

Issue: Group I Written Notice (disruptive behavior); Hearing Date: October 29, 2001; Decision Date: October 30, 2001; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5316



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5316

Hearing Date: October 29, 2001  
Decision Issued: October 30, 2001

APPEARANCES

Grievant  
Associate Warden  
Three witnesses for Agency

ISSUES

Was the grievant's behavior on June 22, 2001 disruptive so as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of corrective or disciplinary action for the conduct at issue?

## FINDINGS OF FACT

The grievant filed a timely appeal from a Group I Written Notice issued on July 10, 2001 for disruptive behavior on June 22, 2001. The parties did not resolve the grievances at the third resolution step and the agency head subsequently qualified the grievance for a hearing.

The Department of Corrections (hereinafter referred to as agency) has employed the grievant as a correctional officer for six years.

Grievant received the institutional operating procedure for employee uniforms and is familiar with the requirements therein. The detailed 19-page memorandum states, in pertinent part:

The hat will be worn squarely on the head or may be tilted very slightly, to either side; whichever is most comfortable. The hat will be worn at all times, but may be removed while indoors or in a vehicle.<sup>1</sup>

At 11:09 p.m. on June 22, 2001, grievant exited a housing unit with her hat in her hand. Her supervisor (sergeant) and a lieutenant observed that she made no attempt to put her hat on as she walked away from the building. The sergeant instructed grievant to put her hat on her head. The grievant responded, "I'm not putting no hat on! I'm hot! Write it up!" Because there were other correctional officers in the area, the lieutenant and sergeant said nothing further. After they had walked about 50 yards from the building, they turned and observed grievant following them, with her hat still in her hand.

When this disciplinary action was issued, grievant had two active Group I Written Notices. In addition, she had had been verbally counseled on several occasions for various infractions including disruptive behavior.

## APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides 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 governmental interest in

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<sup>1</sup> Exhibit 3. Section 402-7.12, Institutional Operating Procedure Number 402, *Employee Uniform*, May 22, 2001.

and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.1-116.05(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>2</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to §§ 2.1-114.5 and 53.1-10 of the Code of Virginia, the Department of Personnel and Training<sup>3</sup> promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal 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.

The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.15 of the DOC Standards of Conduct addresses those offenses that include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force. One example of a Group I offense is disruptive behavior.<sup>4</sup> Section 5-10.16 includes acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal. Failure to follow established written policy and failure to follow a supervisor's instructions are Group II offenses.

The agency has borne the burden of proof to demonstrate, by a preponderance of the evidence, that grievant failed to follow established written

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<sup>2</sup> § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*.

<sup>3</sup> Now known as the Department of Human Resource Management (DHRM).

<sup>4</sup> Exhibit 5. Department of Corrections Procedure Number 5-10.15, *Standards of Conduct*, June 1, 1999.

policy (wear hat at all times when outside) and refused to follow the direct order of her supervisor to put her hat on. Moreover, the grievant's insolent response to her supervisor challenging him to "write it up" was clearly insubordinate. Therefore, grievant's actions warranted the issuance of a Group II Written Notice.

The agency elected to take into consideration the grievant's six years of service and reduced the disciplinary action to a Group I Written Notice. Notwithstanding the leniency shown by the agency, grievant feels the discipline was inappropriate because she claims to have seen other employees who were not wearing their hats while outdoors. However, grievant did not bring any witnesses to support her contention. Further, grievant does not know whether any supervisors actually witnessed others failing to wear their hats. If supervisors did witness others, grievant does not know whether those people were counseled or given disciplinary action. Therefore, grievant has not demonstrated any disparate treatment of other employees.

The grievant contests the use of "disruptive behavior" in her Written Notice. While her behavior was different from typical disruptive behavior, it was nonetheless disruptive because she attempted to precipitate a confrontation with her supervisor by refusing to follow his direct order. Her insubordination in the presence of other correctional officers was therefore disruptive. Moreover, even if one could conclude that the behavior was not disruptive, it was insubordinate and could have justified the issuance of a Group II Written Notice. The associate warden reduced the discipline to a Group I – a very mild discipline given the facts of this case.

### DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued to the grievant on June 22, 2001 is AFFIRMED. This Written Notice shall be retained in the grievant's personnel file for the period specified in Section 5-10.19.A of the Standards of Conduct.

### 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 three 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 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.

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.

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David J. Latham, Esq.

Hearing Officer