

Issue: Group II Written Notice with suspension (failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established written policy); Hearing Date: 07/14/04; Decision Issued: 07/15/04; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 756



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No. 756

Hearing Date: July 14, 2004
Decision Issued: July 15, 2004

APPEARANCES

Grievant
Superintendent
Four 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 grievance from a Group II Written Notice issued for failure to follow supervisor's instructions, perform assigned work, or comply

with established written policy.¹ As part of the disciplinary action, grievant was suspended without pay for five work days. 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 Juvenile Justice (Hereinafter referred to as “agency”) has employed grievant for nearly seven years as a Counselor II.³ Grievant has one prior active disciplinary action – a Group I Written Notice issued on April 3, 2003 for failure to maintain her case files according to written policy.⁴

Counselors are required to conduct individual counseling with wards and to document such counseling in the Running Case Record.⁵ Running Case Records shall document all work on the case including contacts and dates of contacts.⁶ Counselors are also responsible for completing a Service Plan and documenting monthly the ward’s efforts on individual strategies of the Plan.⁷ Counselors are required to complete an initial progress report within 60 days of a ward’s arrival at the correctional center and additional progress reports no later than every 90 days thereafter.⁸ Grievant has received a copy of each of the written operating procedures and is familiar with them.

As a result of the disciplinary action in early 2003, grievant’s supervisor carefully monitored grievant’s performance during the balance of the 2003 performance evaluation cycle. He counseled her on March 17, 2003 regarding case file updating and the need to treat all wards fairly. Grievant was given detailed written counseling late in March 2003.⁹ On April 11, 2003, the supervisor again counseled grievant regarding delays in submission of required reports. In May 2003, grievant was counseled because she left a confidential case file in her office instead of locking it in the file room cabinet. She was also reprimanded for failing to meet a deadline for the transfer of a case file to another counselor and for failing to manage her time effectively. In the counseling memorandum she was put on notice that she could be disciplined for failure to improve her performance.¹⁰ The supervisor also gave grievant an interim evaluation form noting several areas of substandard performance such as failing to submit reports timely, failing to conduct herself professionally, and

¹ Agency Exhibit 1. Written Notice, issued March 31, 2004.

² Agency Exhibit 1. Grievance Form A, filed April 30, 2004.

³ Agency Exhibit 2. Grievant’s Employee Work Profile Work Description, October 30, 2003.

⁴ Referenced in Section IV of the Written Notice.

⁵ Agency Exhibit 5. Section 442-4.4, Agency Standard Operating Procedure 442, *Counseling Services*, January 1, 2003.

⁶ Agency Exhibit 8. Section 445-4.2, Agency Standard Operating Procedure 445, *Case Documentation*, January 1, 2003.

⁷ Agency Exhibit 6. Sections 443-4.8 & 443-4.9, Agency Standard Operating Procedure 443, *Service Plan Development*, January 1, 2003.

⁸ Agency Exhibit 7. Section 444-4.1 & 444-4.3, Agency Standard Operating Procedure 444, *Progress Reports*, January 1, 2003.

⁹ Agency Exhibit 11. Written Counseling to grievant, March 26, 2003.

¹⁰ Agency Exhibit 11. Letter of Reprimand to grievant, May 14, 2003.

demonstrating a lack of concern for confidentiality.¹¹ Additional counseling continued from June through September 2003. Grievant's annual performance evaluation, while rating her overall performance as Contributor, rated her as Below Contributor in two of the five core responsibilities.¹²

Grievant was assigned a new supervisor in February 2004. After reviewing grievant's performance, the new supervisor concluded that grievant's case files lacked documentation of contacts with wards, their parents and, their parole officers. She also found that treatment plans had not been completed, and progress reports were lacking. In meetings with the superintendent, grievant admitted that she had left wards unsupervised in her office on several occasions. This was corroborated by the testimony of a correctional officer. Grievant also admitted to allowing wards to place telephone calls from her office without following the required procedure.¹³ She further admitted to leaving wards unattended while they made telephone calls. In mid-March 2004, the new supervisor issued a written counseling to grievant for continued deficiencies in failing to transfer cases timely, failing to update case file records and, failing to complete service plans.¹⁴

In January 2004, a former ward at grievant's facility tested positive for marijuana during his initial visit with his parole officer. The ward told his parole officer that he had smoked marijuana while at the juvenile correction center and had told grievant about it. Grievant told the ward not to tell his parole officer about the marijuana because it would delay his release date. These revelations were reported to the Office of Inspector General (OIG), which conducted a thorough investigation into the matter.¹⁵ The OIG's investigation concluded, *inter alia*, that grievant 1) told a ward not to report his marijuana use to a parole officer until after his release, 2) spent inordinate amounts of time with wards not assigned to her, 3) was not maintaining case files timely and, 4) had developed "favorites" among the wards. The investigation provides a detailed accounting of grievant's shortcomings and concludes (in the Addendum) that grievant is inept, and that her ineptitude is adversely depriving non-favored wards of services they are entitled to.

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

¹¹ Agency Exhibit 3. Interim Evaluation Form, May 14, 2003.

¹² Agency Exhibit 3. Grievant's Performance Evaluation, October 15, 2003.

¹³ The proper procedure is for the counselor to dial the call, establish who the party on the line is and what their relationship to the ward is, ascertain whether the party is willing to speak with the ward, and then remain present to monitor the entire conversation.

¹⁴ Agency Exhibit 14. Counseling letter to grievant, March 15, 2004.

¹⁵ Agency Exhibit 12. Memorandum from Inspector General, March 2, 2004.

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.¹⁶

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 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 that 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.¹⁷ Among the examples of Group II offenses are failing to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy.

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

¹⁷ Agency Exhibit 9. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

The agency has shown, by a preponderance of evidence, that grievant's performance had been substandard in certain core responsibilities for a long time. The agency provided ample evidence of counseling during the past year and a marginal performance evaluation, all of which put grievant on notice that her performance needed improvement. Grievant had many months in which to get her files current but she continued to be behind in completing various reports and case files. When an investigation revealed grievant's disparate treatment of wards by having "favorites" while virtually ignoring others, the agency had no option but to take decisive corrective action.

Grievant objected to the fact that the OIG reviewed her fact file during the course of its investigation. However, when the Inspector General testified at the hearing, grievant failed to ask him about his authority to view her fact file. The Director of the Department of Juvenile Justice is empowered to designate an inspector general who has the same powers as a sheriff or law-enforcement officer in the investigation of allegation of criminal behavior affecting the operation of the Department.¹⁸ Accordingly, the OIG may review any records reasonably related to the subject of the investigation. Therefore, grievant's objection is without merit.

Grievant also objected to the fact that the OIG did not review all ward records during the investigation. She proffered an institution operating procedure as evidence that the OIG could not have reviewed the records of certain wards because the access forms do not include the OIG's signature. The ward records confidentiality procedure does not specifically address who must sign the access form but only includes the form as an attachment.¹⁹ The form states only that persons needing access to the file for *professional use* should sign and date the form. In the absence of any clarifying instruction, it is presumed that *professional use* is intended for those who are counseling or treating the ward. In any case, the investigative power of the OIG would appear to be an overarching authority to review any and all records. Whether the OIG reviewed the specific cases identified by grievant does not change the report's conclusions regarding her deficient performance. Moreover, the OIG's report is corroborated by the previous supervisor's testimony as well as the current supervisor's testimony and counseling memorandum of March 15, 2004.

Grievant attempted to equate leaving an unsupervised ward alone in his room with leaving an unsupervised ward in her office. Such a comparison is without merit. Grievant's office has a computer with Internet access, a telephone with access outside the facility, a variety of office supplies, and confidential files of wards. Allowing wards unsupervised access to such equipment and supplies constitutes a potential security risk not found in wards' rooms.

¹⁸ Va. Code § 66-3.1. Police powers of internal investigators.

¹⁹ Grievant Exhibit 3. Institution Operating Procedure IOP-106, *Confidentiality of Ward Records*.

Grievant's former supervisor and current supervisor both testified that grievant has shown improvement since issuance of the disciplinary action. One purpose of corrective action such as a written notice and suspension is to help motivate the employee to correct the inappropriate behavior. In this case, the disciplinary action appears to be having the desired effect. The current supervisor states that grievant has been receptive to constructive criticism, has kept the supervisor informed, has been available when needed, and her work has improved. Nonetheless, at the time the agency issued the disciplinary action, the record supports a conclusion that it was reasonable and necessary corrective action.

DECISION

The decision of the agency is affirmed.

The Group II Written Notice and five-day suspension issued on March 31, 2004 for failure to perform assigned work or otherwise comply with established written policy is hereby UPHELD. The disciplinary action shall remain active for the period specified in Section VII.B.2 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:

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.²⁰ 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.²¹

[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

²⁰ 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).

²¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.