

Issue: Group II Written Notice (failure to follow supervisor's instructions);
Hearing Date: 03/24/03; Decision Issued: 03/26/03; Agency: DOC; AHO:
David J. Latham, Esq.; Case No. 5665



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5665

Hearing Date: March 24, 2003
Decision Issued: March 26, 2003

APPEARANCES

Grievant
Warden
Four witnesses for Agency

ISSUES

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 follow a supervisor's instructions.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 corrections officer for four years.

The institution has promulgated a post order for corrections officers assigned to observation towers located on the perimeter of the correctional facility. The post order for tower # 4 specifies that the area of control includes the gates and inmate visitation area of the facility. Among the specific post duties applicable in this case are:

4. Ensure that staff assigned to the visiting room properly identify each visitor before opening any gate(s).
7. Report any damaged or missing equipment or weapons to the Watch Commander at the beginning of [the shift] or when assuming the post.
10. Report, for correction or repair, all conditions hindering or preventing effective operation of post equipment. Notify the Watch Commander and/or submit a work order, if appropriate.³

Grievant was assigned to tower # 4 on September 15, 2002, a scheduled visitation day for inmates. Visitation hours were from 8:30 a.m. to 3:30 p.m. The tower has an electric control panel that locks and unlocks a double set of gates that lead to the visitation building. When a visitor approaches the visitation compound, the tower officer depresses a button that unlocks the outer gate. After the visitor has entered the fenced-in area between the two gates, the visitor must completely close the outer gate behind them.⁴ The officer then depresses a second button that unlocks the inner gate. The control panel contains an interlock mechanism that prevents both gates from being unlocked at the same time. The panel also has an override key that can be used to open both gates at the same time in the event of an emergency (fire, medical emergency, etc.) Visitors leaving the compound must follow the reverse process. In addition, an officer assigned to the visitor desk just inside the entrance of the visitation building must first radio (or telephone) the tower officer to advise the number of people who will be exiting the building.

Shortly after grievant assumed this post on September 15, 2002, he noticed that the control panel was malfunctioning. The panel has lights to indicate whether the gates are unlocked (red) or locked (green). Grievant noted

¹ Exhibit 15. Written Notice, issued October 25, 2002.

² Exhibit 17. Grievance Form A, filed November 23, 2002.

³ Exhibit 11. Post Order # 5, June 13, 2002.

⁴ Exhibit 1. Photographs of visitation building compound and double gates.

that sometimes the light would be green even though he could see that the gate was not locked. The problem did not recur during the rest of the morning. During the day approximately 80-90 visitors came and went through the gates at different times. At about 1:20 p.m., the problem recurred and grievant radioed the desk officer who went outside and completely closed the inside gate.⁵

At about 2:15 p.m., the warden walked toward the gate area from a nearby parking area. He noticed visitors leaving the visitation building and walking down the sidewalk toward the inner gate.⁶ The warden observed that both the inner and outer gates were completely open (i.e., at a 90-degree angle to the fence line) and that the visitors were able to just walk through the gates unimpeded.⁷ After ascertaining that the visitors were not inmates, the warden radioed the watch commander (a lieutenant) to come to the area immediately. Grievant's direct supervisor (a sergeant) heard the radio call from his post inside the visitation building. He promptly went out the front door and observed both gates standing wide open.⁸ When the lieutenant arrived, he and the sergeant went to the tower and then checked the panel and gates. They verified that the panel was malfunctioning. Following that, an officer was posted at the gates for the remainder of visitation. The sergeant then instructed grievant to complete an emergency repair form.⁹

Prior to this incident at 2:15 p.m., grievant had not reported the malfunctioning control panel to the Watch Commander or to his supervisor. Grievant had filled out an inspection form in the morning and had planned to give it to his supervisor when the supervisor made his routine rounds of the tower.¹⁰ The form notes that the telephone was not working and that the interlock system was malfunctioning.¹¹

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

⁵ Exhibit 5. Incident report completed by visitor desk officer, September 15, 2002.

⁶ Exhibit 10. Memo to file completed by warden, September 20, 2002.

⁷ See Exhibit 6. Incident report completed by grievant, September 15, 2002. Grievant's version of events varies from the warden's observations. He asserts that he unlocked the inner gate and that the outer gate was closed but not locked, and that a visitor just pushed it open.

⁸ Exhibit 2. Incident report completed by grievant's supervisor, September 15, 2002.

⁹ Exhibit 3. Emergency repair form, September 15, 2002.

¹⁰ Sergeants are required to make rounds of all posts assigned to officers under their supervision at least once during each shift. The time of the rounds is at the discretion of the sergeant.

¹¹ Exhibit 4. Tower inspection form, September 15, 2002.

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.¹²

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 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.¹³ 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 lists examples of Group II offenses, one of which is failure to follow a supervisor's instructions.¹⁴

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

¹³ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁴ Exhibit 16. Section 5-10.16, DOC Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

The basic facts in this case are undisputed. Grievant became aware of the malfunctioning control panel shortly after entering his post in tower # 4. Early in the afternoon, the panel malfunctioned again and it was necessary to have another officer manually close the gates. Although grievant noted the malfunction on the post inspection form, he failed to notify the Watch Commander or anyone else in a position of authority about this security problem. Therefore, the agency has demonstrated, by a preponderance of evidence, that grievant failed to comply with established written policy, viz., specific post duty numbers 7 and 10 of Post Order # 5. The burden of persuasion now shifts to the grievant to demonstrate any mitigating circumstances.

Grievant contends that his supervisor should have made his rounds of the tower early in the shift so that grievant could show him the inspection report. This contention is not persuasive. The testimony of grievant's supervisor and the Watch Commander both establish that sergeants are not required to make their rounds at any specific time during a shift. They are required to visit each post at least one time during a shift, but have the discretion to decide the time of the visit. Moreover, grievant had a radio with which he could have called his sergeant or the Watch Commander at any time to report the malfunction. Grievant admitted that he could have called on his radio but felt that he could monitor and control traffic through the gate on his own.

Grievant avers that the panel had malfunctioned on previous occasions and that other officers had reported the problem previously. While grievant did not produce any witnesses or documentation to verify this contention, the agency acknowledged that electrical problems are not uncommon at this old facility.¹⁵ The fact that the problem had been previously reported, and had recurred on September 15, 2002, does not excuse grievant from his duty to report the problem. The malfunctioning control panel and gates presented a serious security problem. Had inmates chosen to do so, they could have made a dash through the gates and grievant would have been unable to prevent the break. Contrary to his belief that he could control the flow of people through the gates on his own, it appears that he would have been powerless to prevent inmates from walking out.

Grievant had a clear responsibility and duty to notify the Watch Commander by radio as soon as he became aware of the problem. While it may have taken time to effect repairs, another officer could have been posted at the gates to control ingress and egress. In fact, once the Watch Commander became aware of the problem, an officer was posted at the gate for the remainder of the visitation period.¹⁶ Grievant has failed to demonstrate any circumstances that prevented him from promptly notifying the Watch Commander

¹⁵ The facility was built in an area subject to flooding and underground electric cables are subject to moisture and groundwater. A replacement facility is currently under construction.

¹⁶ Exhibit 18. Grievant's written statement (undated).

about the equipment malfunction. Accordingly, the agency's decision to issue a Group II Written Notice was reasonable.

DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on October 25, 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.¹⁷ You must file a notice of appeal with the clerk of the circuit court in the

¹⁷ 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

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁸

[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

that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.