

Issue: Gross negligence resulting in termination; Hearing Date: February 17, 2004; Decision Date: February 20, 2004; Agency: Department of Corrections; Hearing Officer: Thomas J. McCarthy, Jr., Esquire; Case Number: 545; **Administrative Review: HO Reconsideration Request received ??; Reconsideration Decision issued: 03/19/04; Outcome: Original decision is affirmed**

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 545

Hearing Date: February 17, 2004

Decision Issued: February 20, 2004

APPEARANCES

Grievant

Grievant Representative

Agency Representative

4 Witnesses for Grievant

4 Witnesses for Agency

1 Written Statement received by agreement of Agency and Grievant

ISSUE

1. "Was termination of Grievant's position as Agency Officer due to the issuance of the Group III notice and the nature of the incident proper?"

FINDINGS OF FACTS

The Grievant filed a timely appeal from a Group III Written Notice with Termination issued on November 19, 2003, because Grievant allegedly violated employee Standards of Conduct 5-10.17 B 15, "gross negligence on the job that results in the escape, death or serious injury of a ward of the state or the death or serious injury of a State employee." Following a denial of relief at the second resolution step in the grievance process, the Agency qualified the grievance for a hearing.

At all times relevant on November 11, 2003, Grievant was a Agency Officer serving in B Building as a B-5 Segregation Officer at the facility. Grievant was working on this date with another Agency Officer. Grievant signed the Post Review Log certifying that he had read and discussed with his Supervisor the Post Orders prior to assuming his duties at his post.

Because November 11, 2003, was a holiday, breakfast for inmates in B Building was served one hour late, causing a change in routine for the on duty Agency Officers in getting inmates to showers and recreation activities.

The facility houses the worst inmates from the Commonwealth and other states.

Inmates are scheduled to use individual recreation cages for approximately one hour periods. During these periods, inmates are moved from their cells, one by one, in leg shackles with their hands cuffed behind them, escorted by two (2) Agency Officers.

Prior to being moved from a cell to a recreation cage, all inmates are strip searched. Both their clothing items, including shoes or slippers and their bodies are searched.

On November 11, 2003, the Grievant and another Agency Officer moved three inmates, one at a time, from their cells to the recreation cages. Once the inmates were in the individual 6' by 10' recreation cages, their leg shackles and hand cuffs were removed through ports in the cages and the individual cages were supposed to be locked.

Grievant testified that he did not have the key to the locks on the recreation cages. The second Agency Officer escorting the inmates had the key.

Grievant testified that the locks on the two cages appeared to be locked when the inmates were inside.

A video tape of the recreation cages from the time just before three (3) inmates were placed in them to after the inmates were taken back to their cells was shown and admitted as evidence. [Commonwealth Exhibit 5]

A DVD made from the original video tape in slower motion was also admitted as Grievant Exhibit D.

On the video tape and DVD, the inmate in the cage on the right (Inmate R) is shown to be doing something with his socks or slippers more than once, opening the door to his cage, going to a urinal on a side wall, returning to his cage and closing the door. Several times Inmate R appears to look closely at the lock on his cage.

When three Agency Officers entered the B-4 recreation yard to escort the prisoners from the recreation cages, the inmate in the middle cage (Inmate M) opened the cage door and stated, "You left my cage unlocked." Inmate R then came out of his cage, went over to one of the Agency Officers and punched him in the throat and chest and then ran back into his recreation cage.

The Agency Officer received first aid on the scene and physical therapy later.

From several viewings of the video tape and the DVD, no contraband could be seen to be exchanged between Inmate R and Inmate M.

From the video tape and the DVD, Inmate R and Inmate M could not be seen picking or unlocking the cage locks on their recreation cages.

As mitigating circumstances, Grievant presented:

1. The fact that at times his post was 50% undermanned due to the Agency Officers being called for tasks elsewhere, and due to beaks, thus causing Grievant to be stressed;

2. The testimony of another Agency Officer that he had found locks on the recreation cages to come open when he pulled on them;
3. He thought the locks looked locked;
4. The poor quality of the video tape and the DVD made from it and the fact that it appeared to have very short gaps;
5. Grievant did not have the key to the recreation cage locks; and
6. Grievant was respected by his fellow Agency Officers and the Warden.

Two Agency Officers testified that on previous occasions they had pulled on the recreation cage locks that appeared to be locked and they had come open.

The testimony was uncontroverted that when two Agency Officers escort an inmate, both are responsible for seeing that the inmate is securely locked in the recreation cage.

The Agency's Code of Conduct [Commonwealth Exhibit 6] is posted throughout the facility, including two (2) places in the Staff Training Room.

A facility investigator's statement was read. The statement said he did not interview the inmates involved after the incident.

Grievant's representative asked about a previous occurrence when an inmate being transported to a courthouse cut his stun belt and unlatched a leg shackle and attempted to escape to show uneven application of discipline. No testimony was heard that clearly showed what discipline was imposed in this incident. To the question, "Were there any repercussions or charges made because of this attempted escape?", a Agency Officer Captain answered, "I don't think so."

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to the 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 the workplace." Murray v. Stokes, 237 Va. 653, 656 (1989).

Code Section 2.2-3000 et seq. sets forth the Commonwealth's grievance procedure and provides, in 2.2-3000A:

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 Section 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.

Post Order #43, Security Post Orders [Commonwealth's Exhibit 2], which Grievant signed off as having read and understood [Commonwealth's Exhibit 3] in paragraph 16D. states, "The Inmate will be placed in the recreation cage and the door secured." Although the Post Review Log [Commonwealth's Exhibit 3] lists Post Order #24, the testimony was uncontroverted that this was the Post Review Log for Post Order #43.

The Agency Procedures Manual in Chapter Five: Human Resources contains the "Standards of Conduct". Grievant was issued a Group III Written Notice and terminated. 5-10.17 A of the Agency's Standards of Conduct provides that Group III offenses "... include acts and behavior of such a serious nature that a first occurrence normally should warrant removal." 5-10.17 B lists offenses included in Group III No. 15 of which reads "gross negligence on the job that results in the escape, death, or serious injury of a ward of the state or the death or serious injury of a State employee."

The "Code of Conduct" for the Agency [Commonwealth's Exhibit 6] states "I SHOULD ALWAYS PERFORM MY JOB IN A RESPONSIBLE MANNER;" and "MY ACTIONS AFFECT THE SAFETY AND SECURITY OF EVERYONE;". This is posted conspicuously throughout the facility including two (2) places in the Staff Training Room.

Because of the type of inmates at the facility, Post Orders require two (2) Agency Officers to escort one inmate when that inmate is moved from his cell to the recreation cages. The testimony was that each of the two officers was responsible for securing the inmate. The responsibilities of both were the responsibility of each Agency Officer.

Both Agency Officers were responsible for strip searching the inmates involved. Both Agency Officers were responsible for locking the inmates in the recreation cages. Grievant was one of the two Agency Officers responsible for locking the gates on two individual recreation cages. The cages were not locked, two inmates escaped from their cages, one inmate then assaulted an officer.

Grievant's attempt, through his representative, to show inconsistent application of disciplinary policies was inconclusive.

Grievant's attempt to invoke mitigating circumstances was unpersuasive. The fact that Grievant and the other on duty Agency Officers had many tasks to accomplish did not relieve them of the responsibility for performing the duties they undertook safely and properly. The fact that other Agency Officers testified that they had pulled on the recreation cage locks and some had come open shows that other Agency Officers physically checked the locks for security. Grievant did not, and visual checks were not sufficient. While the video tape and DVD were not great quality, the actions of the inmates could be seen. The fact that Grievant did not have the key to the security locks did not relieve him of the responsibility for checking them to be sure they were locked. While Grievant was well thought of, he was grossly negligent.

The Grievant's action in failing to securely lock two (2) inmates in individual recreation cages in a high security facility resulted in a serious threat to the safety and security of facility staff and inmates, resulted in an Agency Officer being attacked and injured, and certainly amounted to gross negligence.

DECISION

The Agency showed by a preponderance of the evidence presented that the Group III Written Notice and termination was warranted and appropriate in this matter.

Failure to securely lock not one, but two recreation cages, no matter how busy the Agency Officers were, was gross negligence.

The Group III notice and termination of the Grievant was proper from the evidence presented. The issuance of the Group III Written Notice with termination is sustained.

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

This 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 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 Substance 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 HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

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.

Thomas J. McCarthy, Jr., Esquire
Hearing Officer

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
RECONSIDERATION OF DECISION OF HEARING OFFICER

In re: Case Number 545

Hearing Date: February 17, 2004
Decision Issued: February 20, 2004
Reconsideration Date: March 19, 2004

Grievant, by counsel, moved this Hearing Officer to reconsider the finding that the termination of the Grievant's position as an Agency Officer due to the issuance of a Group III notice and the nature of the incident was proper.

This was the issue agreed upon by the parties and their representatives in a pre-hearing telephone conference call and confirmed by my letter of January 30, 2004. Grievant's counsel has raised other issues and has submitted affidavits which were not in evidence at the hearing. Issues not presented at the hearing and evidence not presented at the hearing were not considered as part of the reconsideration requested. The second Agency Officer involved in the incident did not testify at this Grievant's hearing.

Preponderance of the evidence established that the Grievant's failure to secure not one, but two high security prisoners in recreation cages resulted in the exit or escape of two prisoners from recreation cages and an injury to an Agency Officer. After hearing the evidence, and reconsidering it, I find this to be an act of gross negligence. From the evidence presented, it was clearly established that Grievant failed to see that two inmates were securely locked in their recreation cages. Grievant was certainly afforded a fair and impartial hearing. His constitutional rights were not violated. The Agency complied with the grievance procedure in providing true and accurate copies of records to be presented as evidence where they existed. The Agency did not violate Grievant's rights under the grievance procedure by not conducting an investigation and review of the evidence in connection with the incident. The Warden testified such an investigation and review as not needed. Grievant or his representative did not complain to the Hearings Officer of the Agency's alleged failure to provide evidence prior to or at the hearing. The evidence presented at the hearing did not indicate that the inmates either picked or unlocked properly locked locks on the recreation cages.

Having reconsidered all of the issues presented in the Motion for Reconsideration which were presented at the hearing, the original decision in this matter is affirmed.

Thomas J. McCarthy, Jr., Esquire
Hearing Officer