

Issues: Group III Written Notice (falsifying records) with Suspension, Demotion and Pay Reduction; Hearing Date: 10/13/11; Decision Issued: 10/18/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9674; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 11/02/11; EDR Ruling No. 2012-3164 issued 12/18/11; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9674

Hearing Date: October 13, 2011
Decision Issued: October 18, 2011

PROCEDURAL HISTORY

On March 7, 2011, Grievant was issued a Group III Written Notice of disciplinary action for falsifying documents. Grievant was demoted to a Corrections Officer and received a 5% disciplinary pay reduction. Grievant was suspended for two workdays.

On March 16, 2011, 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 she requested a hearing. On September 6, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of the party. On October 13, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
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 Sergeant at one of its Facilities until her demotion to Corrections Officer effective March 7, 2011. She has been employed by the Agency for approximately 22 years. The purpose of Grievant's position was to "provide first-line supervision to Correctional Officers in providing security, custody, and control of adult male offenders."¹ No evidence of prior active disciplinary action against Grievant was introduced during the hearing. Grievant received an overall rating of "Contributor" on her most recent performance evaluation.

Corrections Officers working at the Facility have Post Orders governing their actions while working at a post. On a quarterly basis, the Agency expects Corrections Officers to read their Post Orders, discuss any questions they have with their supervisors, and sign a Post Order Review Log with the following certification:

I understand it is my responsibility to read and understand these post orders prior to my assuming the duties of this post.

¹ Grievant Exhibit 1.

I certify that I have read, discussed with my supervisor and understand the post orders indicated above prior to signing below and prior to assuming the duties of this post.²

After a Corrections Officer has signed the Post Order Review Log, the supervisor is supposed to “countersign” the log as well. The purpose of the supervisor’s signature is to ensure that the Corrections Officer understands the duties of his or her post.

On January 24, 2011, the Warden was making rounds and observed that the Post Order Review Log for Post Order Number 25 was not completed correctly. The first seven lines of the Post Order Review Log were as follows:

Officer	Date	Supervisor
[Officer H]	[1-1-11]	[Grievant's signature]
[Officer R]	1-1-11	[Grievant's signature]
[Officer H]	1-1-11	[Grievant's signature]
[Officer Y]	1-1-11	[Grievant's signature]
[Officer A]	1/1/11	[Grievant's signature]
		[Grievant's signature]
		[Grievant's signature]

The Warden concluded that Grievant had “pre-signed” the Post Order Review Log.

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.”³ 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.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

“[F]alsifying any records” is a Group III offense.⁶ Falsification is not defined by the Agency’s Standards of Conduct 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

² Agency Exhibit 5.

³ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

⁶ Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(2).

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*.

A Post Order Review Log is a record of the Agency. The Agency maintains these records to ensure that employees are complying with Agency procedures and practices.

Grievant received training regarding the correct procedure for Corrections Officers to review their post orders, discuss any questions they have with their supervisors, and then sign the Post Order Review Log. Grievant received training advising her of her obligation to "countersign" the Post Order Review Log after it was signed by a Corrections Officer. Grievant signed her name thereby indicating that she had reviewed Post Order 25 with two Corrections Officers, answered their questions, and verified that they had signed the Post Order Review Log. The two blank spaces on the Post Order Review Log show that Grievant's countersignature was false. Two Corrections Officers did not review their post orders, ask Grievant any questions they had, and then sign the Post Order Review Log. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsification of a record. Upon the issuance of a Group III Written Notice, an agency may demote an employee in lieu of removal and reduce that employee's compensation. An agency may also suspend an employee for up to 30 workdays. Accordingly, Grievant's demotion to a Corrections Officer with a 5% disciplinary pay reduction must be upheld. Grievant's suspension must also be upheld.

Grievant argued that she signed her name on the Post Order Review Log because she had in fact met with two Corrections Officers and answered any questions they had. She contends that she was called away to an emergency in another building before she had a chance to obtain the signatures of the Corrections Officers. The difficulty with Grievant's argument is that there are no facts to corroborate her assertion. Grievant could not identify the two Corrections Officers and have them present testimony or statements indicating that they had met with Grievant prior to her signature but failed to acknowledge that fact by signing the Post Order Review Log. Grievant presented statements from some of her subordinates saying:

"[Grievant] would sign Post Orders and Log Book when I signed them."⁷

⁷ Grievant Exhibit 6.

"[W]hen working for [Grievant], she did sign the post orders every time after I signed them."⁸

"[W]hile working for [Grievant] did sign post orders every time after I did."⁹

"[W]hile working for [Grievant] she did sign the post orders every time after I signed them."¹⁰

The statements do not support Grievant's assertion that two Corrections Officers reviewed their Post Orders on January 1, 2011 but neglected to sign those Post Orders.

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.

Grievant argued that she did not have access to the Agency's policy governing the signing of the Post Order Review Log. Although the Agency did not permit its employees to take copies of policies with them, employees have access to Agency policies through the Agency's intranet. Regardless of whether Grievant was able to obtain a copy of Operating Procedure 401.1, it is clear that she was aware of the Agency's policy requiring that she sign the Post Order Review Log after it was signed by a Corrections Officer. Grievant was aware of her obligation regardless of whether she had access to the Agency's policy providing the source of that obligation.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁸ Grievant Exhibit 7.

⁹ Grievant Exhibit 8.

¹⁰ Grievant Exhibit 9.

¹¹ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion, disciplinary pay reduction, and suspension 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].

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.