

Issue: Group III Written Notice with Termination (Falsifying a document); Hearing Date: 10/21/11; Decision Issued: 10/26/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9691; Outcome: No Relief – Agency Upheld;

Administrative Review: EDR Ruling Request received 11/08/11; EDR Ruling No. 2012-3176 issued 12/22/11; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 11/10/11; DHRM letter mailed 11/17/11 declining to review. Second letter sent 12/12/11.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9691

Hearing Date: October 21, 2011
Decision Issued: October 26, 2011

PROCEDURAL HISTORY

On July 21, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On August 8, 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 he requested a hearing. On September 19, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 21, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
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 Officer at one of its Facilities. He had been employed by the Agency for approximately 12 years prior to his removal effective July 21, 2011. The purpose of his position was to, "provide security over of adult offenders at the institution and while in transport; supervises the daily activities of offenders while observing and recording their behavior and movement to ensure their safe and secure confinement."¹ Grievant had prior active disciplinary action. On March 12, 2010, Grievant received a Group II Written Notice.

The Facility maintains a Duty Roster which lists the names of each employee who is scheduled to work on a particular day. The Duty Roster has blank spaces for employees to write their "Time In" and Time Out". Muster is scheduled for 5:45 a.m. every day. Employees are expected to report to the Support Building for muster and are expected to sign the Duty Roster with a time of 5:45 a.m. An employee who is late for muster is not expected to sign the Duty Roster with a time of 5:45 a.m. because the employee did not report for muster on time. When an employee leaves his or her post, the employee is expected to write the "Time Out" on the Duty Roster. The Time Out

¹ Agency Exhibit 3.

should reflect the time the employee left his or her post even though an employee may actually leave the Facility four or five minutes later after passing through security gates.

Grievant was scheduled to work on May 13, 2011. The Lieutenant authorized Grievant to leave the Facility at 11 a.m. so that Grievant could attend a medical appointment.

On May 13, 2011, Grievant arrived at the Facility at 6:10 a.m. Muster had ended. He could not locate the Duty Roster to sign in. He could not locate the Watch Commander to be assigned a post. He walked to the Boulevard inside the Facility and spoke with a supervisor. He worked for a short period of time and concluded he needed to leave early because he did not feel well. He spoke with the Sergeant. The Sergeant told Grievant to be sure to sign out when he left. At 8:17 a.m., Grievant left the Facility and did not return. Before Grievant left the Facility, he located the Duty Roster and wrote his Time In as 5:45 a.m. and his Time Out as 11 a.m.

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

"[F]alsifying any record" is a Group III offense.⁵ Falsifying 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 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:

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

⁵ Operating Procedure 130.1(V) (D) (2) (b).

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

Grievant falsified the Duty Roster. Grievant arrived at the Facility after muster had been completed. Because he knew he had missed muster, he knew that he had not arrived at the Facility prior to 5:45 a.m. Nevertheless, Grievant wrote his Time In as 5:45 a.m. thereby falsifying the Duty Roster. Grievant left the Facility at 8:17 a.m. He wrote on the Duty Roster that he left his post at the Facility at 11 a.m. Grievant left the Facility one hour and 43 minutes prior to the time he wrote in the Duty Roster. Grievant knew or should have known when he wrote 11 a.m. in the Duty Roster that he was not actually leaving the Facility at 11 a.m. Grievant falsified the Duty Roster by signing his Time Out as 11 a.m. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that he did not intentionally sign the wrong times in the Duty Roster. He argued that he was taking medication that could have influenced his decision making. Grievant's arguments fail.

Grievant knew that he was late to work. Grievant knew that he should have written a time later than 5:45 a.m. in the Duty Roster. Grievant left the Facility one hour and 43 minutes prior to the time he wrote in the Duty Roster. It is unlikely that Grievant confused the time of 8:17 a.m. with 11 a.m.

Insufficient evidence was presented to show that Grievant's medical condition affected his ability to determine his time of entry and departure at the Facility. Simply because an employee does not feel well, does not establish that the employee lacks the ability to determine time correctly.

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...."⁶ 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.

⁶ Va. Code § 2.2-3005.

Grievant argued that the Agency inconsistently applied disciplinary action. He argued that other employees wrote times in the Duty Roster that did not reflect the times they began or ended work. He argued that some employees departed the Facility without having signed the Time Out in the Duty Roster but then called the Facility and asked another employee to write the time of departure. Grievant's arguments fail.

In order to show the inconsistent application of disciplinary action, an employee must show that the Agency singled out him or her for disciplinary action. Although it may be the case that employees at the Facility were leaving at times different from the times they wrote in the Duty Roster, no evidence was presented that this behavior was presented to Agency Managers for action. The evidence is insufficient for the Hearing Officer to believe that the Agency singled out Grievant for disciplinary action.

If an employee departs the Facility without signing the Duty Roster and then calls the Facility to have another employee enter the time of departure, that action does not necessarily establish falsification of a record. For example, if an employee departs at 11 a.m. but fails to sign the Duty Roster and later calls the Watch Commander and asks the Watch Commander to write a time of 11 a.m. as the time of departure, the departing employee has not falsify the document. The time reported in the Duty Roster would match the time the employee actually left the Facility.

In light of the standard set forth in the Rules, 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 with 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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

November 17, 2011

[Grievant]

RE: **Grievance of [Grievant] v. Department of Corrections**
Case No. 9691

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, while identified a policy in your request, you did not establish a relationship between the policy you identified and the issue you are appealing. Rather, it appears that you are disagreeing with the evidence the hearing considered, the weight he placed on that evidence and the resulting decision. We must therefore respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services

December 12, 2011

[Grievant]

RE: **Grievance of [Grievant] v. Department of Corrections**
Case No. 9691R

Dear [Grievant]:

This letter is in response to your concerns regarding the ruling this Department issued on November 17, 2011. Please note that we considered the following criterion in determining the merits of your appeal:

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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. We reiterate that while you identified a policy in your request, you did not establish that the issues are related to any human resource policy. The issues you identified are related to the administration of the grievance procedure: (1) failure of the agency to release documents in a timely manner prior to the grievance hearing and (2) lack of time to prepare for the hearing after receiving the documents on the day of the hearing. The agency policy you identified is related to the administration of the grievance procedure and not a human resource policy. This Agency has no authority to interfere in such procedural matters. We must therefore respectfully decline to honor your request to issue a ruling regarding these matters.

Sincerely,

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services