

Issue: Group II Written Notice (conspiring to remove State property without authorization); Hearing Date: 10/16/03; Decision Issued: 10/22/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5818; **Administrative Review: HO Reconsideration Request received 11/03/03; Reconsideration Decision issued 11/07/03; Outcome: No newly discovered evidence or incorrect legal conclusions. Request to reconsider denied. Administrative Review: DHRM Ruling Request received 11/03/03; DHRM Ruling issued 01/30/04; Outcome: HO's decision comports with the provisions of DHRM Policy 1.60. No reason to interfere with decision; Judicial Review: Appealed to the Chesapeake Circuit Court (February 2004); Outcome: Hearing Decision reversed [CH-04-203] on 07/30/04.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5818

Hearing Date: October 16, 2003
Decision Issued: October 22, 2003

PROCEDURAL HISTORY

On May 22, 2003, Grievant was issued a Group II Written Notice of disciplinary action for:

Unauthorized use of or misuse of state property; Conspiring to Remove State Property Without Proper Authorization. On April 19, 2003, you and a fellow employee conspired to come to the institution to remove electronic audio equipment from [S. Hall] with no notice or approval from supervision. Internal Affairs (IA) Investigator received information prior to your carrying out the plan and notified the Warden. You admitted to the IA Investigator and the Warden that you were planning this unauthorized action. This was a serious violation of Employee Standards of Conduct and Performance; and Standards of Ethics and Conflict of Interest.

On June 20, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 16, 2003, Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 16, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Seven Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action for planning to remove installed equipment.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employs Grievant as a Site Tech at a Facility devoted to providing therapeutic treatment to inmates. Several years ago a former Assistant Warden instructed Grievant to install microphones in the ceilings of rooms where inmates and counselors meet for therapy. The microphones were installed so that therapy sessions could be recorded and later analyzed by other counselors to enhance their treatment of inmates. Grievant and another employee installed the cable to the microphones during the week and installed the microphones on the weekend. Although the microphones were installed in the ceilings, they were never activated¹ and no therapy sessions were ever recorded.

Two inappropriate surveillance devices were discovered at Grievant’s Facility. Special Agent F spoke with Grievant and informed him that anyone installing or possessing a listening device with a microphone to overhear conversations between individuals unaware of the microphones had committed a felony. Special Agent F’s objective was to “put the fear of God” in Grievant. Grievant recalled that he had installed microphones in a treatment area of the Facility. Grievant feared he could be

¹ The microphones had not been activated because the Agency had not yet obtained approval from the Office of the Attorney General.

jailed if the microphones were discovered. He and the B&G Superintendent decided to uninstall the microphones and put them in storage. They originally planned to uninstall the microphones on a Sunday then changed the date to Saturday because Sunday was a holiday.

The Agency's Internal Affairs section received an anonymous telephone call from someone claiming that Grievant and the B&G Superintendent intended to remove equipment from the Facility. On the Friday before the weekend during which Grievant planned to act, the Special Agent confronted the B&G Superintendent. After questioning by Agency staff, Grievant and the B&G Superintendent admitted to planning to remove the microphones.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. 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." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

DOCPM § 5-10.7(C) states, "The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head, although not listed in the procedure, undermines the effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of this procedure." Although the Agency has defined Grievant's behavior as unauthorized use or misuse of State property, Grievant behavior does not fall within that subsection of the Standards of Conduct. Grievant did not use or misuse the microphones. Grievant's behavior is better described as planning to uninstall equipment without proper authority.

The Agency believes Grievant's behavior rises to the level of a Group II offense. The Hearing Officer agrees. An Assistant Warden authorized and directed installation of the microphones. It should have been clear to Grievant that removal of the microphones would require the authorization of Facility managers because (1) installation was at the direction of a Facility manager, (2) uninstalling the microphones would alter the Facility's ability to use them at a later date if the Facility managers chose

to do so,² and (3) removing the microphones would result in an alteration of the Facility's physical plant.³

Grievant argues he was only reacting logically to the Special Agent's statement designed to "put the fear of God" in him. The Hearing Officer believes it was inappropriate for the Special Agent to scare Grievant by threatening him with the risk of going to jail.⁴ Given that several days passed from the time of the Special Agent's comment and the time Grievant's plan was discovered, a sufficient amount of time passed for Grievant to have realized that he should have advised Agency managers.

Grievant contends that the B&G Superintendent had the authority because of his position to remove the microphones. Section 13 of the B&G Superintendent's employee work profile addresses work actions or decisions made without prior approval. This section states:

My work requires that I make daily operational decisions relative to the physical plant maintenance, renovations, and corrective action measures for cited discrepancies, without necessarily getting my supervisor's approval.

Removing the microphones was not plant maintenance, renovations, or corrective action for cited discrepancies.⁵ Thus, the employee work profile did not authorize the B&G Superintendent to remove the microphones without management approval.

The Hearing Officer recommends that the Agency amend the Written Notice to describe the nature of offense as "Planning to uninstall equipment without proper approval." The Written Notice as written incorrectly describes Grievant's behavior.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

² If participants in therapy were made aware of the microphones, using the microphones would have been permissible under the law. The Agency could have required participants to sign a waiver or could have posted signs advising that the sessions would be recorded.

³ The microphones were to be removed and a faceplate would be installed to cover the microphones outlet.

⁴ The Special Agent should have directed his comments to the Warden or another senior Facility manger and not have attempted to intimidate Grievant. In essence, the Special Agent circumvented the chain of command that the Agency is now relying on to support its disciplinary action.

⁵ Indeed, there does not appear to have been any reason to remove the microphones since they were not attached and could not record any conversations.

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.
3. If you believe that 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.

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. 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.⁶

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5818-R

Reconsideration Decision Issued: November 7, 2003

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant argues that since the specific wording of the Written Notice has not been established, the entire Written Notice must be reversed. Procedural due process in an administrative proceeding does not require that the Agency establish each and every word used in a Written Notice. The Agency is only obligated to place Grievant on reasonable notice of the facts upon which the Agency believes Grievant should be disciplined. There is little doubt that the Agency informed Grievant of the basis for its disciplinary action. Although the wording of the Written Notice was not artfully drawn, the Agency presented sufficient facts to support its conclusion that Grievant should be given a Group II Written Notice.

Grievant contends the hearing decision is based on three false assumptions. First, Grievant objects to the hearing decision stating “installation was at the direction of a Facility manager.” There is nothing incorrect about this statement. A former Assistant Warden directed the installation of the microphones. As an Assistant Warden, he was a manager at the Facility. Grievant further argues that removing the microphones was the equivalent of changing a light bulb in a ceiling fixture. The evidence showed to the contrary. If it has been so easy to remove the microphones, Grievant would have immediately removed them rather than planning to remove them several days later. Instead, he planned the timing of the removal to avoid detection.

Second, Grievant objects to the hearing decision stating, “uninstalling the microphones would alter the Facility’s ability to use them at a later date if the Facility

managers chose to do so.” There is nothing incorrect about this statement. If the Agency chose to use the microphones at a later date, the Agency would have to locate the microphones and then install them. Prior to their removal, the microphones were ready to be activated. The additional effort necessary to reinstall the microphones is not immaterial.

Third, Grievant objects to the hearing decision stating, “removing the microphones would result in an alteration of the Facility’s physical plant.” There is nothing incorrect about this statement. Grievant’s request for reconsideration states that he intended to remove the microphone and substitute a new faceplate without a one quarter inch hole in it for the existing faceplate. The removal of a microphone and substitution of a faceplate is an alteration of the Facility’s physical plant.

Much of Grievant’s request for reconsideration downplays the steps required to uninstall and reinstall the microphones. Grievant was not disciplined for the difficulty of removing and installing the microphones, but rather for making a decision to do so and to not inform Facility managers.

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant simply restates the arguments and evidence presented at the hearing. For this reason, Grievant’s request for reconsideration is **denied**.

APPEAL RIGHTS

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 DHRM, 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.

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of
Department of Corrections
January 30, 2004

The grievant has requested an administrative review of the hearing officer's October 22, 2003, decision in Case No. 5818. The grievant objects to the hearing officer's decision on the basis that the entire case is inconsistent with Department of Corrections Procedures Manual, Chapter 5-10. The grievant also requested that the hearing officer reconsider his decision. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this administrative review request.

FACTS

The Department of Corrections (DOC) employs the grievant as a site technician in a facility that provides therapeutic treatment to inmates. On May 22, 2003, the grievant was issued a Group II Written Notice for unauthorized use of state property, conspiring to remove state property without proper authorization. He was charged with a violation of the DOC's Employee Standards of Conduct and Performance and Standards of Ethics and Conflict of Interest.

Following instructions from a former assistant warden at the facility, the grievant had installed six microphones in the ceilings of the therapy rooms several years ago. The microphones were installed so therapy sessions with inmates could be recorded in order for counselors to analyze later the contents of the sessions to aid in the treatment of inmates. The microphones were never activated. Based on several visits by a special agent to the facility and conversations the special agent had with the grievant regarding the legality of the use of concealed microphones, the grievant and his supervisor, a buildings and grounds superintendent, made plans to remove the microphones on a weekend. However, their plans to uninstall the microphones were discovered before they could be carried out. After an investigation was conducted, the agency issued a Group II Written Notice to the grievant.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, Standards of Conduct, states that it is the Commonwealth's objective to promote the well being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth, but is not all-inclusive, examples of unacceptable behavior for which specific disciplinary action may be warranted. The Department of Corrections Procedure Manual, Section 5-10, parallels DHRM's Policy No. 1.60.

In the instant case, the Grievant was charged with “Unauthorized use of or misuse of state property; conspiring to remove state property without proper authorization.” Based on the evidence, the hearing officer concluded that the evidence supported that the offense rose to the level of a Group II offense. However, because the microphones actually were not removed, the hearing officer recommended that the agency amend the Written Notice to describe the nature of the offense as “Planning to uninstall equipment without proper approval.”

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer’s decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department’s authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer’s assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the hearing officer determined that there was sufficient evidence to support the allegations the agency made against the grievant. DHRM Policy No. 1.60, Standards of Conduct, and DOCM, Chapter 5-10 provide guidance to agencies for handling workplace misconduct and behavior and for taking corrective action. This Agency has determined that the hearing officer’s decision comports with the provisions of these policies and will not interfere with the decision.

If you have any questions regarding this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley
Manager, Employment
Equity Services