

Issue: Group I Written Notice (inadequate or unsatisfactory job performance); Hearing Date: January 4, 2002; Decision Date: January 26, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5342;

Administrative Review: Hearing Officer Reconsideration Request received 02/05/02; Reconsideration Decision Date: 02/06/02; Outcome: No newly discovered evidence or incorrect legal conclusions. Request denied;

Administrative Review: EDR Ruling requested 02/05/02; EDR Ruling Date: 08/05/02 (Ruling No. 2002-030); Outcome: HO did not abuse discretion or exceed authority; Administrative Review: DHRM Ruling requested 02/05/02; DHRM Ruling Date: 04/01/02 Outcome: Challenge deals with evidentiary matters. No authority to interfere with decision.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5342

Hearing Date: January 4, 2002
Decision Issued: January 26, 2002

PROCEDURAL HISTORY

On August 31, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

Inadequate or unsatisfactory job performance. On 8-23-01 you were inattentive while on post which is a violation of your written post orders.

On September 25, 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 she requested a hearing. On December 10, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 4, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Representative
Assistant Warden
Institution Safety Specialist

Captain
Assistant Warden Operations
Corrections Officer

ISSUE

Whether Grievant should receive a Group I 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 Officer. She works in Tower One and is subject to Post Order #6 governing her duties. She has been employed by the Agency since 1993 and has not received any prior disciplinary action.

Much of the analysis in this case depends on an understanding of the physical location of buildings.¹ A simple way to picture the location of these buildings is to envision a large baseball diamond with a security tower behind home plate. When a tower officer sits at the control panel, the officer is facing the middle of the facility (towards the pitching mound). Toward the left of the tower (down the third base line), is a long fence forming a perimeter of the Facility. Toward the right side of the tower (down the first base line), is another long fence forming a perimeter of the Facility. The tower is outside the perimeter fences. Immediately below the tower but towards the left side is the sally port entrance. This is a main entrance and a corrections officer is posted there at all times.

The tower is approximately 54 feet high. It is a small square one-room structure with windows facing all directions. Inside the tower is a desk/counter causing the tower officer to sit a foot or two away from the window. An officer can look out and down from

¹ The Hearing Officer climbed into Tower One and looked outward and downward from the tower. The Hearing Officer also stood where the Assistant Warden stood when he called up to the Grievant.

a front window, but must stand and lean forward to do so. A chair is located inside the room. Surrounding the tower is a narrow catwalk. The floor of the catwalk is metal and serves to obstruct an officer's inspection of the area immediately below the tower.

When an officer is seated in the tower at the control panel facing forward, he or she can observe the sally port entrance, the activities within the fenced area, and an exterior road adjacent to the right fence. In order for the tower officer to observe the maintenance shop area, the officer must turn approximately 30 to 45 degrees to the right. If an officer turned to the right to look at a truck parked next to the maintenance shop, the tower officer could see the truck and could observe the truck travel from the maintenance shop to the tower, but would quickly lose sight of the truck as it approached the tower and parked underneath the tower.

Tower officers regularly have their meals delivered to them while they are working in the tower. They are permitted to eat their meals while working but are expected to remain observant at all times. Grievant was seated eating breakfast in the tower when the Assistant Warden approached the tower.

On August 23, 2001, the Assistant Warden drove his truck down the road outside the right fence. He drove to the maintenance shop located approximately 50 yard behind the tower, parked his truck and attended to business within the maintenance shop. At approximately 7 a.m., he left the maintenance shop and drove directly towards the tower and parked directly underneath the tower. He got out of his vehicle and called to the officer in the tower. He wanted the tower officer to lower a key to him so that he could fill his truck with gas. When the Assistant Warden did not get a response, he walked away from underneath the tower and to an distance where he believed he could have a better view of the tower officer.² He looked up towards the tower and did not see an officer. Since the Agency discontinued its former practice of manning towers at all times, the Assistant Warden assumed the tower was unmanned and he left the area. The Assistant Warden did not attempt to contact Grievant by radio even though he had a radio in his vehicle.

CONCLUSIONS OF LAW

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.

² The Assistant Warden also looked for the corrections officer working at the sally port but could not see that officer. The sally port is manned at all times.

The Agency contends Grievant should receive a Group I Written Notice because she was inattentive. This case is very close and difficult to resolve. On the one hand, the Agency expects its employees to be vigilant at all times.³ On the other hand, the Grievant cannot be expected to see through solid objects and overcome normal distractions such as noise. Because the burden of proof is on the Agency, the Hearing Officer must resolve this close grievance in favor of the Grievant.

Although a tower officer is expected to observe activities in all directions of the tower, it is clear that the primary focus of the officer is to look toward the fenced facility where inmate activity takes place. Post Order # 6 states that the tower officer has responsibility for “[a]ll areas within vision of State property, with primary responsibility for the Security Perimeter ...”⁴ (Emphasis added). Grievant was seated eating her meal when the Assistant Warden approached the tower. Thus, she was facing the area where she had primary responsibility. The maintenance shop was behind her.

The Assistant Warden drove from the maintenance shop to directly underneath the tower.⁵ If Grievant had turned and looked behind the tower towards the maintenance shop, there would only have been a short time for her to observe the Assistant Warden before he drove his underneath the tower. Once the truck was directly underneath the tower, it was physically impossible to see the truck from inside the tower. The Assistant Warden stepped away from his truck and attempted to see into the tower. From the location where he was standing, it is difficult to see even the top of the head⁶ of a corrections officer sitting inside the tower.⁷ Likewise, it would be difficult for Grievant to have been able to see the Assistant Warden while sitting in the tower. The Assistant Warden called up to the tower to attract Grievant’s attention. She did not hear him because of the sound of generators and other noise coming from the main yard. The Assistant Warden had a radio in his vehicle that he could have used to relay a message to Grievant but he assumed the tower was unmanned and simply left the area.

³ The Agency argues that if an inmate attempted to escape through a fence or sally port, Grievant would not have seen the inmate. This argument is not supported by the facts of this case. The Assistant Warden drove to the tower from behind the tower. An inmate escaping through a fence would be in front of the tower and within Grievant’s view even if she was eating her breakfast.

⁴ Agency Exhibit 6.

⁵ Given the height of the tower and the amount of other noise in the area, it is not realistic to expect Grievant to have heard the truck engine as the Assistant Warden drove to the tower.

⁶ Grievant is an average height female who would be difficult to see from where the Assistant Warden was standing unless she was standing.

⁷ If Grievant had been standing, the Assistant Warden could have seen her. He could not see her because she was seated eating the meal that had been delivered to her by the agency.

The Hearing Officer is not convinced that Grievant was inattentive.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

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 DHRM, 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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5342-R

Reconsideration Decision Issued: February 6, 2002

PROCEDURAL HISTORY

On January 26, 2002, the Hearing Officer issued a decision rescinding the Agency's disciplinary action taken against Grievant. On February 5, 2002, the Agency filed a timely request for reconsideration.

DISCUSSION

The Hearing Officer based his decision primarily on the inability of Grievant to see directly below her while working in a tall tower and not based on Grievant's inability to hear the Assistant Warden.

The Agency contends that its logbooks show the generators were not operating at the time the Assistant Warden called out to the Grievant. Although the Agency did not offer these log books as evidence during the hearing, if the Hearing Officer assumes that the generators were not operating at 7 a.m., the outcome of the hearing is not affected. Based on the Hearing Officer's observation from the tower, sounds coming from a distance were amplified in the tower. Although the Hearing Officer observed only minor activities in the main yard, the sounds from the yard and activity from the buildings behind the tower created sufficient noise to cover up the sound of someone calling from below the tower.

The Agency points out that the radio in the Assistant Warden's vehicle does not communicate directly with the walkie-talkie assigned to the tower post. The Hearing Officer recalled that testimony which is why the Hearing Officer wrote that the Assistant Warden could have used his radio to relay a message to Grievant. The Assistant Warden could have contacted Master Control or another location where both radios

were maintained and asked someone to contact the Grievant through the walkie-talkie. Although not mentioned in the original draft, the Assistant Warden also could have blown his vehicle's horn to notify Grievant.

After reconsidering the Agency's arguments, the Hearing Officer finds no basis to alter the original decision in this appeal.

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

The Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration is **denied**.

APPEAL RIGHTS

The parties should review the Grievance Procedure Manual, the Code of Virginia, and Rules of the Supreme Court of Virginia if they wish to appeal this Reconsideration Decision.

Carl Wilson Schmidt, Esq.
Hearing Officer