

Issue: Group II Written Notice (failure to follow supervisor's instructions);
Hearing Date: 04/05/04; Decision Issued: 04/06/04; Agency: DOC; AHO:
David J. Lathem, Esq.; Case No. 622



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 622

Hearing Date: April 5, 2004
Decision Issued: April 6, 2004

APPEARANCES

Grievant
Associate Warden
Three witnesses for Agency

ISSUES

Did grievant's conduct warrant 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 of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.²

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for five years. She has been a Corrections Officer for one and a half years.

The facility at which grievant is employed had promulgated a post order for Floor Control Officer which includes among the specific post duties a mandate that the Control Room door is never to be opened if an inmate is in the sally port passage.³ Grievant had read the policy and understood this duty.

On October 2, 2003, grievant was assigned as Floor Control Officer in the lower Control Room of a two-tier housing unit. At about 6:10 p.m., the second-tier control officer was about to be relieved by another corrections officer waiting outside the upper control room. In order to admit the relieving officer into the control room, it is necessary to go "on lock." Going "on lock" requires the control room officer to activate a button that locks all doors in the building except the doors to the control rooms. As is required by policy and practice, the upper control room officer called grievant on the intercom to ascertain whether the lower sally port passage was clear of inmates. Grievant responded that the passage was not clear because ten inmates had just returned to the building and were in the process of transiting the sally port passage. Grievant opened the door to one of the two housing pods and nine of the ten inmates entered that pod. One inmate remained in the sally port passage waiting for the door to the other pod to be opened.

About three minutes after her first call to grievant on the intercom, the upper control officer called grievant again and asked if grievant was "clear." At about this time, the sergeant (building supervisor) yelled at grievant to open the building exit door. Grievant was on the telephone and was also observing inmates in the pod who had been yelling. As grievant turned to check the sally port passage, the upper control room officer went "on lock." One inmate was still in the lower sally port passage. A few seconds later the building was taken off lock and grievant was able to unlock the building exit door so that the sergeant could leave the building.

¹ Exhibit 4. Written Notice, issued November 13, 2003.

² Exhibit 4. Grievance Form A, filed December 7, 2003.

³ Exhibit 1. Post Order # 139, et al, Floor Control Officer, Specific Post Duties, item 10, provides: "Ensure the Control Room door shall never be opened if there is an inmate between the pod gate and sally port. Ensure only one access door is opened at a time. The pod door is be secured when not in use."

After the sergeant had left the building, she called grievant on the telephone and asked whether she realized that there had been an inmate in her sally port passage when the building was briefly locked down. Grievant told the sergeant. "I do not know."⁴ Grievant said she had been distracted by a telephone call and by the inmates yelling in the pod.

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.⁵

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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

⁴ Exhibit 6. Email from sergeant to lieutenant, October 3, 2003.

⁵ § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

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 Personnel and Training Manual* Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature than Group I offenses and are such that an accumulation of two Group II offenses normally should warrant removal from employment.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 5-10.16 of the DOC Standards of Conduct addresses Group II offenses, which are defined identically to the DHRM Standards of Conduct.⁷ Failure to comply with applicable established written policy is one example of a Group II offense.

The agency has demonstrated, by a preponderance of evidence, that there was an inmate in grievant's sally port passage when the building was placed "on lock." Grievant told the second-tier control room officer that grievant's sally port was not clear when she received the first call from upstairs. The second-tier officer testified credibly that she waited a few minutes, called grievant a second time, and heard grievant say, "Go ahead and lock it down." Grievant, on the other hand, maintains that the second-tier officer did not call her a second time but instead locked the building down on her own. However, during grievant's cross-examination of the upper control room officer, grievant asked the other officer whether she might have misunderstood grievant. If, as grievant maintains, there was no second call, there would have been nothing for the upper control officer to misunderstand. Accordingly, it is more likely than not that there was a second intercom call to grievant.

During the hearing, grievant testified that perhaps the inmate had bent down for some reason and she may not have seen him in the sally port passage. Grievant's suggestion that she could have accidentally failed to see the inmate lends credence to the other officer's testimony that grievant had told her to go ahead and lock it down. There would be no need for grievant to suggest the possibility of the inmate bending down if grievant had not told the officer that she was clear. Therefore, the testimony of the other officer is found more credible than that of grievant.

The agency disciplined grievant with a Group II Written Notice because grievant failed to comply with applicable established written policy – a Group II offense.⁸ However, when one reads this offense in conjunction with the other eight examples of Group II offenses, it is apparent that Group II offenses generally require or infer *willful misconduct*. For example, a refusal to work overtime requires a conscious, deliberate decision to disobey the direct

⁶ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

⁷ Exhibit 5. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

⁸ Exhibit 5. Section 5-10.16.B.1, *Ibid*.

instruction of a supervisor. In most cases, the failure to perform assigned work has been considered a Group II offense only when an employee is directed to perform a task, and thereafter *deliberately* fails to perform that task. However, when an employee performs her job duties but does so in an unsatisfactory or inadequate manner, a first offense is generally considered to be the Group I offense of "inadequate or unsatisfactory work performance."⁹

In this case, grievant's offense was not deliberate or willful misconduct. Instead, she failed to perform her duty in a thorough and effective manner by failing to observe that there was still one inmate in the sally port before giving the clear response to the other control room officer. Accordingly, grievant's offense is more appropriately categorized as a Group I offense for inadequate or unsatisfactory work performance.

DECISION

The decision of the agency is modified.

The Group II Written Notice issued on November 13, 2003 is hereby REDUCED to a Group I Written Notice for unsatisfactory work performance. 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. Address your request to:

⁹ NOTE: However, when an employee has been disciplined with a Group I Written Notice for unsatisfactory performance, and thereafter continues to perform unsatisfactorily, the agency may be justified in issuing a Group II Written Notice providing the employee has been given any necessary training and a reasonable time within which to improve her performance.

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.¹⁰ 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.¹¹

[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

¹⁰ 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*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.