

Issues: Group III Written Notice with termination (conduct unbecoming a
Warden); Hearing Date: 12/05/03; Decision Issued: 12/23/03; Agency:
DOC; AHO: Lorin A. Costanzo; Case No. 5823/5824

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS**

DECISION OF HEARING OFFICER

Case No. 5823
Case No. 5824

Hearing Date: December 5, 2003
Decision Issued: December 23, 2003

PROCEDURAL BACKGROUND

On June 11, 2003, Grievant was issued a Group III Written Notice of disciplinary action with Removal for:

Conduct unbecoming a Warden of the Department of Corrections. Specifically, while under oath in an employee grievance hearing you were untruthful when you told the hearing officer you did not know what was on the video tape when, in fact, you knew that on the tape was the recording of your subordinate employees accessing the computer files of another employee's speed dial list.

On June 11, 2003, Grievant was issued a Group III Written Notice of disciplinary action with Removal for:

Conduct unbecoming a Warden of the Department of Corrections. Specifically you instructed your subordinate to remove any mention of his illegal conduct and his violations of policy and Executive Order by accessing the Keen Mountain Correctional Center Data base to determine if another employee had programmed the Fraud, Waste, and Abuse Hotline on his office speed dial in an investigative report. Additionally, you failed to report this to the Inspector General's Office or to take appropriate action against your subordinate employee.

Five written notices were issued Grievant on June 11, 2003 and on July 3, 2003 Grievant initiate five grievances, one for each Written Notice received. This grievance hearing addresses the two grievances above set forth. On July 3, 2003 Grievant timely filed grievances challenging the two above described disciplinary actions. The outcomes of the Third Resolution Step were not satisfactory to the Grievant and he requested hearings on each of the above.

On October 21, 2003 the Department of Employment Dispute Resolution assigned this appeal to the undersigned Hearing Officer.

Grievant requested consolidation of the five grievances filed on July 3, 2003, and requested that the five grievances proceed to three separate administrative hearings (two grievances being consolidated into each of two separate hearings and one grievance being addressed in a third grievance hearing).

The Director concurred and granted Grievant's request for consolidation (see Compliance Ruling of Director- Ruling Number 2003-169, issued October 10, 2003). The Ruling further noted Grievant requested neither of the two EDR full-time hearing officers be assigned to conduct the hearings and that the two full-time hearing officers voluntarily disqualified themselves in these cases.

On October 30, 2003 Grievant requested The Department of Employment Dispute Resolution to assign three separate hearing officers to hear the three grievance hearings (consolidated as above set forth). However, by letter of

November 21, 2003 Grievant withdrew his request and agreed to one hearing officer for all grievances.

At the parties' joint request, the this grievance hearing was held in Richmond, Virginia to facilitate the testimony of witnesses for each party. At the parties' joint request, this grievance hearing was held on December 5, 2003. Upon the motions of both party, the Hearing Officer found just cause to grant an extension of the 30 day time frame for issuing the decision because of a.) the conflicting schedule of the parties; b.) the issue pending of the Grievant's request for three separate hearing officers to be appointed; and c.) witnesses availability.

APPEARANCES

Grievant:

Grievant's Counsel:

Agency Party Designee/Regional Director:

Agency Advocate:

Special Agent:

Special Agent:

Secretary:

Counselor:

Electronic Technician:

Va. State Police:

Institutional Training Officer ("ITO"):

Regional Director:

ISSUES

Whether Grievant should receive a Group III Written Notice of disciplinary action with Removal.

Whether Grievant should receive a Group III Written Notice of disciplinary action with Removal.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") '5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM '9.

FINDINGS OF FACTS

1. Grievant received information that an employee had accessed the computer records of Grievant's secretary. Grievant instructed ITO, who was at the time the institutional investigator, to conduct an investigation of this allegation that and to utilize Electronic Tec. for such investigation.
2. ITO accessed an employee's telephone computer records and determined that speed dial for the Hotline number was set up. ITO prepared an investigation report and included in his report his accessing the employee's computer's records concerning speed dial and the Hotline number.
3. Grievant instructed ITO to remove from his investigation report any mention of ITO's activities that were violations of policies and regulations.

4. ITO wanted to know what was on the speed dial and was not instructed by Grievant to access speed dialing numbers on employee's telephone.
5. ITO video taped investigative activities on March 23, 2002. He video taped 3 activities on one video tape:
 - part 1= video of computer... ITO and Electronic Tec. at secretary's computer
 - part 2= video of accessing employee's speed dial numbers at PBX by ITO and Electronic Tec.
 - part 3= video at secretary's computer with ITO getting assistance on finding date of documents accessed.
6. During a 2002 grievance hearing, part of the videotape that ITO had recorded on March 23, 2002 was viewed. After being played once the video was rewound for an additional viewing. Inadvertently, it was started at an earlier point which showed ITO and Electronics Tec. entering the telephone computer database and showing a listing of an employee's speed dial numbers including the Hotline number.
7. ITO showed Grievant only the part 3 of the video tape made on March 23, 2002.
8. At the times at issue in this cause Grievant held the position of Warden.

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:

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. '5.8 EDR Grievance Procedure Manual, effective July1, 2001.

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 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.3 of the Commonwealth of Virginia's Department of Personnel and Training Policy and Procedures Manual - Policy 1.60 , effective date of 9/16/93, Standards of Conduct, provides that Group III offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal.

The Department of Corrections has promulgated its own Standards of Conduct patterned on the state standards but tailored to the unique needs of the Department of Corrections. Section 5-10.7C "D.O.C. Procedures Manual" states: "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 this procedure." and at Section 5.10.17A of the "D.O.C. Procedures Manual" it is provided that Group III offenses "include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal."

The State Employee Fraud, Waste and Abuse Hotline ("Hotline") was authorized by Executive Order (see: Executive Order 13 (98); Executive Order 24 (2002) . The State Employee Fraud, Waste and Abuse Hotline Policies and Procedures Manual (at page 2) provides, "The State Employee Fraud, Waste, and Abuse Hotline is completely anonymous. Under no circumstances should anyone attempt to identify any person who may call the Hotline." (see Tab FF)

In March of 2002 Grievant received information that an employee had accessed the computer records of Grievant's secretary and Grievant instructed ITO, (then an institutional investigator) to conduct an investigation into this. Grievant directed the Electronic Technician be contacted to assist in the investigation.

During the investigation ITO accessed employee's telephone computer records to determine if the speed dial for the Hotline telephone number was set up on the telephone by the employee as ITO had been informed. The Hotline number was found to be programmed on the speed dial. (Tab J)

This investigation occurred on March 23, 2002 and during this investigation ITO video taped his own investigative activities. One video tape cassette had recorded on it 3 separate parts of the investigation:

part 1: video of computer and ITO and Electronics Tec. at secretary's computer

part 2: video of accessing speed dial numbers at PBX by ITO and Electronic Tec.

part 3: video at secretary's computer with ITO getting help on finding date of documents accessed.

Grievant, during the investigation, talked with ITO who reported his accessing of employee's telephone communications records and that he had video taped this. Grievant acknowledged instructing ITO to remove any reference from any investigative report as to having accessed the employee's telephone communications records. Grievant told ITO that he had concerns that this accessing of the speed dial records would be perceived as a form of retaliation and also that accessing these records was not the focus of the investigation. ITO testified that this was the first time that Grievant had told ITO, the Institutional Investigator at the time of this investigation, to remove information from an investigation report, except for typos and errors.

While Grievant indicated the instructions to remove information related to the fact that the information/records were not the focus of the investigation, removal of the information appears to be more related to concerns over the Hotline related matters and the possible effects that could arise.

An investigation was initiated by Grievant at a correctional facility and in the process of an investigation Grievant gave ITO instructions to remove matters from his investigation report. History between Grievant and employee was testified to and their relationship was a factor. The concerned about the matter having the ability to lead to matters being raised concerning retaliation seems appropriate. However instructions to remove matters reported in the report do not.

The Department of Corrections Procedures Manual, 10-4.9 B states, "The organizational unit head or designee will notify the Internal Affairs Unit whenever there is a violation, or suspected violation of a regulation, policy, rule, or law." Grievant's himself sent a Memo dated April 20, 2000 which provided for supervisors to report violations of policy and procedure.

The Agency did not meet its burden of proof as to issues raise about "failure to report or take appropriate action". Grievant did provide some information surrounding the incident to Special Agent and Regional Director and others but there is conflicting information as to what was presented and /or disclosed.

Grievant was told he needed to call internal affairs and Grievant testified he did call and her assistant said she would call back. Later, Grievant was told an agent was being assigned.

Testimony was received about the relationship between employee and Grievant. Consideration was given to the statement of Grievant that these matters were to be removed because of concerns that accessing the speed dial records might be perceived of as retaliation or raise retaliation issues. Further the Grievant's statements that accessing these records was not the focus of the investigation were considered.

Grievant did not tell ITO to video tape the phone system/access the database but did admit to directing ITO to exclude anything about employee's speed dial numbers in his report. (Tab B)

Written Notice was issued for "Conduct unbecoming a Warden of the Department of Corrections. Specifically, while under oath in an employee grievance hearing you were untruthful when you told the hearing officer. . ." During a December, 2002 grievance hearing the video of March 23, 2002 made by ITO was shown in part and was rewound to be shown again. It was rewound to an earlier place on the tape showing employees speed dial numbers on the computer screen (referred to below as "part 2"). Grievant was under oath at this hearing.

Grievant is charged with stating at the December 2002 hearing that he did not know what was being displayed (in reference to "part 2" on the tape) when he had previously reviewed the video with ITO.

ITO video taped his investigative activities on March 23, 2002 which contained 3 separate parts showing 3 separate activities on the one video tape:
part 1= video of computer... ITO and Electronic Tec. at secretary's computer
part 2= video of accessing speed dial numbers at PBX by ITO and Electronic Tec.

part 3= video at secretary's computer with ITO getting assistance on finding date of documents accessed.

Grievant testified in this proceeding that he had not seen the speed dial portion of the tape (ie. "part 2") showing accessing the PBX computer records of employee. Grievant contends he was not being untrue when he interjected at the prior hearing of December 2002, "that's not it, that's not it" and later testified that he did not know what else was in the video tape.

ITO testified in this proceedings that he showed Grievant the 3rd part of the video tape. The Tape was turned over to Agent after it was reviewed in Grievant's office (Grievant was not present at the viewing)

ITO specifically recalled and testified that when the tape was finished being made he it put in evidence locker. After that, the next time he brought it out was when he showed Grievant the section about employee accessing the secretary's computer. This was first time Grievant saw the tape he saw only what is referred to above as "part 3" and Grievant did not see "part 1" or "part 2". ITO further testified Grievant did not ever have possession of the tape and on April 11, 2002 there was a transfer of custody of the tape to an Agent (with a chain of custody maintained).

The Standards of Conduct allow agencies to reduce the disciplinary action if there are "mitigating circumstances, " which the Standards of Conduct describe as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance. The standards of Conduct also allows agencies to consider aggravating circumstances that would support the level of discipline issues.

The hearing officer may consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct. In considering mitigating circumstances, the hearing officer must also consider management's right to exercise its good faith business judgment in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy. (Rules for Conducting Grievance Hearings, Effective 7/1/2001, Department of Employment Dispute Resolution). Mitigation considerations were taken into consideration by the agency and were addressed both in the Written Notices and in this hearing. Mitigating circumstances were presented, argued, and have been considered. Evidence has been presented and considered concerning the length of service of Grievant, quality of service, and his impact and achievements. Evidence was presented and considered concerning the nature of the position of Warden and its unique responsibilities, authorities, and impact within the Department of Corrections.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for "Conduct unbecoming a Warden of the Department of Corrections. Specifically, while under oath in an employee grievance hearing you were untruthful . . ." is rescinded.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with Removal for "Conduct unbecoming a Warden of the Department of Corrections. Specifically you instructed your subordinate to remove any mention of his illegal conduct and his violations of policy and Executive Order . . ." is upheld. Additionally,

you failed to report this to the Inspector General's Office or to take appropriate action against your subordinate employee.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review

The hearing decision is subject to four types of administrative review, depending upon the nature of the alleged defect with the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resources management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substances Abuse Services which challenge allegations of patient abuse, a challenge that a hearing decision is inconsistent with law may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within 10 calendar days of the date of the original hearing decision. (Note: the 10 day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a final hearing decision, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HMR, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decisions

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Lorin A. Costanzo, Hearing Officer