

Issues: Group III Written Notice (falsifying records), Group III Written Notice (leaving post without permission), Demotion, Transfer and Pay Reduction; Hearing Date: 02/08/10; Decision Issued: 02/12/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9254; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9254**

Hearing Date: February 8, 2010  
Decision Issued: February 12, 2010

**PROCEDURAL HISTORY**

On August 11, 2009, Grievant was issued a Group III Written Notice of disciplinary action with demotion, disciplinary pay reduction, and transfer for falsifying records by omission. On August 11, 2009, Grievant was issued a second Group III Written Notice of disciplinary action for leaving a security post without permission.

On September 4, 2009, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 4, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer extended the timeframe for issuing a decision because of the unavailability of the parties. On February 8, 2010, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
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 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 Lieutenant at one of its Facilities. He had been employed by the Agency for approximately 24 years until his demotion to a Corrections Officer. The purpose of Grievant's position as a Corrections Lieutenant was, "Provide mid-level supervision to Sergeants, staff and inmates."<sup>1</sup>

Grievant frequently worked as Shift Commander or Operations Supervisor at the Facility for the evening shift. Grievant was expected to report to the Facility at approximately 5:30 p.m. His shift ended at approximately 6 a.m. Grievant was often the highest-ranking security employee at the Facility. Grievant had been instructed by Agency managers on several occasions that he was expected to ensure that there were at least three supervisors working at the Facility during the evening shift. To operate with fewer than three supervisors, Grievant had to obtain the permission of the Captain or the Major.

The Agency received a complaint that Grievant was frequently leaving prior to the end of his shift. The Agency's Investigator reviewed the Agency's attendance

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

documents and the Agency's video camera tapes to determine what days Grievant was scheduled to work and when he left the Facility on those days. The Investigator viewed the tape to ensure that when Grievant left the Facility he did not return later in a shift. The Agency presented screenshots from the video camera showing the dates and times Grievant left the facility and did not return.

Grievant was scheduled to work on May 12, 2009. He left the Facility at 9:23 p.m. prior to the end of the shift. Grievant was scheduled to work on May 25, 2009. He left the Facility at 4:06 a.m. prior to the end of his shift. Grievant was scheduled to work on May 30, 2009. He left at 8:26 p.m. prior to the end of the shift. Grievant was scheduled to work on June 12, 2009. He left the Facility at 8:21 p.m. prior to the end of his shift. Grievant was scheduled to work on June 27, 2009. He left the Facility at 8:29 p.m. prior to the end of his shift. Grievant was scheduled to work on July 7, 2009. He left the Facility at 1:14 a.m. prior to the end of his shift. Grievant was scheduled to work on July 11, 2009. He left the Facility at 8:17 p.m. prior to the end of this shift.

Grievant did not obtain permission from the Captain or the Major to leave the Facility early on the above dates. By leaving the Facility prior to the end of his shift, Grievant allow the Facility to be run by two supervisors instead of the required three supervisors.

For those days Grievant left the Facility early, Grievant was paid as if he were working. For the time Grievant was away from the Facility he was expected to complete and submit a P8 to claim annual or other leave. Grievant did not submit any P8 forms to cover the time he left the Facility early.

Grievant was obligated to keep accurate records regarding his leave taken. On July 26, 2009, Grievant signed an Employee Leave Verification. This form showed Grievant's annual, compensatory, sick and other leave balances. It showed the amount of leave used by Grievant from June 10 through July 9, 2009. Grievant signed this document underneath the following wording:

I verify that the above leave balances are accurate as reported. (Note if you have different balances, you must bring in your manual leave record to compare with the timekeepers).

Grievant's leave balances were not accurate as shown on the document because Grievant had not submitted P8 forms for the dates he left work early.

### **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>

“[L]eaving a security post without permission during working hours” is a Group III offense.<sup>5</sup> On May 12, 2009, May 25, 2009, May 30, 2009, June 12, 2009, June 27, 2009, July 7, 2009, and July 11, 2009, Grievant left his security post at the Facility prior to the end of his shift without permission to do so. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for leaving a security post without permission during working hours.

Grievant argued that he had permission to leave the Facility early. No credible evidence was presented to support this allegation.

“[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 of offense. On July 26, 2009, Grievant signed an Employee Leave Verification form to verify that his leave balances were correct. Grievant knew that his leave balances were not correct because he had not submitted P8 forms to account for the time missed on days he left work early. Grievant left work early on several days. He established a pattern of leaving work early and not completing the appropriate leave forms. This pattern is sufficient to show that Grievant knew his leave balances were not accurate. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying official State documents.

Upon the issuance of a Group III Written Notice of disciplinary action, the Agency was authorized to remove Grievant from employment. In lieu of removal, the Agency chose to demote, transfer, reduced Grievant’s compensation because of his 24 years of service and otherwise satisfactory work performance. This action must be upheld.

Grievant argued that the Agency failed to account for times when he was in training and away from the Facility. He argued that he did not have to submit P8 forms or otherwise reflect this in his leave balances. Grievant’s assertion is not supported by the evidence. The Agency’s Investigator and human resource staff properly accounted for those times when Grievant was absent from the Facility and in training.

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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> Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(14).

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 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 for leaving a security post without permission during working hours is **upheld**. The Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action for falsification is **upheld**. Grievant’s demotion, transfer, and disciplinary pay reduction 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

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<sup>6</sup> Va. Code § 2.2-3005.

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.