

Issue: Group II Written Notice (failure to follow supervisor's instruction, perform assigned work or otherwise comply with applicable established written policy); Hearing Date: October 1, 2001; Decision Date: October 4, 2001; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5290



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5290

Hearing Date: October 1, 2001
Decision Issued: October 4, 2001

PROCEDURAL HISTORY

On May 9, 2001, Grievant was issued a Group II Written Notice of disciplinary action for:

Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. On April 11, 2001, at approximately 5:45 p.m., as Watch Commander, you used Force (ULTRON II) to get an inmate to exit the transportation van. You failed to comply with written policy 421-7.0.8, Reporting Institutional Incidents; and 431-11.0.4, Use of force by not reporting the incident to the Administrative Duty Officer or Serious Incident Report (SIRS) until April 30, 2001.

On June 8, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 4, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 1, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

Agency Party Designee
Agency Party Representative
Major
Corrections Officer
Lieutenant
Training Lieutenant
Office Services Specialist

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action.

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 employs Grievant as a Corrections Lieutenant. He has been employed by the Agency since 1992. On April 11, 2001, Grievant was serving as Watch Commander for the Facility. As Watch Commander, Grievant was responsible for all security aspects of the Facility.

At approximately 5:45 p.m. on April 11, 2001, a Department van arrived at the Facility with an inmate inside. After many attempts to persuade the inmate to leave the van, it became clear to Grievant that he would need to use force to remove the inmate. Although the inmate was in restraints, Grievant knew that his staff might be kicked or struck if they attempted as a group to physically remove him from the van. Grievant called the Major and advised him of the situation. The Major was the Chief of Security at that time. Grievant then called the Training Lieutenant in charge of stun guns and asked that an ULTRON II be delivered to Grievant. After the stun gun was delivered to Grievant, he positioned himself behind the inmate after the inmate had been distracted and asked the inmate to move out of the van. The inmate refused, so Grievant applied the stun gun to the inmate's back. The inmate did not exit the van. Grievant again asked the inmate to move out of the van and the inmate again refused. Grievant used

the stun gun a second time and finally the inmate left the van. The inmate was taken to the medical department and evaluated. He did not suffer any physical injuries.

Grievant and the Lieutenant work closely during their shift. They often work together to draft and submit reports. On April 11, 2001 following the use of force to extract the inmate, Grievant and the Lieutenant drafted one detailed incident report and prepared a draft Serious Incident Report. They placed one copy in a package containing documents relating to the entire shift and placed that package in the Major's inbox. They placed a second copy in an envelope and slid it under the Major's door.

An incident report is prepared by the individual staff member who participated in the use of force. A Serious Incident Report may be drafted by the Watch Commander, but is signed and approved by someone higher in rank within the Facility. The Facility submits the Serious Incident Report to regional managers within the Agency.

CONCLUSIONS OF LAW¹

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

Facility Security Post Order 2 governs Grievant's responsibilities as Watch Commander.² One of Grievant's duties is to, "Review and submit all incident and serious incident reports to the Chief of Security." On April 11, 2001, the Major was the Chief of Security. Grievant and the Lieutenant drafted an incident report and prepared a draft Serious Incident Report and submitted those documents to the Major. Thus, Grievant complied with his obligation under Post Order 2.

The Agency contends Grievant violated the Facility's Internal Operating Procedure ("IOP") 421 governing *Reporting Institutional Incidents*.³ Section 421-4.0 of this policy provides:

¹ The Agency submitted its documents to the Hearing Officer on time but did not provide Grievant with copies of those documents as required by the Prehearing Order. Because Grievant could show that he would be prejudiced by the introduction of two of the Agency's proposed documents, the Hearing Officer excluded them. The Hearing Officer does not know how those documents may have affected the outcome of this grievance.

² Agency Exhibit 15.

³ Agency Exhibit 17.

The timely and accurate reporting of incidents which occur at [the Facility] is essential, and will be reported promptly and accurately to the appropriate levels of management. Since incident reports are frequently used in litigation proceedings, the importance of writing clear, concise, and factual and complete reports cannot be over-emphasized. In addition, incident reports allow the Administration to make policy changes as needed and to keep other officials informed as necessary.

IOP 421 sets forth a reporting obligation. IOP 421-7.0(B) provides that when force is used with non-lethal weapons (such as a the Ultron II), the Regional Director must be called within one hour of the incident. In addition, the secretary to the Assistant Warden-Operations must fax a copy of a Serious Incident Report to the Regional Director, Deputy Director, and Internal Affairs. Copies of reports are to be kept in the Operations Office at the Facility.

The difficulty with IOP 421 is that it does not identify who (other than the secretary for the Assistant Warden) is responsible for sending the necessary reports to the Agency's Regional Director, Deputy Director, and Internal Affairs. The procedure does not indicate Grievant had any responsibility under this procedure. Thus, Grievant did not violate IOP 421.

The Agency contends Grievant violated IOP 431 regarding *Use of Force*. Section 431-11.0(B)⁴ provides:

Any employee who uses or observes the use of force must [file a] report which includes a description of the amount and kind of force used, if blows were delivered, methods of restraint, areas of the body struck and whether weapons were used. The report will also cover the presence of others, including offenders, employees and others, and describe their participation, if any, in the incident.

This procedure obligates Grievant to submit an incident report regarding his use of the Ultron II.

Based on the credibility of the witnesses, the Hearing Officer concludes that Grievant complied with IOP 431. Grievant and the Lieutenant testified that they drafted an incident report and prepared a draft Serious Incident Report for the Assistant Warden's signature and submitted those documents to the Major. Although the Agency could not find the reports, this does not mean Grievant and the Lieutenant did not submit them. The Agency has failed to establish that Grievant violated IOP 431.

The Agency contends Grievant should be disciplined because he failed to notify the Administrative Duty Officer. This argument is unsupported. Neither the post orders

⁴ Agency Exhibit 16.

nor the institutional operating procedures presented require Grievant to notify the Administrative Duty Officer. Even if the Hearing Officer assumes for the sake of argument that Grievant was obligated to contact the Administrative Duty Officer, the evidence presented showed he did contact an Administrative Duty Officer. IOP 408⁵ states that the Chief of Security “provides duty officer coverage on a regular basis from 5:00 p.m. to 9:00 p.m. This IOP became effective seven days before the incident. Since the Major was the Chief of Security at approximately 5:45 p.m. on April 11, 2001, he was also an Administrative Duty Officer. The Agency presented an administrative duty schedule⁶ prepared in January 2001 showing someone other than the Major as the Duty Officer on April 11, 2001. Based on these documents, the Hearing Officer concludes that the Agency had named two Administrative Duty Officers on April 11, 2001, one of whom was the Major.

Grievant’s practice was to prepare one detailed incident report reflecting the observations of all of those individuals who witnessed the use of force. Section 431-11.0(B), however, states that all persons who witnessed the use of force should draft incident reports. The Agency did not discipline Grievant for failing to ask other staff to prepare incident reports and did not independently discipline those staff who failed to file incident reports. The Hearing Officer recommends that the Agency, at its sole discretion, counsel Grievant regarding those circumstances in which it expects him to ask other witnesses to draft incident reports.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. GPM § 5.9(a). The Agency is directed to remove the Written Notice from the Grievant’s personnel file in accordance with Department of Corrections Procedures Manual § 5-10.19(B) (June 1, 1999).

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly

⁵ Grievant Exhibit 1.

⁶ Agency Exhibit 18.

discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar days** of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.

Hearing Officer