Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: August 21, 2002; Decision Date: August 26, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esq.; Case No.: 5502

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5502

Hearing Date: August 21, 2002
Decision Issued: August 26, 2002

PROCEDURAL ISSUE

In addition to requesting that his disciplinary action be reversed, grievant requested that other employees be disciplined, and that the Department of Public Safety conduct an investigation. Hearing officers have the authority to uphold, reduce or rescind disciplinary action.[1] Hearing officers do not have authority to discipline employees, or to direct a state agency to conduct an investigation.[2]

APPEARANCES

Grievant
Two witnesses for Grievant
Warden

[1] § 5.9(a)2, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[2] § 5.9(b)5, 6 & 7, *Ibid.*

One witness for Agency

ISSUES

Did the grievant's actions 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 for unsatisfactory job performance on April 3, 2002.[3] Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.[4]

The Virginia Department of Corrections (DOC) (Hereinafter referred to as agency) has employed the grievant as a correctional officer for 16 years. The grievant has no other prior disciplinary action and has been a dedicated correctional officer.

During the week of April 1-5, 2002, grievant and 11 other correctional officers were enrolled in a defensive driving school. The 12 correctional officers work at four different correctional facilities. The training was conducted at a rural airport near a correctional facility.[5] In addition to hands-on driving, the school included classroom training that was conducted in an airplane hangar at the airport. One of the training instructors had used an airplane wing as a podium or desk on which he placed his instructor's manual.

On April 3, 2002, the instructors and some of the students left the hangar to practice on the driving course. Grievant and four or five students remained in the hangar. Grievant walked up to the airplane wing, began to look through the instructor's manual, and found the answer key to two multiple-choice examinations that were to be administered to students toward the end of the week-long school. Grievant started copying the answers on paper and, at the same time, called out the answers for 90 questions so that other students could hear the answers.[6] One student reported this to the superintendent of the correctional facility that evening. On the morning of April 4, 2002, the two lead instructors began questioning students individually to ascertain who was responsible. When grievant was questioned, he readily admitted his culpability.

[3] Exhibit 1. Written Notice, issued April 10, 2002.
[4] Exhibit 2. Grievance Form A, filed April 26, 2002.
[5] Grievant is employed at a different facility located 160 miles away in another part of the state.
[6] For example, 1b, 2d, 3a, etc.

The instructors had to restructure the examination that morning which caused some delay in the training schedule. The revised test was later administered to the students. The lead instructors lectured grievant about what he had done, told him why it was wrong and advised him that he could be subject to discipline pursuant to the Standards of Conduct. The superintendent of the nearby correctional facility had oversight responsibility for the students during their one-week training school. He was notified and similarly counseled grievant about his conduct; he later addressed the entire class to make them all aware that such conduct constituted an unacceptable offense. One of the instructors told the students that, "What happens at [name of facility] stays at {name of facility]." He intended this statement to mean that correctional officers should not return to their home facilities and gossip to others that grievant had attempted to cheat on the examination. Grievant took the statement to mean that the counseling he received would be the only corrective action taken against him.

The incident was reported to the warden of grievant's facility. The warden and others met with grievant upon his return to his home facility on April 8, 2002. Grievant again acknowledged his guilt, stated he was sorry, and assured the warden that it would not happen again. Grievant also complained about certain actions of the instructors during the training school that grievant believed were unprofessional and inappropriate. After review of the matter, the warden issued a Group I Written Notice to grievant for unsatisfactory work performance.

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]

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.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.[9]

Grievant has admitted that he obtained without permission an answer key to an examination he was scheduled to take, that he copied the answers for his own use and benefit, and that he made the answers available to several other students. Therefore, the agency has demonstrated, by a preponderance of the evidence, that grievant committed an offense that is subject to discipline pursuant to the Standards of Conduct. Accordingly, the burden of persuasion now shifts to the grievant to demonstrate any circumstances that would mitigate the offense.

Grievant contends that the training class was presented as a "goof" and that his conduct was also a mere "goof."[10] He avers that the instructors violated several of the rules that had been mentioned on the first day of training. Specifically, he states that instructors smoked in the classroom and in state vehicles, "hot-dogged" vans on the driving course and brought minor children to the driving course – all violations of rules laid down by the instructors. However, at the time these alleged rule violations occurred, grievant did not report them either to the chief training instructor or to the correctional facility superintendent.

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[7] § 5.8, EDR *Grievance Procedure Manual*, effective July 1, 2001.
[8] Now known as the Department of Human Resource Management (DHRM).
[9] Department of Corrections Procedure Number 5-10.15.B.4, *Standards of Conduct,* June 1, 1999.
[10] Exhibit 2. Attachment 1 to Grievance Form A.

To date, he has still not filed any complaint with the superintendent. Grievant mentioned it to his own warden but only because he felt that if he was to be disciplined, others should also be disciplined for their rule violations.

Assuming for the sake of argument that such rule violations occurred, grievant has not shown that this should mitigate his own discipline for five reasons. First, agency management can discipline rule violations only if it becomes aware of the violations. Grievant did not take the violations seriously enough to report them when they occurred. Second, grievant does not know whether the violations have been reported and whether disciplinary action has already been taken against the offenders. Third, the alleged violations were different from the offense grievant committed. Without a review of the facts in those cases, it cannot be determined whether the violators should be counseled or disciplined. Fourth, it appears that grievant only raised the issue of alleged violations when it became apparent that he was going to be disciplined. Grievant's attempt to divert attention from his own offense appears to be merely a smokescreen. Finally, grievant was unable to demonstrate that any of the alleged rule violations adversely affected him in any way.

Grievant argues that the counseling he received from the training instructors and the facility superintendent was informal discipline and that he should therefore not be disciplined by his own Warden. Grievant's argument that he is being subjected to double jeopardy is not persuasive for four reasons. First, the Standards of Conduct do not provide for "informal" discipline. The policy provides for corrective action that can range from informal action such as counseling to formal disciplinary action.[11] Second, there is no provision in the Standards of Conduct that prohibits counseling immediately after an offense, followed by issuance of a disciplinary action. Immediate counseling is intended to prevent a recurrence of offensive behavior, while the purpose of discipline is to more formally establish the offense and document the disciplinary action taken. Third, the superintendent of the other facility does not have the authority to discipline grievant. Only grievant's warden has the authority to fully review the matter and decide upon an appropriate level of discipline. Fourth, counseling is not discipline because no there is adverse action associated with counseling. There is no discharge, demotion, transfer, reduction in pay, suspension or written record placed in the personnel file; these actions are taken only when formal disciplinary action is issued. Since there is no adverse action connected with counseling, subsequent disciplinary action is not "double" jeopardy.

Grievant also argues that the instructor who left his manual on the airplane wing should be disciplined for leaving the manual where students could access it. The instructor testified that, in four years of teaching, he had never previously had any problem with students looking into his manual and copying answers from the test answer key. He had always believed that students could be trusted not to snoop into his training material. Grievant contended that he should be

[11] Section 5-10.6, DOC Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

disciplined only if the instructor is also disciplined. However, under cross-examination, grievant acknowledged that he should be disciplined solely because of his own actions.

A preponderance of the evidence, including grievant's admission of guilt, establishes that grievant made an unauthorized copy of an answer key to an examination he was scheduled to take, and that he facilitated the distribution of the answers to fellow students. Grievant's conduct was unethical and unprofessional. Such an offense amounts to the unauthorized removal of state records – a Group III offense. The agency's decision to issue only a Group I Written Notice for unsatisfactory job performance represents a significant mitigation of the discipline that could have been given to grievant. The evidence in this case amply supports the disciplinary action issued by the agency.

Grievant requested as part of his relief that there be no retaliation as a result of his grievance. All three grievance step respondents assured grievant in writing that there would be no retaliation. The Commonwealth's grievance procedure prohibits retaliation, stating, in pertinent part, "An employee may ask EDR to investigate allegations of retaliation as the result of the use of or participation in the grievance procedure…."[12] EDR will investigate such complaints and advise the agency head of its findings. During the hearing, the Hearing Officer advised grievant of this protection.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued on April 10, 2002 is hereby UPHELD. 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

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

[12] § 1.5, Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[13]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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David J. Latham, Esq.
Hearing Officer

[13] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.