Issue: Group II Written Notice with demotion (failure to follow established written policy); Hearing Date: February 25, 2002; Decision Date: February 26, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5386

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5386

Hearing Date: February 25, 2002
Decision Issued: February 26, 2002

APPEARANCES

Grievant
One witness for Grievant
Warden
Four witnesses for Agency

ISSUES

Did the grievant's actions on November 28, 2001 warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on December 7, 2001 because he failed to follow applicable established written procedures.[1] Grievant was demoted with a ten percent salary reduction and transferred to a different facility. Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.

The Virginia Department of Corrections (hereinafter referred to as agency) has employed the grievant for 21 years. Prior to this disciplinary action he was a sergeant. The grievant has three prior active written notices. A Group I Written Notice was issued on September 5, 2001 for unsatisfactory attendance, specifically, abuse of sick leave. A Group I Written Notice was issued on October 11, 2001 for insubordination. A Group II Written notice was issued on October 17, 2001 for failure to report for work as scheduled. All three disciplinary actions were grieved and have been upheld by decisions of hearing officers.

The agency's post order for correctional officers who work in the segregation unit provides, in pertinent part:

> Whenever removing inmates from their cells two correctional officers will be present. The handcuffs shall be placed on the inmate from behind through the tray slot. … During showering, the shower door should be unsecured before removing inmate from cell. Allow inmate to enter shower, then secure door lock before removing handcuffs and restraining strap through door slot.[2]

In addition, a separate memorandum details the procedure for restraint of segregation unit inmates and states:

> What follows is the procedure to restrain a Segregation or Death Row inmate from within the cell prior to being transported to and from the inmate's destination. Correctional staff instructs the inmate to present himself to be restrained from behind with handcuffs through the trayslot. Once the inmate is restrained, the restraining strap will be applied to the handcuff prior to opening the cell door by *Correctional Officer **#1***. While holding the restraining strap, the cell door will be ordered open and the inmate will be instructed to kneel with both knees touching the floor. Leg irons will be applied to the inmate while he is kneeling by *Correctional Officer **#2***.[3] (Bold and Italics added)

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[1] Exhibit 5. *Written Notice*, issued December 7, 2001.
[2] Exhibit 2. Specific Duty 12, *Post Order # 82, 83, 84, 85, Building 3A & B, Segregation Floor Officer.*
[3] Exhibit 4. *Memorandum* from Warden to correctional staff, June 15, 2001.

The post order for correctional sergeants states that sergeants must "know, understand and follow the provisions set fourth (sic) in IOP's related to … Inmate Movement…."[4] Supervisors are expected to set the proper example for correctional officers by adhering to all institutional operating procedures.

Grievant had read and understood the post orders.[5] He acknowledged during the hearing that there should always be two officers escorting inmates housed in the segregation unit. On November 28, 2001, grievant removed an inmate from a shower and escorted the inmate to his cell without having another correctional officer present. The facility's operations officer witnessed this incident and promptly reported it to the warden.[6] The operations officer is of the same ethnic background as grievant.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 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 and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2.3000 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 § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[7]

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[4] Exhibit 7. Job Summary, *Post Order # 62*, Unit 3 Building Supervisor. (an IOP is an institutional operating procedure)
[5] Exhibit 3. *Post Order Review Log*, signed by grievant on October 3, 2001.
[6] Exhibit 1. *Incident Report* prepared by Operations Officer, November 28, 2001.
[7] § 5.8 Grievance Procedure Manual, Department of Employment Dispute Resolution.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[8] 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. Section V.B.2 defines Group II offenses to include acts and behavior more severe in nature are such that an additional Group II offense should normally warrant removal from employment.

The Department of Corrections, pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct. The DOC Standards includes as an example of a Group II offense the failure to comply with applicable established written policy.[9]

Grievant testified that he "does not remember" escorting an inmate from the shower without having a second correctional staff person present. The agency's operations officer was in the building and witnessed the entire incident. Another correctional officer was busy distributing lunches in the area and did not observe the incident. The only other person who might have been aware of the incident was working in the control booth, however, she is no longer employed and was unavailable to testify. Accordingly, the only available evidence pits the testimony of the operations officer against that of the grievant. For the following four reasons, it is concluded that the testimony of the operations officer is more credible than grievant's testimony.

First, grievant has not denied the allegation. He has stated only that he "doesn't remember" the incident. He contends that there is a lot of activity happening quickly in the segregation unit, which may account for his inability to remember what occurred.

Second, grievant argues that, "Incidents take place so fast and often in this unit that to expect each incident to be handled picture perfect is not realistic. As a supervisor, like any other supervisor I must evaluate the situation and make the best decision at that time."[10] This argument is a rationalization for grievant's actions – not a denial. It suggests that grievant decided that he was capable of

[8] Now known as the Department of Human Resource Management (DHRM).
[9] Exhibit 6. Department of Corrections Policy Number 5-10.16.B.1, *Standards of Conduct,* June 1, 1999.
[10] Exhibit 8. Attachment to *Grievance Form A*, filed January 2, 2002.

handling this inmate without assistance and made a judgement call to not follow the established written policy.

Third, grievant contends that the post order for supervisors contains "nothing in there to indicate that a supervisor needs a second staff member to escort an inmate within the pod."[11] Here, grievant attempts to find justification for his action by referring to Post Order # 62. In fact, that post order requires supervisors to "know, understand and **follow**" all of the institutional operating procedures applicable to correctional officers. Thus, not only is grievant's reading of Post Order # 62 erroneous, but his employment of this argument suggests strongly that grievant is again attempting to justify his action.

Finally, grievant has been unable to demonstrate any motive for the operations officer to fabricate this incident. Grievant acknowledges that he has never been disciplined by, or had any problems with, the operations officer. The operations officer's testimony was clear, detailed and unambiguous. She is the same race as grievant and therefore, in the absence of any evidence to the contrary, is presumed not to have been racially motivated in filing her incident report.

In his written grievance, grievant contends that the disciplinary action was unfair, that the Warden has a vendetta against him, that the Warden is harassing him due to his ethnicity, that the Warden is racist, and that four other members of management should be sanctioned for their parts in the issuance of the disciplinary action. However, grievant presented no evidence or testimony to support any of these allegations. In fact, during the hearing, grievant did not even address these allegations. Mere allegations without corroborative evidence are little more than smoke. Like smoke, such allegations quickly dissipate when they are unsupported by substantive evidence.

Grievant pointed to the lack of incident reports from the two other correctional officers who might have seen this incident. Normally, the agency practice is to obtain written incident reports from those who may have observed the incident. The agency acknowledged that such reports should have been obtained. One of the two officers did testify during the hearing and he cannot recall the incident; the other is no longer employed or available. While the lack of such corroborative evidence makes the agency's case weaker, it is not fatal. The hearing officer must make his decision based on the available evidence, which in this case is the testimony of grievant and the operations officer. As concluded previously, the testimony of the operations officer is found to be more credible than grievant's testimony. Accordingly, it is concluded that the agency has shown that it is more likely than not that grievant did escort an inmate from the shower to his cell without having another correctional officer present.

[11] Exhibit 8. *Ibid.*

Mitigation

The Standards of Conduct policy provides for the consideration of mitigating circumstances in the implementation of disciplinary actions and states, in pertinent part:

> While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:
>
> a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
> b. an employee's long service or otherwise satisfactory work performance.[12]

Prior to this disciplinary action, grievant had two active Group I Written Notices and one active Group II Written Notice. The normal discipline for a second Group II Written Notice is removal from employment. In this case, grievant has now incurred a second Group II Written Notice; a second such Notice should warrant automatic removal from employment. Nonetheless, because of his length of service, the agency elected to demote and transfer grievant rather than discharge him. Given grievant's disciplinary record, the agency has been unusually generous by allowing grievant to remain employed.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on December 7, 2001, the demotion, salary reduction and transfer to another facility are hereby AFFIRMED. The 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:

[12] Section VII.C.1, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

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