

Issue: Group II Written Notice (failure to follow supervisor's instructions);
Hearing Date: 07/12/04; Decision Issued: 07/15/04; Agency: DOC; AHO:
David J. Latham, Esq.; Case No. 757



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 757

Hearing Date: July 12, 2004
Decision Issued: July 15, 2004

APPEARANCES

Grievant
Warden
Advocate for Agency
One witness 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?

FINDINGS OF FACT

The grievant filed a timely grievance 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 eight years. He was a security officer IV (Sergeant) at the time this discipline was issued.³ Grievant has one other active disciplinary action that was issued concurrently with the action at issue herein. That disciplinary action was a Group III Written Notice for a security breach that occurred on a different date from the offense at issue herein; it resulted in grievant being demoted to Corrections Officer Senior and transferred to a different correction center.⁴

Grievant was assigned as the building supervisor on the night shift (6:00 p.m. – 6:00 a.m.). The facility at which he works is security level five, housing long-term inmates with single, multiple and life sentences for some of the most serious crimes.⁵ The building has four pods. As a building supervisor, grievant is responsible for, among other things, conducting hourly rounds in each pod and ensuring that staff maintains compliance with all cell compliance policies.⁶ During rounds, a supervisor is expected to check physical facilities and subordinate performance to assure compliance with security policies. Grievant supervised up to eight corrections officers including two control booth officers (upper and lower), four floor officers, an escort officer, and a cadre floor officer.

The warden had instructed all supervisors, including grievant, that there should not be inmate movement in the pods after the 9:30 p.m. inmate count. There are exceptions to this general rule. For example, inmates who work in the kitchen sometimes are not released from the kitchen until after 9:30 p.m. They are allowed to shower after returning from the kitchen. Similarly, kitchen workers who work in the morning are awakened at about 12:45 a.m. and leave for the kitchen between 1:00 and 1:30 a.m. Diabetics are awakened when a nurse makes rounds, usually between 4:00 a.m. and 5:30 a.m. When inmates are out of their cells for these or similar reasons, the warden requires that the number of inmates be small and capable of being managed by the reduced night security staff. The warden had also instructed supervisors to notify either him or the shift

¹ Exhibit 1. Written Notice, issued March 9, 2004.

² Exhibit 1. Grievance Form A, filed March 31, 2004.

³ Exhibit 5. Grievant's Employee Work Profile Work Description, October 25, 2003.

⁴ Exhibit 6. Group III Written Notice, issued March 9, 2004. NOTE: Grievant filed a separate grievance of the Group III disciplinary action which qualified for a hearing. A different hearing officer heard the case and upheld the disciplinary action. *See Decision of Hearing Officer*, Case Number 718, issued June 4, 2004. Grievant has appealed that decision and, therefore, it has not become final as of the date of this decision.

⁵ Corrections center security levels range from one to six, with six being maximum security for the most dangerous and disruptive inmates.

⁶ Exhibit 4. Post Order # 60, Building Supervisor.

commander whenever inmates requested showers because of late return from the kitchen after the 9:30 p.m. count.

A review of a security camera videotape for the night of January 17-18, 2004 revealed that several inmates were out of their cells at the same time. Some were sitting at tables in the central pod area, one appeared to have been watching television, some appeared to be standing in a group, and others were engaged in undetermined activity. Still photographs from the videotape taken between 10:58 p.m. and 1:40 a.m. document some of the activity.⁷ Grievant arrived at work at 11:49 p.m. The majority of inmate activity outside of their cells occurred prior to grievant's arrival at work, however, even after his arrival some inmates were outside of their cells. A corrections officer is present in only three of eight photographs; in the other photographs, the inmates appear to be unsupervised. The logbook reveals that grievant entered the pod on three occasions to assist an officer in conducting inmate counts.⁸ However, there is no record that grievant conducted any rounds during any of the seven hours he was at the facility. Grievant believed that making a count was an adequate substitute for making rounds. Grievant did not seek permission from either the warden or the shift commander for the inmate movements on February 17-18, 2004.

On the night of February 17-18, 2004, two of grievant's corrections officers were drafted to work elsewhere in the facility due to a staffing shortage that night; they left the building at about 9:30 p.m.⁹ A third officer left the facility at 2:22 a.m. Thus, grievant had six of eight staff present for part of the night and from 2:30 a.m. to 6:00 a.m., only five corrections officers were present.

As a result of this incident, the warden disciplined the shift commander and assistant shift commander. He also counseled both the control room officer and the floor officer who had been working for grievant in the pod at issue.

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).

⁷ Exhibit 3A. Photographs of inmate activity on January 17-18, 2004.

⁸ Exhibit 4. Logbook, February 17-18, 2004.

⁹ Exhibit 4. Daily Duty Roster, January 17, 2004.

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.¹⁰

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 Standards of Conduct policy 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.¹¹ 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.¹² One example of a Group II offense is failure to follow a supervisor's instructions.

The agency has shown that inmates were outside of their cells on the night of February 17-18, 2004. Several were sitting at tables in the pod area or were engaged in other activities for which there is no explanation. The evidence further reflects that grievant did not make hourly rounds as required by policy. Grievant was in the pod on three occasions to assist in taking required inmate counts, however, counts are taken quickly and are not a substitute for rounds.

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

¹¹ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹² Exhibit 7. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

Had grievant been making regular rounds he would have observed the unauthorized inmate movement in the pod.

More importantly, grievant believed that the inmate activity documented on the videotape was not prohibited. He believed it was permissible to have a group of inmates sitting at tables in the pod area because they were waiting to clean the shower rooms after other inmates finished showering. The warden's instructions are that no inmates should be outside their cells unless they engaged in an approved activity, and with the specific permission of the shift commander. Grievant did not request approval from the shift commander on the night at issue. The inmates sitting at tables were not engaged in approved activity. If they were assigned to clean showers, they should have been kept in their cells until the time to perform their assignments. Grievant has no explanation for the inmates observed in the pod area without any correction officer in the area. Therefore, the agency has demonstrated, by a preponderance of evidence, that grievant failed to follow the warden's instructions to obtain permission for inmate movement and to closely supervise such movement. Grievant also failed to perform his assigned responsibility of making hourly rounds to assure that the policy was followed.

Grievant contends that taking an inmate count is a substitute for making rounds. Inmate counts generally take about five minutes with the sole focus of assuring that the physical headcount of inmates matches the number of inmates assigned to the pod. Making a round correctly involves checking physical facilities, observing subordinates, responding to questions from inmates and subordinates, and can take from several minutes up to an hour. Accordingly, an inmate count is not a substitute for a properly conducted round of the facility.

Grievant observed that the warden is a stern disciplinarian but he also acknowledged that the warden is fair in his treatment of employees. This is corroborated by the fact that four other security persons were either disciplined or counseled as a result of this incident. Thus, grievant was not singled out for corrective action.

Grievant contends that inmate movement was not extensive on the night in question. However, the issue is not the extent of inmate movements but whether the inmate movements had been approved in advance and, whether the movements were conducted pursuant to the warden's instructions. The evidence establishes that the movements were not approved and were not conducted appropriately. In fact, some inmate movements appear to have been totally unsupervised.

Grievant asserts that the facility was under control and that nothing untoward happened. While this is true, it does not alter the fact that grievant failed to follow reasonable instructions and failed to perform assigned work. These failures created a potential for security problems.

DECISION

The decision of the agency is affirmed.

The Group II Written Notice issued on March 9, 2004 for failure to follow a supervisor's instructions is hereby 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 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.¹³ 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.¹⁴

[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

¹³ 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).

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.