

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 01/08/03; Decision Date: 01/13/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No.: 5595



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5595

Hearing Date: January 8, 2003
Decision Issued: January 13, 2003

APPEARANCES

Grievant
Chief of Security
Six witnesses for Agency

ISSUE

Was the grievant's conduct 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 I Written Notice issued for inadequate or unsatisfactory job performance.¹ Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.²

The Department of Corrections (Hereinafter referred to as “agency”) has employed grievant as a drill instructor for 14 years.

Grievant’s position description states that he, “Communicates problems and other information to staff and detainees (when appropriate) by way of radios, telephones, written reports, visits, interviews, meetings, etc. Writes and provides documentation in log books, on forms, etc., of security activities which take place. Reports unusual incidents or suspicious behavior to supervisor.”³ The security post order for front gate officer lists many general duties including “Document activities in the log book as well as usual incidents, personnel in area, etc.”, and the specific duty of “Maintain gate log.”⁴

On August 14, 2002, grievant worked day shift (5:30 a.m. to 6:00 p.m.), assigned as front gate officer on the first floor of the security building.⁵ Among his responsibilities was the opening and closing of electrically controlled doors of the shakedown room leading to the visitation room in the basement of the security building.⁶ At 5:45 p.m. a substance abuse counselor came through the front gate and told grievant she was going to the visitation room to prepare for a class that she was scheduled to teach at 6:00 p.m. Grievant told her to go to the basement and that he would open the doors from the remote panel at his front gate post. The counselor walked downstairs and as she approached the first door heard the electric lock “pop” indicating that it was unlocked. She went through the first door and looked for something in the shakedown room to prop the door open. She was unable to find something before again hearing a “pop” indicating that both doors were locked. The counselor was locked in a small shakedown room between the visitation room and the commissary waiting area. She did not have a radio and there is not a telephone in the shakedown room. She was trapped until approximately 7:20 p.m. when another correctional officer heard her kicking on the door.⁷

Grievant had unlocked the shakedown room doors, allowed them to remain open for what he thought was a reasonable time (30-45 seconds), and then locked the doors. He could not see the shakedown room from his post one

¹ Exhibit 7. Written Notice, issued August 20, 2002.

² Exhibit 7. Grievance Form A, filed August 23, 2002.

³ Exhibit 6. Position Description, August 25, 2000.

⁴ Exhibit 4. Security Post Order 2, December 28, 1998.

⁵ Exhibit 1. Floor plan, Security Building first floor.

⁶ Exhibit 2. Floor plan, Security Building basement.

⁷ Exhibit 5. Dayroom logbook, August 14, 2002.

floor above the room. There are no surveillance cameras in the shakedown room area. Grievant's shift ended at 6:00 p.m. and he left the facility a few minutes after 6:00 p.m. He was not aware that the counselor was trapped. Grievant did not make any entry in the front gate logbook to document that the counselor had entered the building.⁸ Before leaving, he did not advise anyone that the counselor had gone downstairs to the visitation room.

There is a telephone in the visitation room but the counselor could not access this telephone from the shakedown room. It had not been a common practice of front gate officers to telephone the visitation room to assure that staff or visitors had successfully passed through the shakedown room.⁹ Testimony about whether anyone on night shift knew that the counselor had entered the building was contradictory and inconclusive. At least one officer knew that a class was to be held but he did not know that the counselor had already entered the building.

The counselor had been providing services at the facility since August 1, 2002. Although a coworker had given her a brief tour of the facility in early August, she had not previously gone into the visitation room. She was not familiar with the shakedown room and how the electrically controlled doors operated. Grievant learned about the incident when he returned to work on August 19, 2002; he promptly sought out the counselor and apologized to her.

Grievant was given a Group I Written Notice for failing to follow up and assure that the counselor got safely into the visitation room, and for failing to tell anyone on the night shift that the counselor had entered the building and gone to the basement.

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).

⁸ Exhibit 3. Front gate logbook, August 14, 2002.

⁹ Since this incident, the procedure has been changed and front gate officers are now required to call staff and visitors to assure that they successfully entered the visitation room without being trapped in the shakedown room. Non-security personnel are also now allowed to carry visitation security keys allowing them to manually unlock the shakedown room doors.

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 her claim by a preponderance of the evidence.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 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group I offenses include acts and behavior that are the least severe in nature.¹² 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 5-10.15 of the DOC Standards of Conduct addresses Group I offenses; one example is inadequate or unsatisfactory job performance.¹³

The basic facts underlying this incident are undisputed. Grievant knew that the counselor was new to the facility but he did not follow up to assure that she had successfully entered the visitation room. He also did not notify anyone on the relieving shift that the counselor had entered the building and gone to the

¹⁰ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

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

¹² DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹³ Exhibit . Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

basement. Grievant also failed to make an entry in the logbook to document this event. In response, grievant has demonstrated that there was no written policy or common practice to follow up on people entering the visitation room. While some officers did follow up, this was neither a requirement nor an established policy or practice.

However, given grievant's knowledge that the counselor was new to the facility, it would have been prudent for him to call the visitation room to assure that she had successfully entered the room. Moreover, given the post order for the front gate officer, grievant should have made an entry in the logbook to reflect that the counselor had entered the building and gone to the basement. In the absence of such an entry, he should have notified someone on the relieving shift of the counselor's presence in the building. Grievant assumed that the night shift lieutenant was aware of the counselor's presence, but in this case an assumption was not a reasonable substitute for actually telling the lieutenant. Therefore, it is concluded that the agency has demonstrated, by a preponderance of the evidence that grievant did not perform his job satisfactorily with respect to this incident.

Grievant argues that others could have taken actions that might have prevented this incident from occurring. For example, the person who gave the counselor a tour could have given her detailed instructions about the operation of the doors in the shakedown room. While this is true, the explanation would not necessarily have prevented the incident from happening. Even with instruction, the counselor might still have gotten trapped on her first solo trip to the visitation room.

Grievant contends that because there was no written procedure in effect at the time, he is not responsible to follow up and call the visitation room to assure safe entry by the counselor. It would highly impractical to create a written procedure for every aspect of anyone's job. The fact is that grievant knew that the counselor was new to the facility and it is reasonable to expect that he would go the extra step of following up by making a brief call to the visitation room.

Grievant also argues that the relieving shift should have discovered the counselor much earlier by making a security check of the entire building. However, the un rebutted testimony of the dayroom officer was that he did make a security check of the area, looked through the very small porthole window of the shakedown room door and did not see the counselor. While the counselor was later kicking on the door to attract attention, the dayroom officer did not immediately hear it because a number of detainees were conducting marching drills on the floor immediately above the dayroom.

Grievant contends that complete blame has been assigned to him. However, as a result of this incident, facility management has made changes in the visitation room procedure – recognition that this type of occurrence had not

previously been anticipated. Thus, the agency has not put the *complete* blame on grievant because it has also corrected a minor deficiency in the procedure. Nonetheless, the agency has reasonably determined that, but for grievant's failure to take certain actions, the event could have easily been prevented. Therefore, it is reasonable to advise grievant in a written notice that he failed to take those actions, and that he should handle similar future situations in an appropriate manner.

DECISION

The decision of the agency is affirmed.

The Group I Written Notice issued on August 20, 2002 for inadequate or unsatisfactory job performance is hereby 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.

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.¹⁴

[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]

David J. Latham, Esq.
Hearing Officer

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.