In this case, the Agency waited until Grievant accumulated six late arrivals before taking disciplinary action. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for excessive tardiness.

"[F]ailure to follow a supervisor's instructions" is a Group II offense. On May 15, 2008, Grievant was instructed by a supervisor to write his signature legibly on official documents. An inmate charge is an official document on which Grievant should have written his signature legibly. On March 3, 2009, Grievant did not

write his signature legibly thereby failing to comply with a supervisor's instructions. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

"[F]alsifying 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" is a Group III offense.

"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 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*.

On April 24, 2009, Grievant wrote in a log sheet that he had completed five rounds in 30-minute intervals. Log sheets are official state documents used by the Agency to document the physical status of inmates at particular times during the day. At the time, Grievant wrote he had completed rounds, he knew he had not completed the rounds because the times he wrote were times in the future. For example, when Grievant wrote that he had conducted a round at 20:26, that time had not yet passed. When 20:26 occurred, Grievant had already been relieved by another corrections officer and Grievant was not on the tier at that time. The Agency has presented sufficient evidence that Grievant falsified log sheets thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency was authorized to remove Grievant from employment.

Grievant made several arguments that the Agency was "piling on" with its disciplinary action and that the Agency failed to comply with procedure in the issuance of disciplinary action. Upon consideration of these arguments, the Hearing Officer concludes that the Agency has presented sufficient evidence to support the issuance of its disciplinary action against Grievant.

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..." 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 the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for tardiness is **upheld**. The issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is **upheld**. The issuance to the Grievant of a Group III Written Notice of disciplinary action for falsification of official State documents is **upheld**. Grievant's removal is **upheld**.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is beyond the limit of reasonableness, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness." Attachment A, Unacceptable Standards of Conduct, of this policy sets forth examples of unacceptable behavior for which

specific disciplinary action may be warranted. These examples are not all-inclusive. In addition, the Department of Corrections has promulgated DOC Operating Procedure 135.1, Standards of Conduct, to suit specific business needs of the agency.

Based on the evidence, the hearing officer determined that the grievant violated the agency's policy as related to tardiness and was disciplined accordingly (Group I Written Notice). In addition, the hearing officer determined that the grievant failed to follow his supervisor's instructions and was disciplined accordingly (Group II Written Notice). Finally, the hearing officer determined that the evidence supported that the grievant falsified documents for which he was issued a Group II Written Notice with termination.

This Agency has determined that the hearing officer properly has interpreted the relevant policy. Therefore, there is no bases for this Agency to interfere with the application of the decision.

Ernest G. Spratley