

Issue: Group II Written Notice (providing false information); Hearing Date: 10/20/14; Decision Issued: 11/05/14; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 10443; Outcome: No Relief - Agency Upheld; Judicial Review: Appealed to Circuit Court in Bland County; Outcome: Circuit Court ruling issued 03/24/15 - AHO's decision affirmed.

DECISION OF HEARING OFFICER
IN RE: CASE NO. 10443
HEARING DATE: October 20, 2014
DECISION ISSUED: November 5, 2014

PROCEDURAL HISTORY

A complaint was made against Grievant based on an event of April 10, 2014 regarding Grievant's falsification of state records due to an inaccurate ammunition report. Grievant was issued a Group II Written Notice on May 1, 2014 for violation of Operating Procedure 135.1, "Standard of Conduct" and offense Code number 74. As this was not a termination case, Grievant had a first (5-19-14) second (6-16-14) and third (7-9-14) step resolution meeting.

A Hearing Officer was appointed on August 19, 2014 and a pre-hearing conference was scheduled on August 28, 2014 at which time Agency's attorney was not available. A later phone conference was rescheduled on September 15, 2014. During the prehearing conference a Hearing was scheduled for October 20, 2014

APPEARANCES

Agency Attorney
Agency representative as witness
Agency additional 3 witnesses
Grievant as witness and 1 witness

ISSUES

- 1) Whether Grievant knowingly filed an inaccurate ammunition report.
- 2) Whether the filing of an inaccurate report is a falsification of state records.
- 3) Whether mitigating factors had been considered.
- 4) Whether there was disparate treatment in Grievant's discipline.

BURDEN OF PROOF

In disciplinary actions, 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 is to be proved is more probable than not. GPM § 9. Grievant has the burden of proving any affirmative defenses raised by Grievant GPM §5.8.

APPLICABLE LAW and POLICY

The Agency relies on its Operating Procedure 135.1 "Standard of Conduct"¹ and Agency Offense Code #74.²

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."³

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

These issues revolve around a request in April of 2014 from the Academy for Staff Development (ASD) to a Department of Corrections (DOC) facility requesting a count of ammunition at the facility. Agency presented evidence that an employee of ASD placed a call to the Armory Officer (AO), the person at the DOC facility in charge of ammunition supplies. The AO relayed a message to Grievant regarding a response needed for an ammunition count. Grievant stated at the hearing it was the AO's responsibility but Grievant had an additional duty to help her. Grievant and the ASD employee who had sent the request had a discussion prior to the request being made of Grievant. Grievant was dismayed over the ASD being in charge of ammunition distribution as Grievant felt his facility was often ignored in receiving sufficient ammunition stocks. Throughout his testimony Grievant stated he thought the ASD was "up to something".⁴

Grievant's only witness was unavailable. The hearing was interrupted for approximately one hour while the witness was contacted by phone.

Evidence did show that the ASD employee had not been formally identified to the facility as the person with authority to request an ammunition count. Evidence did show that Grievant had received his information second hand which could have been a miscommunication.

¹ Agency Exhibit 4

² Agency Exhibit 3

³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁴ Grievant's testimony at 2:20:47 and 2:23:56

On April 8, 2014 the ASD employee called the facility speaking with the AO requesting an ammunition count for training purposes. The request was forwarded by AO to Grievant.⁵

On April 10, 2014, Grievant replied with an ammunition count that was significantly below the actual inventory of ammunition for training purposes.⁶ Grievant also responded there was “stuff to transition to the Glock” and then ask why the ASD wanted to know. Grievant claimed he meant to write in his email “we have *emergency stock*” but forgot to type the words “*emergency stock*”.⁷ He also claimed the statement “I’m curious why you’re asking” was an attempt to clarify what count was requested. Although the question could also have been an inquiry about staff that was training on the Glock.⁸

Grievant copied his ammunition count response to an employee of another facility. On April 14, 2015 Grievant asked this same employee of the other facility if he had contacted all the other facilities in the area to ascertain if they were also being asked for an ammunition count.⁹

When the ASD employee received Grievant’s memo on April 10, 2014 with a very low ammunition count he forwarded to his superior with a comment “surprised?”.¹⁰

On April 14, 2014 Grievant was in the Assistant Warden’s office after the Assistant Warden had been made aware of the low count report. Grievant stated he had sent a low report because his facility had been denied their ammunition request in the past. Agency submitted statements of three persons who confirmed they had heard Grievant admit he intentionally sent the low inventory count.¹¹

At the meeting, Grievant did not agree that the incorrect count was an instance of falsifying a state record. At hearing Grievant claimed that he had received disparate treatment because he knew of other false claims that were not punished. He stated other employees had attended training session and lied about the amount of time they were in training.

OPINION

After much testimony it became obvious to the hearing officer that the issue was, indeed, as described by Grievant’s counsel in her closing, a “turf war”.¹² There is no doubt, for whatever reason, that Grievant intentionally sent an ammunition count that was not responsive to the request. If Grievant had honestly not known what count was

⁵ Agency Exhibit 1 pg. 4 and pg. 9

⁶ Agency Exhibit 1 pg. 3

⁷ Grievant’s testimony at 2:30:44

⁸ Agency Exhibit 1 pg. 2

⁹ Agency Exhibit 4 pg. 1

¹⁰ Agency Exhibit 1 pg. 2

¹¹ Agency Exhibit 1 pg. 5, 6, 7

¹² Closing testimony at 3:12:19

intended or who had the authority to ask there were several opportunities for him to clarify by questioning the ASD employee or the Warden before giving an answer. Instead, he chose to give an oblique answer, copied confidential information to an employee of another facility and questioned what other facilities had received the same request. The question should have been direct and up the chain of command and been, "What specifically are you asking and do you have authority to ask?", not the irrelevant question "Who else is being asked?". Further, the ASD employees comment of "Surprised?" was only further evidence of unnecessary adult game playing.

The request was in regards to state business. The response was answered by a state employee presumably on state time with a state computer. The information was knowingly inaccurate. It is clearly a falsification of a state record.

Grievant states there is disparate treatment as he knows of others who have falsified records. Grievant had no witness or documentation to prove his claim.

The Agency stated they considered Grievant's long and good previous record and mitigated the possible discipline based on that record. The hearing officer will not dispute this consideration and the hearing officer does not find the discipline to be over harsh.

Both length of service and otherwise satisfactory work performance are grounds for mitigation by Agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the Agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the Agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are never relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an Agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charges. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.¹³

Falsifying state records is a Group III offense¹⁴ which was further aggravated by Grievant's intentional inaccurate ammunition report which could create a serious security issue. However, Grievant was given a Group II discipline. Grievant presented no valid reason for his actions that would warrant further mitigation of the discipline. Grievant

¹³ EDR Ruling No. 2007-1518 (October 27, 2009)

¹⁴ Agency Exhibit 4 pg. 9 D2a

was unable to prove an example of behavior that paralleled his action that received less harsh discipline.

DECISION

For the above reasons, Agency's Group II discipline 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 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.¹⁵

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

Sondra K. Alan, Hearing Officer

¹⁵ 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.