Issue: Group I Written Notice with suspension (due to accumulation) (unsatisfactory job performance); Hearing Date: 05/03/04; Decision Issued: 05/04/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 654

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 654

Hearing Date: May 3, 2004
Decision Issued: May 4, 2004

PROCEDURAL ISSUES

Grievant requested as part of the relief she seeks: that previous disciplinary actions be removed from her personnel file; that she be assigned to different supervision; and, that no one should have oversight authority over her decisions. Hearing officers may provide certain types of relief including reduction or rescission of the disciplinary action.[1] However, hearing officers do not have authority to expunge prior disciplinary actions from personnel files, reassign employees, or direct the means by which work activities are carried out.[2] Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

[1] § 5.9(a)2. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

[2] § 5.9(b)2, 4, 6 & 7. *Ibid.* NOTE: Previous disciplinary actions became final on the 31st day following issuance because grievant did not grieve the actions within 30 days of their issuance.

Grievant filed two grievance forms on the same day. One of the grievances failed to include the date the alleged grievance occurred and is therefore procedurally defective. However, both grievances appear to have their genesis in the disciplinary action taken on January 5, 2004. Because both grievances address the most recent disciplinary action, the agency treated the two grievances as one in its responses. Grievant apparently acquiesced and therefore, this decision will address the only qualifiable issue identified in both grievances – the Group I Written Notice issued on January 5, 2004.

Grievant asserted during the second-step resolution meeting that she was grieving issues that began in April 2001 and continued to the present time. The grievance procedure provides that a written grievance must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute.[3] Therefore, the only issue qualified for hearing in this case is the disciplinary action issued on January 5, 2004.

APPEARANCES

Grievant
Five witnesses for Grievant
Warden Senior
Associate Warden

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?

[3] § 2.2, *Ibid.*

FINDINGS OF FACT

The grievant filed a timely appeal from a Group I Written Notice issued for inadequate or unsatisfactory job performance.[4] Grievant was suspended for five work days as part of the disciplinary action because she had accumulated three active Group I Written Notices. During the second resolution step of the grievance process, the respondent offered grievant an opportunity to voluntarily take a lateral transfer to another position but grievant rejected the offer. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[5]

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for 17 years. She is a Legal Services Officer I (Hearings Officer).[6]

Grievant has received written counseling regarding unsatisfactory job performance relating to erroneous decisions and hearing defects on seven occasions: May 3, 2001, June 6, 2001, July 2, 2001, October 30, 2001, November 20, 2001, October 3, 2002, and October 9, 2002. In addition, her supervisor issued to grievant a Notice of Improvement Needed/Substandard Performance in November 2001.[7] Grievant has previously received two disciplinary actions that were active on January 5, 2004 – both are Group I Written Notices for inadequate or unsatisfactory performance.[8] Following counseling in June 2001, grievant was sent to the agency's Academy for Staff Development and given remedial training for her position.[9] In her performance evaluations for the 2001, 2002, and 2003 performance cycles, grievant has been rated Below Contributor for her primary core responsibility of handling disciplinary charges in compliance with applicable policies.

In October 2003, grievant conducted a disciplinary hearing for an inmate who had been charged with being under the influence of drugs. The inmate had been randomly tested for drugs on September 29, 2003 and was found to be positive for marijuana. The disciplinary offense report from the reporting officer confirms that the inmate tested positive for marijuana. Grievant heard the case and read into the audiotaped record the report's Description of Offense including the statement that the inmate tested positive for marijuana. The correctional center's drug testing unit report confirms that the inmate tested positive for marijuana. Grievant's decision in the case stated that the inmate was Not Guilty because "R/O [Reporting Officer] did not state in description the drug in which

[4] Exhibit 2. Written Notice, issued January 5, 2004.
[5] Exhibit 1. Grievance Form A, filed February 4, 2004.
[6] Exhibit 4. Grievant's Employee Work Profile, October 25, 2003.
[7] Exhibit 5. *Notice of Improvement Needed/Substandard Performance*, November 28, 2001.
[8] Exhibit 2. Group I Written Notices issued on January 28, 2002 and August 12, 2003.
[9] Exhibit 6. Academy for Staff Development Training Report, June 15, 2001.

(sic) [name of inmate] tested for, a procedural error."[10] In her disciplinary hearing, grievant did not offer any reason for making such an error.

The facility employs three other hearings officers. Grievant's supervisor has counseled and disciplined grievant about her unsatisfactory performance far more often than the other three officers combined. When he has counseled the other three, they have corrected their behavior such that discipline has not been necessary.

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.[11]

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

[10] Exhibit 2. Disciplinary Offense Report for inmate.
[11] § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

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 *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group I offenses include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.[12] 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, which are defined identically to the DHRM Standards of Conduct.[13] Among the examples of Group I offenses is inadequate or unsatisfactory job performance. Upon the accumulation of three "active" Group I offenses, the employee should normally be suspended without pay but such suspension shall not exceed five workdays.

The agency has demonstrated by a preponderance of evidence that grievant's work performance was unsatisfactory. The available evidence is clear and convincing that the offense report stated that the inmate had tested positive for marijuana, the drug test confirmed the inmate to be positive for marijuana, and yet grievant decided that he was not guilty. Her stated reason on the offense report for making such a finding was because she claimed the report description did not identify the drug. This was clearly erroneous and grievant now admits that she erred.

In mitigation, grievant asserts that she made a mistake and wrote down an incorrect reason for finding the inmate not guilty. She maintains that the inmate would be found not guilty because his hearing occurred more than 15 days after the inmate was served with the charge.[14] In this case, the inmate was served with his charge on September 29, 2003. Grievant had initially docketed the hearing for October 13, 2003 but then postponed the hearing because two key witnesses were not available. The hearing was conducted three days later on October 16, 2003.

Grievant's defense is not plausible for three reasons. First, if she had meant to dismiss the inmate's case for a procedural technicality, she should have checked the "Dismissed" block rather than the "Not Guilty" block. Second, and most significantly, the requirement to hear inmate cases within 15 days can be *waived* if a valid reason exists.[15] Although inmates have to be returned to

[12] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[13] Agency Exhibit 3. Procedure Number 5-10*, Standards of Conduct,* June 15, 2002.
[14] *See* Exhibit 1. Attachment to Grievance Form. Inmate discipline rule 861.12 provides that the hearing should be held no later than 15 calendar days after service of the charge, unless a valid reason exists.
[15] Sections 861.12 & 861.13, Division Operating Procedure 861, *Inmate Discipline*.

general population if their case is not heard within 15 days, the hearing may still be conducted after the 15th day providing there is a valid reason to postpone the hearing. In this case, the evidence reflects that there was a valid reason to postpone the case because the two key witnesses were not available on October 13, 2003. Accordingly, the fact that the hearing occurred on the 16th day after service was not a legitimate reason to dismiss the charge. Finally, grievant failed to raise this defense in her disciplinary hearing and brought it up only after discipline had been issued. Therefore, grievant's claim that this was her reason for finding the inmate not guilty is neither credible nor supported by the evidence.

Grievant feels she has been singled out for discipline. There is no doubt that grievant has received extensive verbal and written counseling, a Notice of Substandard Performance, disciplinary actions, and repeated comments about performance on her evaluations. However, the unrebutted evidence establishes that all of these feedback mechanisms have been utilized in an attempt to identify to grievant those aspects of her performance that require improvement. Grievant has not shown that she has been singled out for any reason other than the fact that her performance is deficient in certain respects.

Grievant also feels that she is never commended for good performance. It is unrebutted that she works hard and sometimes works extra hours in order to complete her work. She feels she should be complimented on her efforts and not just talked to when she makes errors. While grievant may be correct in this observation, the fact remains that during the past three years, she has made a number of errors that required counseling, discipline, and comment on her performance evaluations. Grievant's supervisor would be remiss if he did not take these necessary actions. The supervisor cannot ignore performance errors; he is responsible to bring such errors to grievant's attention – first through counseling and then, if necessary, through discipline. In this case, the supervisor has followed progressive corrective action appropriately.

DECISION

The decision of the agency is hereby affirmed.

The Group I Written Notice issued on January 5, 2004 for inadequate or unsatisfactory job performance 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 rev12 0 tupw1 Yither to

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David J. Latham, Esq.
Hearing Officer