

Issues: Group II Written Notice (failure to follow supervisor's instruction, perform assign work, or otherwise comply with established written policy), and arbitrary performance evaluation; Hearing Date: 09/18/02; Decision Date: 09/20/02; Agency: Dept. of Juvenile Justice; AHO: David J. Latham, Esq.; Case No. 5512



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5512

Hearing Date: September 18, 2002  
Decision Issued: September 20, 2002

**PROCEDURAL ISSUES**

The grievant filed a grievance that challenged four issues. The agency qualified for hearing two issues – the Group II disciplinary action issued on February 15, 2002, and a performance reevaluation dated March 8, 2002. The agency found two other issues not qualified for hearing – grievant's 2001 performance evaluation, and a written memorandum of counseling. Grievant appealed the agency's decision to the Department of Employment Dispute Resolution (EDR). The EDR Director issued a qualification ruling affirming the agency's determination and denying qualification of the 2001 performance evaluation and the written memorandum of counseling.<sup>1</sup>

During the hearing, the agency attempted to proffer evidence relating to grievant's conduct and performance during periods of time prior to the dates of offense cited in the Group II Written Notice, and prior to the 90-day reevaluation period covered by the performance reevaluation. The Hearing Officer ruled that,

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<sup>1</sup> Exhibit 2. EDR *Qualification Ruling of Director* No. 2002-138, issued July 23, 2002.

with the exception of foundational and background information, testimony about past years' performance is not relevant because the issues qualified for hearing are limited to the specific dates of offense cited in the disciplinary action, and to the period covered by the 90-day performance reevaluation.

### APPEARANCES

Grievant  
One witness for Grievant  
Superintendent  
Four witnesses 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? Was grievant's performance reevaluation arbitrary?

### FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued for failing to follow a supervisor's instructions, perform assigned work or otherwise comply with established written policy.<sup>2</sup> During the second resolution step of the grievance process, the superintendent offered to reduce the discipline to a Group I Written Notice.<sup>3</sup> Grievant rejected this offer and advanced his grievance to the third resolution step. Grievant also appealed from a performance reevaluation that rated him "Below Contributor."<sup>4</sup> Pursuant to policy, the agency reassigned grievant by removing him from the position of Institutional Training Officer.

The Virginia Department of Juvenile Justice (DJJ) (hereinafter referred to as agency) has employed the grievant for a total of 28 years. He holds the rank of institutional sergeant. He had no other active disciplinary action on February 15, 2002.

Grievant was given a Group II Written Notice for failing to comply with established deadlines, and for failure to comply with verbal and written counseling regarding deficiencies in his performance. Grievant had been the institutional training officer responsible for coordinating and providing training to employees. Grievant's position description from 1996 through 2000 required him

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<sup>2</sup> Exhibit 2. Written Notice, issued February 15, 2002.

<sup>3</sup> The second-step resolution response prepared by the Superintendent on April 26, 2002 is erroneously titled a Step III response.

<sup>4</sup> Exhibit IX.QQ. Performance Reevaluation form, March 8, 2002.

to assess, develop, deliver, evaluate and record all mandated, elective and specialty training for the facility.<sup>5</sup> Beginning in 2001, the agency replaced position descriptions with employee work profiles. Grievant's work profile describes his position in five core responsibilities.<sup>6</sup> Although the language used varied from the earlier position description, grievant remained responsible for the same essential elements.

The position of Institutional Training Officer (ITO) was created in 1996. Grievant and six other sergeants were selected to fill this position. The seven ITOs were given training during October 1996 in writing skills. From October 28, 1996 through November 20, 1996, the ITOs were given an orientation and trainer acclimation course, and observed, assisted and taught in a Basic Skills class.<sup>7</sup> ITOs also received annual training in 1997 and 1998. Part of the training emphasized the need to keep accurate, up-to-date training records because it was known that the Office of Inspector General (OIG) would be conducting audits of each facility.

The agency utilizes the Office of Inspector General to periodically audit the eight facilities operated by DJJ. OIG conducts certification audits during which a team of investigators spends three or more days at the facility reviewing operations in considerable detail.<sup>8</sup> OIG also conducts less extensive, but more frequent, certification monitoring visits during which a smaller group of investigators reviews areas of deficiency noted on the most recent certification audit. During 2000, investigators noted that some employees had not received the required 40 hours of training per year, and that staff training plans had not been developed for each employee.<sup>9</sup> Grievant had not corrected these deficiencies by the summer of 2001.

The superintendent and grievant's supervisor met with grievant on August 10, 2001 to discuss the deficiencies and to counsel grievant about the need for improvement. Grievant's supervisor subsequently conducted his own internal audit and found additional concerns. The superintendent then issued a detailed written counseling memorandum to grievant detailing the identified deficiencies, and the actions grievant should take to correct the deficiencies.<sup>10</sup> The superintendent also advised grievant that failure to make the required improvements would result in further action to include disciplinary action and relocation within the agency. The superintendent further told grievant that he should notify his supervisor and the superintendent if other supervisors were uncooperative in making their subordinates available for training classes.

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<sup>5</sup> Exhibit VI.W. Grievant's Position Description.

<sup>6</sup> Exhibit IX. Employee Work Profile for grievant.

<sup>7</sup> Exhibit IV.K. Memorandum from Training Manager to superintendents, October 10, 1996.

<sup>8</sup> Exhibit III.H. Standards evaluated by OIG. See also Exhibit III.I. *Compliance Manual* applicable to Juvenile Correctional Centers.

<sup>9</sup> Exhibit V.T. Summary of OIG investigation findings from 2000-2002.

<sup>10</sup> Exhibit VIII.II. Memorandum from Superintendent to Grievant, August 21, 2001.

The grievant's performance continued to be substandard and in November 2001, grievant's annual performance evaluation rated him "Below Contributor" on all but one of his core responsibilities and gave him an overall rating of 'Below Contributor.'<sup>11</sup> Policy provides that an employee who receives a rating of "Below Contributor" must be reevaluated within three months.<sup>12</sup> In December, grievant's supervisor gave him an interim evaluation that noted areas in which grievant continued to be rated substandard.<sup>13</sup> Grievant's supervisor verbally counseled grievant on January 29, 2002 that he was continuing to not complete tasks in a timely manner, was disorganized, not maintaining accurate and current training records, and not maintaining adequate training documentation. Grievant was further advised in writing in February 2002 that he had failed to develop a yearly training schedule by the deadline, failed to submit a list of required training for employees, and failed to timely submit a quarterly training list to supervisors.<sup>14</sup> During the 90-day reevaluation period, grievant was unable to perform training on four days when he was drafted to be acting shift commander. During the 90-day reevaluation period, grievant was tardy in arriving for work on several days. On a few occasions, the acting assistant superintendent asked grievant to help transport cadets to a local hospital for treatment.

The OIG investigators conducted a full certification audit of the facility from December 17-19, 2001. During the audit they found four areas of deficiency within the training area for which grievant is accountable.<sup>15</sup> The investigator conducting the audit testified that, of the facilities he has audited, grievant's facility had the worst audit. Of eight facilities operated by the agency, grievant's facility has the smallest number of employees; most facilities have from two to four times as many employees.<sup>16</sup>

### 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).

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<sup>11</sup> Exhibit 2. Grievant's annual *Performance Evaluation*, signed November 8, 2001.

<sup>12</sup> DHRM Policy No. 1.40, *Performance Planning and Evaluation*, revised August 1, 2001.

<sup>13</sup> Exhibit VIII.II. Interim Evaluation Form, December 15, 2001.

<sup>14</sup> Exhibit 2. Memorandum from supervisor to Grievant, February 8, 2002.

<sup>15</sup> Exhibit V.T. Audit findings, December 17-19, 2001.

<sup>16</sup> Exhibit X.MMM. Staffing levels at eight agency facilities.

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. In all other actions, the employee must prove his claim by a preponderance of the evidence.<sup>17</sup>

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 Human Resource Management 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 which are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment. One example of a Group II offense is failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy.<sup>18</sup>

The Commonwealth's performance evaluation policy provides:

If the employee receives a re-evaluation rating of "Below Contributor," the supervisor shall demote, reassign, or terminate the employee by the end of the three (3)-month re-evaluation period.

The re-evaluation process does not prevent the agency from taking disciplinary action based on the employee's poor performance or other reasons stipulated in Policy 1.60, Standards of Conduct, or issuing additional Improvement Needed/Substandard Performance Forms.<sup>19</sup>

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<sup>17</sup> § 5.8, EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>18</sup> DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

<sup>19</sup> DHRM Policy No. 1.40, *Performance Planning and Evaluation*, revised August 1, 2001.

Grievant acknowledged that he had received the Bureau of Juvenile Justice standards in January 2000, and that he understood he would be held accountable for the training standards. Grievant acknowledged that he has made mistakes, that he has misplaced documentation, and that he has failed to comply with some deadlines. He also acknowledged that he fully understood the August 2001 counseling from the superintendent, and the consequences that could follow from failure to comply with agency expectations. Grievant claims to have sent a memorandum to the superintendent on one occasion regarding an uncooperative supervisor but did not proffer the memorandum during the hearing; the superintendent does not recall receiving such a memorandum.

Grievant's witness (an ITO from another facility) testified that some procedures in his facility are handled differently from grievant's facility. For example, a human resources assistant performed some of the recordkeeping of training records in his facility. This testimony is unpersuasive because each superintendent has total authority over her own facility. Grievant must comply with his own Employee Work Profile (EWP) and with the instructions of his own supervisor and superintendent. Grievant's EWP and the superintendent had made it clear to grievant that he was responsible for all recordkeeping relating to training.

Grievant complained that when he first acquired his own office two years ago, he did not have any furniture and that records had to be stacked on his desk. However, grievant has not demonstrated that he requested furniture, or that he did not later receive adequate furniture. Moreover, this is an insufficient excuse for not finding an alternative method to properly organize training records.

Grievant also attributes some of his failures to a several-day absence in early December due to the death of his father. It is understandable that this unexpected absence may have caused some disruption to grievant's work. However, almost every employee encounters similar situations from time to time. When employees return to work, they are expected to be organized enough to regroup and get back on schedule within a relatively short time. Here, the deficiencies in grievant's performance had existed for a long period of time before the absence, and continued for months after the absence. Thus, the brief absence does not mitigate grievant's failure to fulfill the requirements of his position over a prolonged period of time.

Grievant argued that being drafted as acting shift commander on four occasions and providing occasional assistance in transporting cadets to a local hospital decreased the amount of time available to fulfill his training responsibilities. However, the grievant has not shown that these occasional interruptions required so much time that he could not have fulfilled his responsibilities if he had applied himself in an organized fashion. As noted, grievant's facility has fewer employees than any other agency facility. All other

ITOs successfully fulfilled their training duties for significantly larger groups of employees than grievant had.

Grievant alleged that his performance reevaluation was arbitrary. "Arbitrary" is defined in the grievance procedure as, "In disregard of the facts or without a reasoned basis."<sup>20</sup> The agency has demonstrated, by a preponderance of evidence, that grievant's performance during the 90-day reevaluation period continued to be substandard and that the reevaluation rating of "Below Contributor" was justified. The testimony and documentary evidence are sufficient to conclude that grievant did not complete some required tasks in a timely manner, was disorganized, and did not maintain accurate training records. Based upon grievant's "below contributor" performance reevaluation, the agency could have terminated grievant's employment. The grievant has not borne the burden of proof necessary to show that his performance reevaluation was arbitrary. Pursuant to policy, the agency had no choice but to demote, reassign or discharge the grievant. In recognition of his years of service, the agency chose the least punitive measure by reassigning him (without demotion) to another position.

The agency has also shown, by a preponderance of the evidence, that grievant's substandard performance was directly attributable to his failure to follow the instructions of a supervisor and to perform assigned work. Therefore, pursuant to Policies 1.40 and 1.60, the agency appropriately took disciplinary action by issuing a Group II Written Notice to grievant.

### DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on February 15, 2002 is hereby UPHeld. The Written Notice shall be retained in the grievant's personnel file for the period specified in Section VII.B.2 of the Standards of Conduct.

The grievant has not shown that his performance evaluation of March 8, 2002 was arbitrary. The relief requested by grievant is hereby DENIED.

### 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:

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<sup>20</sup> Definitions section, EDR *Grievance Procedure Manual*, effective July 1, 2001.



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.
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.<sup>21</sup>

[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

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<sup>21</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.