Issue: Group II Written Notice with 5-day suspension (failure to follow supervisor's instructions, perform assigned work or otherwise comply with established written policy); Hearing Date: 10/03/03; Decision Issued: 10/13/03; Agency: DOC; AHO: Cecil H. Creasy, Jr., Esq; Case No. 5815

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Department of Corrections Case No. 5815

Hearing Date: October 3, 2003
Decision Issued: October 13, 2003

PROCEDURAL BACKGROUND

On July 23, 2003, the grievant was issued a Group II Written Notice of disciplinary action with suspension for five days for conduct occurring on June 30, 2003.

On August 8, 2003, the grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Second Resolution Step was not satisfactory to the grievant and she requested a hearing. On September 16, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer.

A pre-hearing conference was held by telephone on September 30, 2003. The hearing was held on October 3, 2003, at the Agency's regional facility.

APPEARANCES

Grievant
Representative for Grievant
Representative for Agency
Two witnesses for Agency (one also serving as witness for Grievant)

ISSUES

Was the grievant's conduct on June 30, 2003 such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

BURDEN OF PROOF

The burden of proof is on the agency to show by a preponderance of the evidence that its disciplinary actions against the grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence that shows the point to be proved is more probable than not, or evidence that is more convincing than the opposing evidence. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented, the Hearing Officer finds that the pertinent facts giving rise to this disciplinary action largely are not in dispute.

The grievant has worked as a corrections officer with the Virginia Department of Corrections for at least twelve years, with at least satisfactory annual employment evaluations. On July 23, 2003, the agency issued a Group II Written Notice to the grievant for conduct occurring on June 30, 2003. The written notice stated

> Failure to Follow a Supervisor's Instructions, Perform Assigned Work or Otherwise Comply With Applicable Established Written Policy. On June 30, 2003, [the grievant] was responsible for the supervision of 6 Work Center inmates in the town of Jarratt. The inmates are to be under constant sight supervision. According to reports, 3 inmates left the area, approached a citizen and had a conversation with the citizen. The inmates were not maintained under constant sight supervision per policy.

The disciplinary action was suspension for five days, from July 24, 2003 through July 28, 2003. The record does not show any other active Written Notices.

The agency relied on Institutional Operating Procedures (IOP) 462 (*External Security*), 463 (*Supervision of Inmate Highway Labor*), and 497 (*Management of Inmate Work Center*). Hearing Officer Exhibit B. In essence, these IOPs provide that inmates working on community projects shall be under constant sight supervision by a corrections officer. IOP 826-7.5 states that at least two Department of Corrections employees shall supervise each inmate community activity. Hearing Officer Exhibit A.

The grievant's primary work experience was in the facility's kitchen. At the time of the incident, the grievant was assigned to take a work gang to Jarratt in the absence of the corrections officer normally assigned to this post. The grievant was charged with six inmates. The grievant had never worked this post before, and she was unfamiliar with the task at hand or the specific post orders. The grievant did not sign the post orders, and there is no evidence her supervisor reviewed them with her.

The agency's witnesses established that the grievant has had all required in-service training, and that the primary responsibility for corrections officers is public safety and constant sight supervision over inmates. The agency's witnesses conceded that policy requires at least two corrections officers to supervise work gangs of six inmates or more. While the agency conceded that its policies are sometimes in conflict, the overriding duty of a corrections officer is public safety. The agency's witnesses also established the utmost importance and necessity of timely reporting the inmate count.

The agency's witnesses testified that the officer usually assigned to this work gang is able to have the inmates present when in the municipal building area with the telephone. Neither of the agency's witnesses, however, have first-hand knowledge of the building or the limitation on allowing inmates in the telephone room. An officer who has actually worked the post did not testify.

The grievant testified that she had never transported inmates before, and that she was unfamiliar with the location of work to be done in Jarratt. When questioned, her supervisor, who was present and testified at the hearing, advised her he, too, was unfamiliar with the location and that she was to follow directions provided by one of the inmates. When she and her work gang arrived in Jarratt for the work detail, one of her duties was to use a telephone at the municipal building to call in her inmate count timely. The municipal building available for this purpose had one area in which the inmates could gather and eat lunch. According to the grievant, the telephone was in a separate place in the municipal building, which was off limits to the inmates because of equipment and records kept in the area. According to the grievant, she had to leave the inmates unsupervised while she was in the office using the available telephone to report her inmate count. Although the van was equipped with a radio, the count must be called in via telephone.

It was during this time that the inmates wandered from the municipal building to a local laundromat and approached a civilian female. The civilian complained about the situation to the agency.

There were a total of 6 documentary exhibits entered into the record, three marked agency exhibits,[1] one marked grievant exhibit, and two marked hearing officer exhibits. The grievant's exhibit is a written statement submitted by a witness she requested. The witness was not a state employee.[2]

[1] Certain pages within agency exhibit no. 2 were withdrawn, and so marked.
[2] I do not find the substance of the witness's statement determinative of any facts used to reach the ultimate decision.

APPLICABLE LAW AND OPINION

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training[3] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of state 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 No. 160 provides that Group II offenses include acts and behavior which are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Among examples of a Group II offense are failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy.

There is no material dispute as to the applicable policies that apply to the situation presented, as referenced in the facts noted above. See IOPs 462, 463, 497 and 826. There are also post orders that are pertinent to the circumstances.

It is uncontradicted that for a few minutes time on June 30, 2003, the grievant left the inmates in her charge and failed to maintain constant sight supervision. On the bare face of these facts, the grievant was in violation of applicable policy. The agency has shown, by a preponderance of the evidence, that the grievant failed to maintain constant sight supervision over the inmates in her charge. The central question, then, becomes whether there are mitigating circumstances that warrant reducing the level of discipline. I find that there are such mitigating factors.

The grievant credibly testified that she was unfamiliar with the procedure and duties when given an order to transport and supervise a work gang. She had not performed that duty before. The grievant credibly testified that she voiced to the supervisor who assigned the post some objections to the assignment that were not heeded. The grievant testified that she had never completed the defensive driving training, a requirement before transporting inmates. The grievant also noted to her supervisor assigning the duty that she did not possess a commercial driver's license (CDL), which she mistakenly thought was required to drive the 15-passenger van. The assigning supervisor did not go over the applicable post orders with the grievant. Nevertheless, the grievant undertook the assignment of transporting the work gang to Jarratt, using directions provided by one of the inmates.

The grievant credibly testified that she was given sole charge of six inmates, when the regulations, as conceded by the agency witnesses, require two corrections officers to supervise any gang of more than five inmates. The agency did not present testimony from the usual officer assigned to this work gang, or from anyone, who could testify first-hand that a sole corrections officer is able to telephone the count from the municipal building while keeping constant sight

[3] Now known as the Department of Human Resource Management (DHRM).

supervision over the inmates. The agency failed to show by a preponderance of evidence that just how the grievant could have performed both duties of calling in her count at the municipal building while maintaining constant sight supervision over the inmates.

The agency acknowledged that some policies might be in conflict, but relied on the clear mandate that even the grievant admitted--always keep constant sight supervision over inmates in the interest of public safety. The grievant, however, credibly demonstrated that she had to choose between timely calling in her count at the municipal building and staying with the inmates. She could not have anticipated that situation before she left the corrections facility, because she was totally unfamiliar with the location. The agency did not credibly rebut the grievant's testimony regarding the accessibility of the available telephone at the municipal building. Because no officer having previously performed this post testified as to the circumstances, the reasonable inference to make is that the corrections officer or officers who have actually performed in this post could not have testified otherwise.

Although there are mitigating factors, the grievant could have demonstrated efforts to adjust to the limits of the situation confronting her. She should have demonstrated an attempt to insure constant sight supervision of the inmates. She acknowledged the paramount duty of corrections officers to guard the public safety. But, she offered no efforts of pursuing alternative arrangements in the face of unfamiliar circumstances, such as inquiring of another possible telephone for use or other measures to maintain constant sight supervision. The van had a radio available. While the radio is not used for calling in the count, radio contact could have been made to coordinate efforts to call in the count while keeping constant sight supervision over the inmates. I find that the grievant is responsible for violating the applicable policies, but I also find the totality of the circumstances mitigate in favor of reducing the level of discipline.

Accordingly, I reduce the Group II Written Notice to a Group I Written Notice. Because a sole Group I Written Notice does not support any suspension, the suspension without pay is also reversed.

DECISION

I find the agency has borne its burden of proving disciplinary action was warranted, however, because of the mitigating circumstances the Group II Written Notice issued to the grievant on July 23, 2003 is reduced to a Group I, and the suspension without pay is reversed. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the *Grievance Procedure Manual* set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review

This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Cecil H. Creasey, Jr.
Hearing Officer