Issue: Group II Written Notice (failure to follow supervisor's instructions and failure to comply with established written policy); Hearing Date: 09/15/04; Decision Issued: 09/16/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 850

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 850

Hearing Date: September 15, 2004
Decision Issued: September 16, 2004

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Chief Probation and Parole Officer
Advocate for Agency
Two 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?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice issued for failure to follow a supervisor's instructions and failure to comply with applicable established written policy.[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 nine years. He has been a Probation Officer for five years.[3] Prior to this incident, grievant's job performance has been satisfactory and he has been rated a "Contributor" on his three most recent annual performance evaluations.[4]

Grievant has received training on, and is familiar with, the Strategies, Training, Equipment, & Policy (STEP) manual.[5] This manual outlines agency policy with regard to search and seizure procedures and provides that "Generally, Probation and Parole Officers do not conduct searches of an offender's person or residence. Such searches are usually conducted by competent and qualified law enforcement personnel or Correctional Officers."[6] In subsequent subsections, the manual notes that in some situations an officer may be compelled by circumstances to conduct a search, such as warrantless searches following lawful arrest or when a Circuit Court Circuit Judge so orders. "In both instances, the search should be conducted by a law enforcement officer. Probation and Parole Officers should generally limit their participation to observing the search and not become an active participant."[7]

Probation officers are not given detailed training on search procedures because the agency policy, as stated in the STEP manual, is that only law enforcement officers should conduct searches.[8] Grievant is also familiar with, and has received, a policy issued by the Chief Probation and Parole Officer (Hereinafter referred to as "Chief"). The policy observes that Circuit Court Judges in the circuit where grievant is employed frequently order that probationers submit to searches by their probation officer. The policy directs that warrantless searches are to be conducted by law enforcement officers and, that probation and parole officers should observe the search and not become an active participant.[9] Grievant also acknowledges that he had read an email message to

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[1] Agency Exhibit 1. Group I Written Notice, issued May 20, 2004.
[2] Agency Exhibit 1. Grievance Form A, filed June 11, 2004.
[3] Agency Exhibit 9. Employee Work Profile, October 25, 2002 – October 25, 2003.
[4] Grievant Exhibit 12. Annual Performance Evaluations for 2001, 2002 & 2003.
[5] Grievant Exhibit 2. District Office Manual reviewed by grievant, May 14, 1999.
[6] Agency Exhibit 8. Section II.C, STEP Manual, p.32, April 21, 1999.
[7] Agency Exhibit 8. Section II.D & F, *Ibid.*
[8] Testimony of the Chief who has conducted training of probation officers at the Academy for 17 years.
[9] Two different versions of this policy were entered into evidence. Agency Exhibit 1 includes a version that grievant avers came from a policy manual. Agency Exhibit 5 is a version that the Chief distributed to all officers in January 2002. While there are differences in the two versions, both contain the admonition that searches are to be conducted by law enforcement officers and that probation and parole officers are not to become active participants.

the Chief that clearly directed that probation officers should not conduct searches.[10]

On April 7, 2004, grievant and another probation officer attended court during the morning. Neither grievant nor the other probation officer carry firearms. Grievant had been training the other officer since her hire in December 2003. As they left court, grievant asked whether the other officer whether she wanted to go to lunch or return to the office; the other officer responded that she preferred to return to the office. Grievant said words to the effect of, "Actually, I want to check on [a probationer's] residence." The probationer's residence was only a few blocks from the courthouse.

The probationer lived in a residence owned by his father. Grievant had been informed earlier in the week that the probationer had not shown up for work for four days. In the past, the probationer had been known to go on drug binges and, on these occasions, he would usually stay at his mother's house in another town. Grievant did not expect to find the probationer at the father's residence but wanted to leave a business card with instructions for the probationer to contact him. At the residence, grievant went to the front door while the trainee officer remained in the vehicle. The probationer's sister answered the door and advised grievant that the probationer was not at home. Grievant asked to see the probationer's room; she granted permission and grievant entered the house. As they walked toward the bedroom, the probationer walked out of a bathroom. Grievant decided to obtain a urine specimen from the probationer to test for drugs. Grievant returned to the front door and told the trainee officer to bring his field bag into the house. When the trainee officer entered the house, she, grievant, and the probationer went to his bedroom in the rear of the house. Grievant noticed an adult male sitting in the kitchen with the probationer's sister; grievant had not seen this male before and did not know who he was. The trainee officer observed a one-year-old child in the living room.

Grievant requested permission from the probationer to search his room and the parolee consented. Grievant looked under the mattress and found a plastic baggie containing what appeared to be marijuana. During the search, the probationer appeared nervous and agitated.[11] Grievant and the other officer escorted the probationer to the front porch of the house. Grievant told the other probation officer that he should have called the police first but he didn't think the probationer would be home. Grievant called the local police department and requested assistance. Because the police station was only a few blocks away, uniformed officers arrived within three minutes. The police conducted a further search and found additional controlled substances in the probationer's room.

As part of the sentencing order for the probationer, the Circuit Court had <u>not</u> ordered the probationer to be subject to any searches by the probation and

[10] Agency Exhibit 5. Email to Chief, November 1, 2002.
[11] Agency Exhibit 7. Memorandum from other probation officer to Chief, May 3, 2004.

parole officer.[12] Even though the court often ordered such searches, grievant knew that the court had not ordered searches of this probationer. Grievant did not inform the other probation officer that he was going to search the probationer's room.

During the Chief's investigation of this incident, grievant acknowledged to the Chief that he had made an "imperfect decision" when he decided to conduct the search.[13] The training of probation officers provides that officers working in pairs should watch their partner's back and keep each other in sight.

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. In all other actions the employee must present his evidence first and must prove his claims by a preponderance of the evidence.[14]

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[12] Agency Exhibit 11. Circuit Court sentencing orders, July 16, 2003, March 12, 2001, and November 28, 2000.

[13] Agency Exhibit 2. Chief's investigation report, May 17, 2004.

[14] §5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

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.[15] 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.[16] One example of a Group II offense is failure to follow a supervisor's instructions or otherwise comply with applicable established written policy.

The law provides that probation and parole officers have certain powers and duties, including the performance of duties required of him by the court or judge by whom he was authorized.[17] The agency recognizes that judges may order such searches but the agency has implemented a detailed policy that directs that such searches are to be carried out by law enforcement officers – not probation officers.

The agency's position is that grievant should have left the residence as soon as the probationer's sister told him that grievant was not there, and that grievant's entrance into the residence thereafter was improper notwithstanding the fact that he was given permission to enter. The agency indicates that grievant should have left his business card with the sister with instructions to have the probationer call him.

Grievant maintains that he did not expect to find the probationer at the father's residence. Grievant had surmised that the probationer's unexplained absence from work was caused by a drug binge, as had happened previously. Grievant also maintains that he did not expect to find any illegal or controlled substances because, in the past, the probationer had only used such substances at his mother's house. Nonetheless, grievant decided to search the probationer's

[15] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[16] Agency Exhibit 10. Procedure Number 5-10*, Standards of Conduct,* June 15, 2002.
[17] Agency Exhibit 6. Va. Code § 53.1-145.5 provides that probation and parole officers shall: "Keep such records, make such reports, and perform other duties as may be required of him by the Director or by regulations prescribed by the Board of Corrections, and the court or judge by whom he was authorized."

room because the probationer's sister had lied about his whereabouts. Grievant knew, based on the residence's proximity to the local police station, that law enforcement officers could be at the house in a matter of minutes – and in fact, when called, the police arrived in three minutes. It was not unreasonable for grievant to be suspicious about why the sister had lied. It would have been reasonable for grievant to ask the probationer to come outside the residence and then call the police to conduct a search. However, it was grievant's admittedly "imperfect decision" to initiate a search on his own.

The agency considers grievant's decision to conduct an unauthorized, warrantless search without law enforcement officers to have been not only contrary to established written policy but also a potential safety problem. Although grievant knew that the probationer was not likely to resort to physical violence, grievant had no knowledge of the other male in the residence, whether he was armed, or whether he had a propensity for violence. Grievant's search could have resulted in serious problems if the other male were, for example, an armed drug dealer. The potential for harm to an innocent one-year-old toddler also existed in this situation.

Grievant argues that he initiated the search because he did not expect to find controlled substances and his search would prove that the probationer was not taking drugs. This is a fallacious argument. If grievant wanted to find that the probationer was not taking drugs, he would not have searched. In fact, grievant searched because 1) he knew from past experience that the probationer was likely to be on a drug binge and, 2) the sister's lie about the probationer's whereabouts suggested a cover-up. Grievant therefore had reasonable grounds for a search. The issue, however, is that grievant did not follow proper procedure because he should have called the local police *before* the search.

Grievant almost immediately recognized that he had not followed proper procedure because, as they left the house, he told the other probation officer that he should have called the police first. Grievant reaffirmed his recognition when he subsequently admitted to the Chief that he had made an "imperfect decision."

By grievant's own admission, the relationship between him and the Chief is strained. The former deputy chief corroborated the strained relationship in an affidavit submitted as evidence by grievant.[18] This relationship was exemplified by the grievant's failure to comply with the Chief's instruction to remove a large knife from his office in 2002. Grievant did not remove the knife until the Chief had given him three separate instructions (two in writing) and threatened to take disciplinary action.[19]

Grievant also acknowledges that he disagrees with the agency's policy and the Chief's policy prohibiting searches. Grievant believes that he was

[18] Grievant Exhibit 13. Affidavit, September 9, 2004.
[19] Agency Exhibit 12. Emails from Chief to grievant, June 26, 2002 and July 3, 2002.

justified in conducting a search because the Circuit Court Judge frequently directs probation officers to conduct warrantless searches. This argument is not persuasive for two reasons. First, the undisputed evidence is that there was no instruction to search in the pre-sentencing order for this probationer. Grievant suggests that it may have been oversight that such a search instruction was not included in the order. However, in three separate orders issued over a three-year period, the judge *never* included a search instruction for this probationer.

Second, even if the judge had included such an instruction, grievant is bound to implement that instruction *pursuant to guidelines provided by his employer.* Grievant is employed by Department of Corrections, not by the Circuit Court Judge. Employees are obligated to comply with the reasonable instructions of their employers. Certainly, an employee does not have to comply with illegal or immoral instructions from an employer. However, in this case, grievant has not demonstrated that the agency's policy regarding searches either violates a law or is immoral. Grievant cannot ignore the agency's policy merely because he interprets it differently from agency management. The agency has issued a reasonable policy which provides that such searches should be conducted by law enforcement officers – not by probation officers. The agency's policy provides for implementation of the court's order in such a way that maximizes the safety of everyone involved, particularly the probation officer.

Finally, grievant argues that the agency's policy is unclear. Written policies must be read in their entirety to understand their full meaning. In this case, the STEP manual provides a procedure for search and seizure. While recognizing in procedural step D that circumstances may sometimes require a search, subsequent step F provides examples of such circumstances, viz., warrantless searches following lawful arrest, or searches ordered by a circuit court. Step F then states unambiguously that such searches *should be conducted by a law enforcement officer.* If grievant still had any question about this policy's meaning, the Chief's policy and the November 2002 email make it abundantly clear that probation officers are not to conduct searches.

Grievant's position is that his interpretation is correct and that the agency is incorrect. He contends that he only complied with what the Court *should* have ordered. Grievant has not demonstrated any remorse or conceded that he should have followed agency policy. Considering the totality of the evidence in this case, grievant's offense is one that, if repeated, would be grounds for removal from employment – the definition of a Group II offense.

DECISION

The decision of the agency is affirmed.

The Group II Written Notice issued on May 20, 2004 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.[20] You must file a notice of appeal with the clerk of the circuit court in the

[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

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]

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David J. Latham, Esq.
Hearing Officer

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.