

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: March 14, 2002; Decision Date: March 15, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5399



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5399

Hearing Date:	March 14, 2002
Decision Issued:	March 15, 2002

PROCEDURAL ISSUE

The grievant agreed to the hearing date in a pre-hearing conference. A Notice of Hearing letter was mailed to the grievant at his last known address. The Notice was not returned by the postal service and therefore it is presumed that grievant received the Notice. The grievant failed to submit any documents or a witness list prior to the hearing. Grievant failed to appear at the hearing on the docketed date. The hearing officer conducted the hearing and took evidence from those who appeared.

APPEARANCES

Assistant Warden
One witness for Agency

ISSUES

Did the grievant's actions on October 15, 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 I Written Notice issued on October 17, 2001 for unsatisfactory job performance on October 15, 2001.¹ 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 at his current facility as a correctional officer for three years. He is responsible for maintaining security, custody and control over inmates, especially while the inmates are in transport or in movement on facility grounds.² He has received specific training that the rear door of Building 4 must be locked during the hours of darkness and that inmates being escorted to their housing units must be inside the building before driving off.³

Grievant had received and read a post order regarding grounds security that states, in pertinent part:

24. NO inmate is to leave your area of control between the hours of dusk and dawn without direct security supervision and notification of Grounds Security Patrol.
25. Grounds Security shall ensure the door entering the rear and front of Building # 4 are locked at dawn [should be dusk] and unlocked prior to the day shift arriving at approximately 7:00 a.m.⁴

At about 7:00 p.m. on October 15, 2001, grievant's supervisor (a lieutenant) was making a routine check of the buildings and grounds. He checked the rear door of Building 4 and found it unlocked. He contacted grievant by radio and asked for an explanation but grievant offered none. The lieutenant locked the door and continued his checks. Sunset occurred at 6:33 p.m. and twilight ended at 6:59 p.m. on October 15, 2001.⁵

¹ Exhibit 1. Written Notice, issued October 17, 2001.

² Exhibit 5. Grievant's *Employee Work Profile*, signed May 5, 2001

³ Exhibit 8. Security Department briefing sheets, February 3, 2001 and March 9, 2001.

⁴ Exhibit 6. Post Order # 18 & 19

⁵ Exhibit 10. U.S. Naval Observatory sun and moon data for October 15, 2001.

Grievant has attended training on inmate supervision and control of inmate movement and has attended a correctional officer's training school.⁶ He was trained on the institutional procedure for counting procedures, which states:

Whenever inmates are moved in groups, a count will be made of the group upon departure and return to determine that all inmates returned.⁷

At about 8:30 p.m. on October 15, 2001, grievant's supervisor drove up behind grievant. Grievant was in a van driving slowly behind a group of inmates who were walking along a driveway. The lieutenant called grievant on the radio and asked him how many inmates he was escorting. Grievant responded that he had not counted them when they left the gymnasium.⁸ Grievant's responsibility on this occasion was to escort the inmates from the gymnasium to their housing unit and assure that all eight entered the housing unit.

Grievant then drove past the inmates, pulled around the circle at the end of the driveway and parked his van for a few minutes. The inmates walked down the opposite side of the circle, along the side of one building and towards their own housing unit. There are six-foot high bushes in the center of the circle that obscure the view of people walking on the opposite side. Grievant was unable to see the inmates as they walked around the circle, along the side of one building and towards their own housing unit. Grievant then drove away. The lieutenant remained and escorted the inmates to their housing unit.

During 2001, grievant has been counseled on multiple occasions for failure to follow instructions, unacceptable job performance and insubordination.⁹

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).

⁶ Exhibit 9. Grievant's training records.

⁷ Exhibit 4. Section 411-7.3.E, Institutional Operating Procedure (IOP) 411, *Counting Procedures*, March 15, 2001.

⁸ The lieutenant counted the group; there were eight inmates.

⁹ Exhibit 7. Counseling memoranda during 2001.

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.¹⁰

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 Training¹¹ 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.1 defines Group I offenses to include behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.

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. One example of a Group I offense is inadequate or unsatisfactory job performance.¹²

The agency has demonstrated by a preponderance of the evidence that grievant's job performance on October 15, 2001 was unsatisfactory. Grievant failed to lock a door in Building # 4 at dusk, as required by the post order. He also failed to count the number of inmates in the group he was escorting and failed to keep them in sight until they entered their housing unit.

¹⁰ § 5.8, Grievance Procedure Manual, Department of Employment Dispute Resolution, July 1, 2001.

¹¹ Now known as the Department of Human Resource Management (DHRM).

¹² Exhibit 3. Department of Corrections Policy Number 5-10.15.B.4, *Standards of Conduct*, June 1, 1999.

Grievant contends that he was not responsible for locking the rear door in Building 4 on October 15, 2001 because another correctional officer was working in the Building 4 area. The credible testimony of grievant's supervisor contradicts grievant's assertion. Grievant also argues that for a period of time, he was working alone and did not have time to check the door. Again, the supervisor's testimony established that, if grievant could not check the door, he could have called his supervisor on the radio. The supervisor would then have had someone else secure the door.

Grievant has not offered a satisfactory explanation for failing to count the inmates he was escorting. IOP 411 clearly requires such a count and does not provide for any exceptions to the rule. Grievant contends that he allowed the inmates out of his sight and left the area before they had returned to their housing unit because he believed his supervisor had taken over the escort duty. However, the lieutenant's credible testimony is that he was not escorting the inmates but just happened to be in the area observing grievant's performance. Sometimes, the lieutenant and a correctional officer will agree by radio to jointly escort inmates. On this occasion, however, there had been no radio communication between grievant and his supervisor beforehand. Grievant did not rebut the lieutenant's credible testimony. Grievant acknowledges that, when the lieutenant drove up behind him, grievant assumed the lieutenant was going to assist him.¹³

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued on October 17, 2001 is 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:

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,

¹³ Exhibit 1, p. 8. Employee comments to first resolution step.

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.

David J. Latham, Esq.
Hearing Officer