

Issue: Group III Written Notice (falsifying documents); Hearing Date: 11/18/16;  
Decision Issued: 12/08/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 10871; Outcome: Partial Relief.



***COMMONWEALTH of VIRGINIA***  
***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 10871**

Hearing Date: November 18, 2016  
Decision Issued: December 8, 2016

**PROCEDURAL HISTORY**

On April 4, 2016, Grievant was issued a Group III Written Notice of disciplinary action for falsifying records.

On May 2, 2016, 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, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 18, 2016, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
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 Virginia Department of Corrections employs Grievant as a Corrections Officer at one of its Facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Inmates in the Segregation Unit were kept in cells in a housing unit with a cinderblock wall in the middle of the housing unit. The wall was five or six feet tall. Inmate cells had a paper form called an Individual Log next to each cell door. Corrections Officers were supposed to record on the Individual Log whether the inmate accepted or refused meals delivered on food trays.

Inmates were not permitted to have more than one pair of "boxers" at one time.

On March 1, 2016, Grievant worked in the Segregation Unit. He was responsible for distributing food trays to offenders. Grievant moved a cart containing food trays into the Segregation Unit. Grievant observed that two of the inmates had an extra pair of boxers. Grievant instructed each inmate to give him the extra boxers. Each inmate refused to do so.

At approximately 10:30 a.m., Grievant approached the Lieutenant and told her two of the inmates had an extra set of boxers. The Lieutenant told Grievant that "When they give up the boxers, they can eat." Grievant understood the Lieutenant's instruction to mean that he should not feed the inmates until they had given him the extra boxers. Grievant told the inmates that they could receive their food trays if they surrendered their unauthorized clothing. When the first inmate refused to give Grievant the boxers, Grievant placed that inmate's food tray on the wall in the middle of the Segregation Unit. Grievant delivered food trays to four or five other inmates and then reached the second inmate's cell. The second inmate refused to give Grievant the extra boxers. Grievant placed that inmate's food tray on the wall in the middle of the Segregation Unit.

At approximately 10:56 a.m., after Grievant finished delivering trays to the inmates in the Segregation Unit, he walked to each inmate's cell door and accessed each inmate's Individual Log. Grievant circled the "A" on the form to show that each inmate had "accepted" his lunch tray. Grievant wrote his initials on the form. Grievant circled the "A" and wrote his initials for the two inmates to whom he did not give food trays.

The Sergeant observed the trays on the wall of the Segregation Unit. He reported his observation to the Unit Manager.

At approximately 4 p.m., two dinner trays were given to each of the two inmates instead of one food tray. The inmates considered this as an adequate resolution of their objection to Grievant's refusal to provide them with lunch.

### **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>1</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>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

"[F]alsifying any record" is a Group III offense. Falsification is not defined by the 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

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

justifying termination. This interpretation is less rigorous but is consistent with the definition of “Falsify” found in Blacks Law Dictionary (6<sup>th</sup> 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*.

If an employee knew or should have known that he or she was writing something false on a document, then an agency can establish that an employee falsified a document.

In this case, Grievant did not have actual intent to falsify the Individual Log. Grievant did not sign the Individual Log immediately after delivering each tray. His customary practice was to deliver all of the food trays and then go to each cell door and sign each Individual Log. At the time he signed the Individual Log for each inmate, he did not remember whether or not that inmate had accepted a food tray. He simply assumed that each inmate had accepted a food tray.

Grievant should have known that two inmates had not received their food trays and that his customary practice of circling “A” and placing his initials on all of the Individual Logs was not appropriate. Grievant had conversations with the two inmates about their having unauthorized clothing and had a conversation with the Lieutenant telling him not to deliver food trays. Grievant should have remembered that he had not delivered food trays to at least two inmates. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice for falsification of records. The Agency’s discipline in this case, however, must be mitigated.

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 Human Resource Management ....”<sup>4</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

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<sup>4</sup> Va. Code § 2.2-3005.

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

DOC Operating Procedure 425.4 governs Management of Bed and Cell Assignments. Section 12(b) provides that “[f]ood may not be used as a disciplinary measure.”<sup>5</sup> Grievant told the Lieutenant that the inmates were refusing to give him their extra boxers. She told him the two inmates could have their food when they gave him their extra boxers. The Lieutenant’s instruction was contrary to policy. Grievant complied with the instruction because he felt he was obligated to comply with the instructions of a superior officer. If the Lieutenant had not given Grievant an improper instruction, he would have given each inmate a food tray. Grievant’s customary practice of circling “A” and writing his initials on all of the Individual Logs in a quick sequence would not have resulted in any inaccurate Individual Logs. Based on the facts of this case, the disciplinary action should be reduced to a Group II Written Notice.

Grievant argued that he was distracted from his duties because he had to respond to an inmate’s suicide in another location of the Facility. When he returned to the Segregation Unit he forgot to write charges against the inmates and forgot to give them their trays. It is unclear the sequence of these events. Even if the Hearing Officer assumes for the sake of argument that the events occurred in the order described by Grievant, the Group III Written Notice would not be mitigated below a Group II Written Notice given the severity of the offense.

Grievant argued that he did not violate any policy because the Agency’s policies do not specify the times inmates must be fed. Each inmate received three meal trays on March 1, 2016 and, thus, no policies were violated according to Grievant. This argument is misplaced. Grievant was disciplined for falsifying a record. DOC Operating Procedure 425.4 was violated (at the Lieutenant’s direction) because inmates were not fed their lunches as a form of discipline.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice.

## 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

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<sup>5</sup> The Agency also asserted that failing to deliver food to inmates was contrary to statute.

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

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>6</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.

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<sup>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

Hearing Officer