Issue: Group II Written Notice (failure to comply with established written policy); Hearing Date: 12/02/02; Decision Date: 12/03/02; Agency: DOC; AHO: David J. Latham, Esq.; Case No.: 5573; **Judicial Review: Appealed to the Circuit Court in the county of Sussex on 12/10/02; Outcome pending**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5573

Hearing Date: December 2, 2002
Decision Issued: December 3, 2002

PROCEDURAL ISSUES

Grievant requested as part of his relief a written apology from those involved in disciplining him. Hearing officers may order appropriate remedies but may not grant relief that is inconsistent with the grievance statute. Requiring that one employee apologize to another is among the types of relief that are not available to a hearing officer.[1]

Grievant participated in a telephonic pre-hearing conference on November 4, 2002 during which he and the agency representative agreed to the hearing date of December 2, 2002. The hearing officer advised grievant during the conference that the hearing would not be postponed for the convenience of a representative, if grievant should later decide to obtain representation. On the last workday prior to the hearing, grievant retained an attorney who requested a

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

postponement of the hearing. The hearing officer denied the postponement request because grievant had ample time to secure representation well before the hearing date.

APPEARANCES

Grievant
Two witnesses for Grievant
Warden
Four witnesses for Agency

ISSUE

Was the grievant's conduct on April 18, 2002 subject to 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 for failure to comply with established written policy by allowing an inmate to handle and deliver another inmate's mail.[2] Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[3] The Department of Corrections (Hereinafter referred to as "agency") has employed grievant for three years. He is a correctional officer senior.

The facility has a written procedure for the handling of mail coming into the institution that states, in pertinent part:

> Because of the sensitive nature of the mail room, no inmate should be assigned to work there. Additionally, no inmate should be permitted to handle mail, packages, or packaging enroute to or from the mail room. Inmates should not be allowed to carry, deliver, handle, or transport in any manner, any mail, memorandum, letters, notes, etc. which originates within the facility for a staff member or inmate within the facility.[4]

On May 18, 2002, grievant was assigned as floor officer for two pods of a housing unit. Part of grievant's responsibility on that day was the delivery of mail to inmates. He asked an inmate to carry a portion of the mail. Other inmates in

[2] Exhibit 1. Written Notice, issued May 31, 2002.
[3] Exhibit 6. Grievance Form A, filed June 8, 2002.
[4] Exhibit 2. Section 404-7.13, Departmental Operating Procedure (DOP) 404, *Institution Mail Procedures*, February 1, 1993.

the pod noticed this and loudly objected by shouting and banging on cells. At this point, grievant retrieved the mail from the inmate and delivered it the remaining cells himself.

A potentially key piece of evidence in this case was the surveillance videotape of the housing unit recorded on April 18, 2002. A facility investigator retrieved the videotape from the housing unit and retained it in her office until approximately the first part of November 2002 when she knowingly destroyed it. While the videotape was in her possession, it was viewed at different times by the warden, the unit manager, the human resources manager, the female investigator and an officer who is no longer employed by the agency. The male investigator responsible for investigating this case cannot recall whether he ever viewed the videotape. Those who viewed the videotape saw one or more inmates sliding some type of papers under cell doors; it could not be determined that these papers were mail. Of those who viewed the videotape, only the female investigator claims to have seen the grievant on the tape. The resolution of the tape was so poor that those who viewed it were unable to identify any of the inmates. The female investigator physically destroyed the videotape after the human resource manager viewed it in late October 2002.

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. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[5]

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[6] 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 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.[7] The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.16 of the DOC Standards of Conduct addresses Group II offenses; one example is failure to comply with applicable established written policy.[8]

Seven inmates, including the inmate who assisted grievant with the mail, purportedly submitted complaint forms. Six of the complaint forms are written in virtually identical language and were obviously copied from each other.[9] Moreover, the same hand wrote four of the complaint forms. Although the forms contain inmate names and numbers, the inmates did not sign the forms. All were purportedly written on April 18, 2002. The agency did not offer the testimony of any inmates. Accordingly, the hearing officer finds the six virtually identical complaint forms to be of no value and assigns no evidentiary weight to them in making this decision.

It is highly troubling that the agency knowingly and deliberately destroyed a key piece of evidence in this case only weeks before this hearing. The grievance was filed in June 2002 and advanced through the resolution steps during the summer. As late as October 2002, the warden requested that the

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[5] § 5.8 EDR *Grievance Procedure Manual,* effective July 1, 2001.
[6] Now known as the Department of Human Resource Management (DHRM).
[7] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[8] Exhibit 3. Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.
[9] All six complaint forms contain the same phrases such as, "This is clearly a violation of family privacy," and "This unprofessionalism cannot be allowed."

human resource manager view the videotape. When the female investigator destroyed the tape in early November 2002, the agency knew that the grievance was going to a hearing. It is simply inconceivable that the agency would deliberately destroy such a key piece of evidence in the face of a forthcoming hearing.

In any case, testimony about the videotape was inconclusive. Only the female investigator claims to have seen grievant on the videotape. The others who viewed the videotape did not see grievant and testified that the quality of the tape was so poor that inmates could not be identified. While inmates were seen putting something under cell doors, it could not be determined whether it was mail, other paperwork or magazines. Thus, the sum total of the testimony about this videotape fails to show either that grievant gave mail to an inmate or that inmates were distributing mail belonging to other inmates. The agency presented witnesses to testify about what the videotape showed. The rules of evidence require that to prove the content of a video recording, the videotape itself is the best available evidence. When the agency fails to produce the best available evidence in its possession, which the agency reasonably should have preserved, there is a presumption that the evidence would not have been favorable to the agency. Therefore, under these circumstances, the hearing officer gives no evidentiary weight to testimony about the contents of the videotape.

The remaining available evidence pits grievant's denial against the testimony of his supervisor that grievant admitted allowing an inmate to handle mail. Grievant could have obtained corroboration for his denial by obtaining either testimony or an affidavit from the inmate who held the mail, however, grievant provided no such evidence. On the other hand, the agency has offered corroboration for the supervisor's testimony. First, grievant's supervisor related this incident to the unit housing manager shortly after learning about it in late April 2002. The unit manager testified credibly about what the supervisor had related to him.

Second, the inmate asked by grievant to assist him with the mail wrote a complaint on April 18, 2002.[10] An investigator then interviewed the inmate on May 9, 2002. The inmate's interview was entirely consistent with the details of his complaint written three weeks earlier.[11] His description of the event appears plausible, logical, and consistent with the testimony of the grievant's supervisor and housing manager. Third, a second inmate interviewed by the investigator corroborated the first inmate's version of events in all salient respects.[12]

Grievant contends that a logbook page for April 18, 2002 proves that he could not have given the inmate mail.[13] Grievant's contention is not persuasive.

[10] Exhibit 4, p.1. Complaint form, April 18, 2002.
[11] Exhibit 4, pp 9, 10. Interview report, May 9, 2002.
[12] Exhibit 4, pp 11, 12. Interview report, May 9, 2002.
[13] Exhibit 7. Logbook page for April 18, 2002.

The logbook page notes significant events in the unit on the day at issue, however, it does not prove that grievant did not allow an inmate to assist him for a few minutes as he delivered mail to six or seven cells.

Grievant submitted a broad list of allegations but has failed to provide any evidence to support his charges.[14] He proffered no evidence regarding his allegations of policy misapplication, retaliation, or discrimination. He challenged the hearing decision before it had even been conducted. It appears that grievant has simply made a number of broadside allegations in the hope that one might be found to have merit.

The agency has proven, by a preponderance of the evidence, that grievant did allow one inmate to hold and handle other inmates' mail while grievant delivered it to cells. Grievant knew this was a violation of written policy – a Group II offense.

DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on May 31, 2002 for failure to comply with established written policy is UPHELD. The disciplinary action shall remain active 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.

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.

[14] Exhibit 9. Grievant's "Reasons to Grant Relief," September 19, 2002.

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.[15]

[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

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