Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 02/20/03; Decision Issued: 02/21/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5634

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5634

Hearing Date: February 20, 2003
Decision Issued: February 21, 2003

PROCEDURAL ISSUE

Due to availability of the participants, and one postponement due to inclement weather, the hearing could not be docketed until the 36th day following appointment of the hearing officer.[1]

APPEARANCES

Grievant
Superintendent
One witness for Agency

[1] § 5.1 Department of Employment Dispute Resolution (EDR) *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 grievance from a Group I Written Notice issued for inadequate or unsatisfactory job performance.[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 20 years. He is a lieutenant. Grievant was assigned to his current facility in 1998.

The agency has a contract with a private vendor to provide for the showing of recreational videotapes to detainees. Each correctional facility is free to "opt out" of the contract on an annual basis. Any facility that opts into the contract must pay a fee to obtain recreational videotapes from the vendor. The facility at which grievant is employed has opted out of the contract. Therefore, the facility is prohibited by the terms of the contract from showing any recreational videotapes to detainees. Grievant was not aware of the contract arrangement. However, the superintendent had distributed to all employees an interoffice memorandum on the subject of videos. The memorandum was placed in a memorandum log, which is part of the facility and agency policy manual. The memorandum states, in toto:

> Please be advised no video tapes are to be shown to the detainees at any time which are not educational or part of the approved materials to be shown in therapeutic groups and Substance Abuse Education class. There will be no Recreational videos of any form shown at any time to the detainees. Any questionable videos require approval by the superintendent.[4]

Lieutenants are part of the management structure at the facility. On weekends, they are usually shift commanders and the ranking person at the facility. Experienced lieutenants are expected to be familiar with agency and facility policy, as well as memoranda issued by the superintendent to the entire staff. The major has discussed on multiple occasions during staff meetings the prohibition against recreational videotapes being shown.

---

[2] Exhibit 3. Written Notice, issued October 21, 2002.
[3] Exhibit 2. Grievance Form A, filed November 19, 2002.
[4] Exhibit 1. Interoffice memorandum from superintendent to staff, January 20, 1998.

The facility owns a certain number of educational and therapeutic videotapes that are approved for showing to detainees. Treatment counselors at the facility often make some of these owned videotapes available for showing to detainees on the weekends. The facility's library of videotapes is limited and many of the detainees had seen the videotapes several times. They were bored repeatedly seeing the same videotapes.

On or about September 28, 2002, a corrections officer asked grievant for permission to bring recreational videotapes from home to show to detainees on the weekend. Grievant did not contact either his direct supervisor or the superintendent to seek approval for the videos. He did not review the Videos policy memorandum. The grievant reasoned that, if counselors could authorize videos for showing to detainees, he as shift commander should have similar authority. Grievant felt that the videotapes suggested by the corrections officer were harmless and he gave permission for their showing. The videotapes were shown to detainees on the weekend of September 28 & 29, 2002.

One group of detainees saw fewer videotapes than another group and subsequently complained to a major. The major investigated the incident and learned that grievant had given permission for the videotapes to be shown. Grievant admitted to the major that he knew it was contrary to policy to show the tapes but argued that, "I tried to hold off as long as I could but finally gave in and allowed the showing." Although grievant violated established written policy – a Group II offense – the superintendent elected to discipline grievant with the less serious Group I Written Notice that was issued on October 21, 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 her 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 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.1 of the Commonwealth of Virginia's Standards of Conduct Policy No. 1.60 provides that Group I offenses include acts and behavior that are the least severe in nature.[6] 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.[7] The Standards also 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.[8]

The agency has demonstrated by a preponderance of the evidence, and it is undisputed, that grievant authorized the showing of recreational videotapes to detainees on September 28 & 29, 2002. Grievant knew, or reasonably should have known, that he did not have the authority to permit such a showing.

---

[5] § 5.8 EDR *Grievance Procedure Manual,* effective July 1, 2001.
[6] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[7] Exhibit 4. Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.
[8] Section 5-10.7C *Ibid*.

In mitigation, grievant argues that he was not aware of the policy memorandum issued by the superintendent. As a lieutenant and shift commander, grievant had a duty and obligation to be familiar with the facility's policies. Accordingly, he should have made himself familiar with the Videos policy. Moreover, grievant acknowledged that he had reservations about permitting the showing of the videotapes and that he, "had held off as long as he could," from giving permission. Therefore, it appears more likely than not that grievant was aware of the policy. However, when he made the decision to permit the showing, he did not recall the importance of the memorandum and felt this his own authority was at least equal to that of a counselor.

Grievant testified that, had he realized that the agency was contractually obligated to pay fees for the showing of recreational videotapes, he would not have granted permission. However, the fact that grievant was unaware of the DOC contract is not sufficient mitigation. The superintendent's policy memorandum of January 20, 1998 is unambiguous in its meaning when it states that no recreational videos are to be shown to detainees, and that questionable videos require the superintendent's approval.

Grievant contends that other lieutenants have showed videotapes on other shifts. However, the only other lieutenant specifically identified has also been disciplined for his offense. The superintendent is unaware of anyone else who has shown recreational videotapes. Grievant has not demonstrated that facility management has been advised of specific dates and persons who have shown recreational videotapes.

Grievant argues that the punishment does not fit the offense. The agency issued the lowest level of discipline – a Group I Written Notice. It could have issued a Group II Notice. The agency could also have issued only a written counseling statement rather than a disciplinary action. Given that grievant's decision placed the agency in potential peril because of the contractual violation, the offense is sufficiently serious to merit disciplinary action in order to assure that there is no recurrence. It appears that the decision to issue a Group I Written Notice was a tempered and measured corrective action. The hearing officer finds no basis to question the agency's selection of discipline in this case.

DECISION

The decision of the agency is affirmed.

The Group I Written Notice issued on October 21, 2002 for permitting the showing of recreational videotapes 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.[9] 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.[10]

[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

[9] 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).

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