

Issue: Group II Written Notice (failure to comply with established written policy);  
Hearing Date: 02/11/03; Decision Date: 02/12/03; Agency: DOC; AHO:  
David J. Latham, Esquire; Case No. 5619



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5619

Hearing Date: February 11, 2003  
Decision Issued: February 12, 2003

**PROCEDURAL ISSUE**

Due to the availability of participants, the hearing could not be docketed for hearing until the 35<sup>th</sup> day following appointment of the hearing officer.<sup>1</sup>

**APPEARANCES**

Grievant  
Representative for Grievant  
One witness for Grievant  
Warden  
Human Resource Officer  
Five witnesses for Agency

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<sup>1</sup> § 5.1 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001, requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

## 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 II Written Notice issued for failure to comply with established written policy by bringing a knife onto institutional property and thereafter losing the knife in an area accessible to inmates.<sup>2</sup> Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>3</sup> The Department of Corrections (Hereinafter referred to as "agency") has employed grievant for nine years as a correctional officer. He has no prior active disciplinary actions.

All corrections officers are told during their training that weapons of all types, including guns and knives, are prohibited at state correctional facilities. When reporting for work each day, all officers entering the facility are searched to assure that they do not bring any contraband or weapon into the facility. The visitor's guide to the facility contains a prohibition against bringing any type of weapon to the facility.

At about 4:00 p.m. on August 6, 2002, grievant finished his shift and went home.<sup>4</sup> He placed some of his uniforms and a bag of approximately 12 knives on the front seat of his car. He then drove to a knife shop where he left the knives for sharpening. From there, he drove back to the grounds of the correctional facility and took the uniforms to the clothing exchange.<sup>5</sup> While in the clothing exchange he parked his vehicle in the driveway of the clothing exchange facility, which is next door to a storage shed used to store tools used by inmates.

At about 6:00 p.m., a corrections lieutenant who was in the area of the clothing exchange building noticed a small hunting knife in a leather sheath lying in the driveway.<sup>6</sup> He retrieved the knife and called his direct supervisor (a major) who instructed him to retain custody of the knife until the following morning.<sup>7</sup> On the morning of August 7, 2002, it was initially thought that civilian contractors who had been performing work in the area might have lost the knife. The contractors

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<sup>2</sup> Exhibit 4. Written Notice, issued September 11, 2002.

<sup>3</sup> Exhibit 3. Grievance Form A, filed October 6, 2002.

<sup>4</sup> Exhibit 8. Daily Duty Roster, August 6, 2002.

<sup>5</sup> Exhibit 10. *Clothing Exchange* flyer.

<sup>6</sup> Exhibit 3. Photocopy of knife and sheath.

<sup>7</sup> Exhibit 1. Incident report completed by lieutenant, August 6, 2002.

were questioned but no one claimed ownership. At that point, the lieutenant who found the knife recalled that he had earlier seen grievant's vehicle parked in the same area where the knife was found. Another corrections officer corroborated this.<sup>8</sup> The grievant's initials are carved in the knife sheath.

The major then called grievant and asked if he had noticed anything missing from his vehicle, and whether he carried a hunting-type knife in his vehicle. Grievant said he would check his vehicle and call back. He called the major back a few minutes later and said that the knife couldn't be his and that he knew better than to bring a knife on state property. Later that morning, grievant went to the major's office and said he did not want any more write-ups in his file.<sup>9</sup>

Grievant acknowledged under oath that the knife in question is his knife, that he had brought the knife onto state property, and that he had lost the knife. The driveway on which the knife was found is within 30 feet of a storage shed used by inmates of a correctional unit, which is directly across the street from the clothing exchange and storage shed. Inmates frequently work in this area under the supervision of unarmed corrections officers.

#### 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

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<sup>8</sup> Exhibit 2. Email from corrections officer to major, August 6, 2002.

<sup>9</sup> Exhibit 2. Incident report completed by major, August 7, 2002. NOTE: The two dates in this document are incorrect. The report was completed on August 7, 2002; the major spoke with the lieutenant on August 6, 2002.

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.<sup>10</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 of the Commonwealth of Virginia's *Department of Human Resource Management* 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.<sup>11</sup> 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. The DOC Standards of Conduct state:

The offenses listed in this [procedure] are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head, although not listed in the procedure, undermines the effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of the procedure.<sup>12</sup>

The agency has demonstrated, by a preponderance of evidence, that grievant entered state property on which a correctional unit is located and had in his possession a small hunting knife in a sheath. While his vehicle was parked in a driveway, he took clothing from the front seat of his vehicle to the clothing exchange. Shortly after he left the facility, his knife was found lying on the driveway in the area where he had parked his vehicle. Although grievant does not know how the knife came to be on the driveway, it is more likely than not that it fell from his vehicle as he took his uniforms out. Grievant's knife is

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<sup>10</sup> § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>11</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>12</sup> Exhibit 6. Section 5-10.7C DOC *Standards of Conduct*, June 15, 2002.

unquestionably a dangerous weapon that should not have been brought on to state property, especially a correctional facility.

Grievant argued that bringing a knife in his vehicle is not a breach of security. He claims to be aware of other employees who have had knives in their vehicles while at work. The agency did not offer any written policy that states that a knife securely locked in a private vehicle in the parking lot is contrary to policy. Of course, the inference of all the training and instructions is that anything that could be used as a weapon should not be brought into correctional facilities, or, by extension, onto correctional property. However, even if the policy does not specifically prohibit having a knife securely locked in a parked vehicle, it would be inapplicable in this case. Grievant's knife was found, not in a locked vehicle, but lying on a driveway to which inmates have access. It was grievant's carelessness in failing to properly secure his knife that resulted in the knife falling out of the vehicle in an area where an inmate could have found it.

Grievant contends that signs posted on the roads into the facility do not specifically list knives as prohibited weapons. Grievant did not produce a photograph of the sign to prove this contention. However, even assuming that he is correct, grievant's argument is irrelevant. Grievant has been trained and knows from his nine years of experience that knives are dangerous weapons and have always been prohibited on correctional property.

Grievant also attempted to divert attention from his own culpability by suggesting that the lieutenant erred in retaining the knife overnight until he could turn it in to the Chief of Security. However, the Chief of Security (major) testified that she had specifically directed the lieutenant to secure the knife until the next morning, that he held it in his own living quarters, and that inmates did not have access to this area.

Finally, grievant argues that the fact that he was off duty should exonerate him. This argument is not persuasive. While grievant was not "on the clock" when he came to the clothing exchange, he was performing a work-related duty by exchanging his uniforms for newer ones.

The object and intent of the agency's Standards of Conduct policy is to identify to an employee "behavior that is unacceptable."<sup>13</sup> Bringing a dangerous weapon onto correctional facility property, failing to secure it and losing it in an area where inmates could have found it is clearly unacceptable behavior. The purpose of issuing a Written Notice is to assure that the employee understands the behavior that is not acceptable, and that a repetition of such behavior could have more serious disciplinary consequences.

In this case, the examples of Group II offenses listed in the Standards of Conduct do not specifically address grievant's behavior. However, as pointed

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<sup>13</sup> Exhibit 6. Section 5-10.3, *Standards of Conduct*, Ibid.

out above, any offense that undermines agency activities may be addressed under the Standards. This type of offense is certainly one that, if repeated would warrant removal from employment – the definition of a Group II offense.

### DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on September 11, 2002 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.

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.<sup>14</sup> You must file a notice of appeal with the clerk of the circuit court in the

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<sup>14</sup> An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, Record No. 2853-01-4, Va. App., (December 17, 2002).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>15</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>15</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.