

Issues: Two Group III Written Notices (falsifying records) and Termination; Hearing Date: 11/08/12; Decision Issued: 11/12/12; Agency: DOC; AHO: Jane E. Schroeder, Esq.; Case No. 9937, 9938; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In the matter of Cases # 9937, 9938

Hearing Date: November 8, 2012

Decision Issued: November 12, 2012

PROCEDURAL HISTORY

The Grievant was employed by the agency as a correctional officer. On August 23, 2012, the agency issued two Group III Written Notices to the Grievant for falsifying records. ON August 23, 2012, the Grievant was terminated from employment. The Grievant submitted two dismissal grievance forms directly to EDR to challenge his termination. The grievances were qualified for hearing. On September 25, 2012, EDR consolidated the two grievances into a single hearing. On October 8, 2012, the hearing officer was assigned to hear the case.

A pre-hearing conference was held on October 8, 2012. The hearing date was set for October 26, 2012. At the requests of the representative of the Department of Corrections, the hearing date was subsequently changed first to November 7, and then to November 8, 2012. The hearing was held on November 8, 2012. It began at 9:05 a.m. and concluded at 11:49 a.m. Five witnesses testified. The agency's exhibits (Exhibits 1-8) were entered into evidence without objection. The Grievant had no exhibits. Two additional exhibits were requested by the Hearing Officer during the hearing and were admitted into evidence without objection (Exhibits H.O. 1 and H.O. 2)

APPEARANCES

Grievant
Agency Representative
Witnesses for Agency
Witness for Grievant

ISSUES

CASE 9937: Falsifying log book and log sheet entries:

Whether the first Group III Written Notice given on August 23, 2012 for falsifying records should be affirmed or rescinded. The Agency alleges that the nature of the offense is as follows: “On August 16 you were assigned to make 30 minute checks in Special Housing pursuant to your post orders. OIC C. [Employee T] made her rounds at 12:00 noon and noticed you had signed the cell check sheet at 12:27. [Employee Y] then checked at 12:21 pm and confirmed that you had logged in a check for 12:27 pm. You later confirmed that you had done this.”¹

CASE 9938: Falsifying Incident Report:

Whether the second Group III Written Notice given on August 23, 2012, for falsifying records should be affirmed or rescinded. The Agency alleges that the nature of the offense is as follows: “On 8/16/12, while in the SHU you claimed that the door handle hit you in the back as you were getting the food tray, causing you to hit the floor. You wrote a statement to that effect. When you were called in to verify that statement, you told both [Employee M] and [Employee Y] that you did not fall to the floor or to your knees. You were informed that you made another false stmt.”

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. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual)²

FINDINGS OF FACT

CASE 9937: Falsifying log book and log sheet entries:

1. The Grievant worked for the agency for eight years as a correctional officer until he was terminated as a result of the offenses named in the Group III Written Notices.
2. In this correctional center, there is a Correctional Officer in Charge that is responsible for the overseeing of the correctional officers in four areas: the basement, the kitchen, the hill (also known as the dorms), and the Special Housing Unit, known as the SHU. The officer assigned to the hill also covers the SHU. The basement, the kitchen, the hill and the SHU have log books that used to keep track of activities in those areas. In addition, the SHU has individual log sheets for each inmate assigned to the SHU.³

¹Exhibit 1, p. 1.

²Exhibit 2, p. 1.

³Testimony of Correctional Officer in Charge

3. Before beginning work as a correctional officer, the employee attends basic training course of four to seven weeks. There are also yearly in-services of 40 hours to review policy and duties.⁴ The General Duties for the correctional officers are outlined in a Security Post Order which is periodically updated. This order is reviewed by the officer and each officer signs a sheet that he understands the post order. The Grievant signed this sheet on August 1, 2012.⁵
4. One of the duties of a correctional officer is to make checks of his assigned area at least once every thirty minutes and to write in the log book for his area (as well as the log sheet for the SHU if he is covering the hill) at least once every thirty minutes during his shift.⁶
5. The officer in charge for August 16, 2012 testified that the Grievant was assigned to the hill and the SHU on that day. The Grievant had written in the SHU log book, "Rounds made" at 11:29a.m., 11:58 a.m. and 12:27 p.m. The officer in charge made rounds and signed in the log book, "12:00 p Made rounds all OK."⁷ She was going to sign in on the SHU log sheet at 12:00 but saw that the Grievant had already signed the sheet at 12:27.⁸ She then went to the Grievant and told him that she could not sign in at 12:00 because he had signed in with the time 12:27 some time before 12:00. He complained that he does not have time to sign in.⁹
6. The officer in charge then reported the log sheet discrepancy to the lieutenant. The lieutenant went to the SHU, signing in the log book at 12:21, and spoke to the Grievant. When he asked the Grievant what happened, the Grievant said he did not have enough time to keep the log book correct. The Lieutenant then told the Grievant that he would be reporting this to the Major.¹⁰
7. The Major testified that on August 16, 2012, she had gone the SHU at 11:40 a.m. and had signed the SHU log sheet accordingly. Her signatures and those of other supervisors were written in green ink. Although her signature does not appear on the copy in Exhibit 3, page 4, the original log sheet was presented at trial which clearly shows her signature in green ink on 8/16/12 at 11:40 a.m. The Grievant signed below her and gave the time as 11:29 a.m.¹¹

⁴Testimony of Correctional Officer in Charge and Lieutenant

⁵Exhibit 4.

⁶Exhibit 4, p. 2.

⁷Exhibit 3, p.1 after red sheet.

⁸Exhibit 3, p. 4 after red sheet.

⁹Testimony of Correctional Officer in Charge.

¹⁰Testimony of the Lieutenant.

¹¹Testimony of the Major; Exhibit 3, p. 4 after red sheet.

8. On that same day, the Major asked the Grievant about the discrepancies in the log book and on the log sheet. He said there must have been a mistake, that he was busy, that he couldn't do it all, and that he was not going to make all the checks. The Major told the Grievant that this was unacceptable. She reminded him that another supervisor had spoken to him earlier that week about another time that the Grievant had signed the log book with an incorrect time which showed that he was signing the log book in advance. When that supervisor told him that was against policy, the Grievant replied that he did not have the time to sign the log book on time. The supervisor warned him that he should not do that again.¹²
9. The Superintendent of the correctional center was provided the information about the log discrepancies and held a disciplinary hearing with the Grievant on August 23, 2012. The Grievant admitted that written down the wrong times in the logs, but said he was working the hill and the basement, and could have looked at his watch wrong.
10. The Superintendent testified that there is a procedure to correct an accidental error on the log book entries. The Grievant did not follow this procedure. If there is a more serious error, the correctional officer should tell the supervisor. This case had significant errors and the Grievant did not inform the supervisor.¹³ The Grievant testified that he knew the procedure for correcting errors in the log book, but that he did not follow those procedures.¹⁴
11. The Grievant testified that he did write the wrong times in the log book. His explanations included that he looked at his watch wrong, that maybe his blood sugar was dropping, that he had to cover the basement as well as the hill, that he had to do the shakedowns and strip searches all by himself, that accidents do happen, and that the 16th was a bad hair day. When he was shown the log book that showed that the basement was closed at 10:30 that morning and did not reopen until 12:12 p.m., he said that it must have been another morning that he covered the basement.¹⁵

CASE 9938: Falsifying Incident Report:

12. On the afternoon of August 16, 2012, the same day as the incident above, the Grievant was working in the SHU and was with an inmate that had the food trays. The Grievant testified that he was backing up when he hit the door handle in his back and went down. He fell down to his knees. He testified that he told this to the Officer in Charge, but she said nothing.¹⁶

¹²Exhibit 8.

¹³Exhibit 3, p.1-3; testimony of the Superintendent.

¹⁴Testimony of Grievant.

¹⁵Testimony of Grievant; H.O. Exhibit 2.

¹⁶Testimony of Grievant.

13. The Officer in Charge testified that the Grievant did tell her that the door hit him in the back. She told him to file an incident report. She wrote a memo to the Lieutenant on August 20 describing the conversation.¹⁷
14. On August 17, 2012, the Grievant completed an “Internal Incident Report” form in which he described the door handle incident, including the following: “I backed into the door handle of the door. It hit in the middle of my back and I hit the floor. My back is still sore from hitting the floor last Sept.”¹⁸
15. When the Major read the Internal Incident Report on August 20, 2012, she interviewed the inmate, and then called the Grievant into her office for a meeting with her and the Lieutenant. The Major said to the Grievant that the incident report stated that the Grievant fell to the floor. She asked him if this was true, because that was not the observation of the inmate who was there. According to the Major and the Lieutenant, the Grievant replied that he did not fall to the floor, but his knees may have given in a little bit. She told him that change of statement was another case of falsifying records.¹⁹
16. The Grievant testified at the hearing that he had fallen to his knees when the door handle hit his back. He said that he did not tell the Major and the Lieutenant that he had not fallen to the floor.
17. The report of an injury by the Grievant was reviewed by the supervisors with special concern because of three things:
 - First, the Grievant had hurt his back the previous September and was out on medical leave for six months, returning April 29, 2012. In the incident report, he even refers to the previous incident when he wrote, “My back is still sore from hitting the floor last Sept.”;
 - Second, the Grievant offered no medical reports to confirm an injury; and
 - Third, on previous day, August 15, 2012, the Grievant had asked the Officer in Charge for a day off because his daughter had gone into labor and was having complications. The Officer in Charge testified that she said no, and he said, “I can fix that. I can play sick and then I have to go home.”²⁰ The Grievant later admitted making that statement, but said he was kidding.²¹

APPLICABLE LAW AND OPINION

¹⁷Testimony of Officer in Charge; Exhibit 3, p. 7 after red sheet.

¹⁸Exhibit 3, p.5 after red sheet.

¹⁹Testimony of Major; Exhibit 3, p. 6 after red sheet.

²⁰Testimony of Officer in Charge.

²¹Exhibit 3, p. 3.

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Department of Corrections has produced Operating Procedures which include:

Policy Number 1.35.1: Standards of Conduct.

Policy 1.35.1 provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Offenses are grouped by levels, from Group I to Group II. Group I Offenses generally includes offenses that have a relatively minor impact on agency business operations but still require management intervention. Group II Offenses include acts of misconduct of a more serious nature that significantly impact agency operations. Group III Offenses generally include acts of misconduct of a most serious nature that severely impact agency operations.

Under the Group III Offenses listed in the Standards of Conduct is V.D.2.b., "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"²²

The Superintendent issued two Group III Written Notices to the Grievant for falsifying records.

CASE 9937: Falsifying log book and log sheet entries:

²²Exhibit 7, page 9.

The Agency alleges that the Grievant falsified the log books and sheets by writing in log in times that he knew were false. The evidence shows that, on several occasions, the Grievant wrote in the log book and log sheets that were false. The Grievant admitted doing so. His myriad of excuses has not persuaded this hearing officer that there was any valid justification for falsifying the records.

For safety of the inmates, it is imperative that the correctional officers make their rounds at least once every thirty minutes and record the times in the log book and log sheets. The Grievant showed flagrant disregard for these procedures. He wrote down that he had made rounds at 12:27p.m., when, in fact, the time was not yet 12:00. This pattern was repeated on several occasions. He was warned to stop doing this, and yet he continued. This left the supervisors unable to trust the Grievant to follow procedures, thus putting the safety of the inmates at risk. Based on the evidence presented, I find that the Grievant deliberately falsified the log book and log sheet on August 16, 2012. This constitutes misconduct. I find that this conduct was properly characterized as a Group III offense. Termination from employment is the appropriate action by the agency and is consistent with law and policy. The Agency's discipline did not exceed the limits of reasonableness, and therefore no mitigation is appropriate.

CASE 9938: Falsifying Incident Report:

The Agency alleges that the Grievant falsified an Internal Incident Report by saying he fell to the floor and then changing his story. In the Incident Report, the Grievant claimed to have fallen and hit the floor when the door handle hit him in the back. The testimony of the supervisors that the Grievant said he did not hit the floor is in opposition to the testimony of the Grievant. I find that, by the preponderance of the evidence, the Grievant's testimony that he told the supervisors that that he hit the floor is not credible. I find that he told the supervisors that he did not hit the floor. This statement triggered the response by the Major that the Grievant had made another false statement, in that he had written in the incident report that he hit the floor.

Of course, there is no way to know for certain if the Grievant hit the floor or not. If he hit the floor, the incident report is correct, and the record was not falsified, but his statement to the supervisors was false. If he did not hit the floor, the incident report was falsified, and the statement to the supervisors was true. For purposes of this decision, certainty is not required. Based on the evidence presented at the hearing, it is the opinion of this hearing officer that the Grievant did not hit the floor. Thus, the incident report is a falsified record. Falsifying this record constitutes misconduct. I find that this conduct was properly characterized as a Group III offense. Termination from employment is the appropriate action by the agency and is consistent with law and policy. The Agency's discipline did not exceed the limits of reasonableness, and therefore no mitigation is appropriate.

DECISION

CASE 9937: Falsifying log book and log sheet entries:

The Agency has sustained its burden of proof for the Group III Written Notice. The Group III Written Notice given to the Grievant on August 23, 2012 for falsifying log book and log sheet entries is hereby affirmed and upheld.

CASE 9938: Falsifying Incident Report:

The Agency has sustained its burden of proof for the Group III Written Notice. The Group III Written Notice given to the Grievant on August 23, 2012 for falsifying an incident report is hereby affirmed and 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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.¹

[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].

November 12, 2012

Jane E. Schroeder, Hearing Officer

cc: Department of Corrections
Agency Representative
Grievant
EDR

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.