

Issue: Group III Written Notice with termination (actions which compromised security or undermined effectiveness in carrying out duties); Hearing Date: 04/27/04; Decision Issued: 04/28/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 682



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 682

Hearing Date: April 27, 2004
Decision Issued: April 28, 2004

APPEARANCES

Grievant
Representative for Grievant
Two witnesses for Grievant
Warden
Advocate for Agency
Five 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 appeal from a Group III Written Notice issued for actions which compromised security or undermined the employee's effectiveness in carrying out her responsibilities.¹ Grievant was removed from employment as part of the disciplinary action. During the second resolution step of the grievance process, the agency offered to allow grievant to resign in lieu of termination of her employment but grievant rejected the offer. 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 as a Corrections Officer Senior. She was functioning as an academic security officer on the date of the offense.

Agency policy prohibits associations between staff and inmates which may compromise security or which undermines the employee's effectiveness to carry out her responsibilities.³ Such a violation may be treated as a Group III offense. The facility's post order for academic security officers includes among the general post duties the requirements to: report all breaches of security to one's supervisor; be constantly aware of inmate behavior; and, maintain control of all situations.⁴ The facility's institutional operating procedure requires the timely and accurate reporting of all incidents occurring at the facility.⁵ An incident is defined as: "An event or happenings outside the ordinary routine which results in disruption or threaten[s] security, good order and discipline of the facility and/or harm or threat of harm to staff, inmates, visitors or the physical facility."⁶ The procedure also mandates that a detailed report of the incident must be drafted prior to the end of the respective shift and a copy given to the Chief Warden's Office. Grievant received training on this procedure.⁷

On January 1, 2004 at about 1:00 p.m., grievant decided to retrieve a bottle of water from the refrigerator located in the faculty lounge of the education building. She met the corrections officer responsible for security of the area and he accompanied her to the hallway outside the lounge. The other officer unlocked the door to the lounge and stepped away so that grievant could enter. Grievant pushed on the door but encountered resistance because the door was being blocked from inside the lounge. The door has a small glass window through which grievant was able to see that an inmate was holding the door shut. Grievant told the inmate to let her in because she wanted to retrieve a bottle of water from the refrigerator. She heard the refrigerator door open and grievant thought it was someone other than the inmate. The inmate

¹ Exhibit 1. Written Notice, issued January 29, 2004.

² Exhibit 1. Grievance Form A, filed February 13, 2004.

³ Exhibit 5. Agency Procedure Number 5-22.7.A, *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*, June 1, 1999.

⁴ Exhibit 4. Facility Post Order, *Academic Security Officer*, revised July 11, 2002.

⁵ Exhibit 6. Section 421-4.0, Institutional Operating Procedure (IOP) Number 421, *Reporting Institutional Incidents*, March 7, 2002.

⁶ Exhibit 6. Section 421-6.0, *Ibid.*

⁷ Exhibit 7. Training Outline and Class Roster for in-service training, October 20-24, 2003.

opened the lounge door about 8-10 inches and passed the water bottle to grievant. Grievant and the other corrections officer then left the area.

When grievant attempted to enter the lounge, the windowless room was dark because the overhead lights were off. When the refrigerator was opened, the refrigerator light came on and grievant observed a pair of black boots and a state-owned radio lying on the floor.⁸ When the inmate opened the lounge door to pass out the water bottle, grievant detected a “strong aroma of sexual activity emanating from the room.”⁹ As she left the area, grievant did not say anything to the other corrections officer about what she had observed. She did not report the incident to a supervisor or write an incident report. When she went to the break room, she encountered a fellow corrections officer and told him what she had observed. He advised her to report the incident to a supervisor but she did not do so. Later in the shift, grievant encountered the inmate and asked him whether anyone had been in lounge with him; the inmate responded in the negative.

After her shift ended, grievant went home and related the details of the incident to her boyfriend (also a corrections officer). The following morning, the fellow corrections officer she had told about the incident decided that he had better report the incident since grievant had not. The matter was reported up the chain of command and in late morning, a captain called grievant at home and asked if there was anything she should report. Grievant was initially reluctant to talk about the incident but did finally admit what she had observed.

The inmate admitted to being in the darkened lounge with a female corrections officer. In his first signed statement to an investigator, he contends that he was consoling the officer because she was upset about something. In his second signed statement, the inmate admits that he was having sexual intercourse with the female officer. In his testimony during the hearing, he averred that she took her clothes off, but that they did not engage in sexual activity.¹⁰

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

⁸ Grievant acknowledged during the hearing that the radio was of the type issued to corrections officers for intra-facility communication.

⁹ Exhibit 2. Grievant’s *Internal Incident Report*, January 5, 2004.

¹⁰ In deciding this case, it is not necessary to decide whether the inmate and female officer were actually engaging in sexual activity in the lounge. The issue herein is whether grievant’s failure to take appropriate action under the circumstances warrants disciplinary action, and if so, what action.

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.¹¹

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.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹² 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 5-10.17 of the DOC Standards of Conduct addresses Group III offenses, which are defined identically to the DHRM Standards of Conduct.¹³ Violation of DOC Procedure 5-22 is one example of a Group III offense.

The essential facts in this case are undisputed. Grievant observed in a darkened room an inmate who physically prevented her from entering the room. She observed portions of a corrections officer's uniform and equipment lying on the floor in the room. She concluded that at least one other person was in the room. She smelled what she characterized as the strong aroma of sexual activity coming from the room. When confronted with this situation, grievant took no action either to investigate or to report it.

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

¹² DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹³ Exhibit 8. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

Given the facts of this case, grievant did not know who was in the lounge with the inmate; there could have been other inmates holding an officer hostage. She did not know whether a corrections officer was in the room voluntarily or involuntarily. While grievant concluded (from clothes on the floor and what she smelled) that sexual activity had or was occurring, she did not know whether it was consensual or whether someone had been raped. She did not know why the inmate, and whoever else, was in a room with no lights on. She did not know why the inmate prevented her from entering the room. All of these unknowns should have immediately alerted grievant that, at the very least, something illicit and potentially dangerous was occurring. Grievant could have asked the officer with her to help investigate, called on her radio for more assistance, or reported it to a supervisor. Instead, grievant said nothing and walked away.

The agency characterized grievant's offense as an action that compromised security or undermined her effectiveness to carry out her responsibilities. During most of a corrections officer's day, the work may be relatively uneventful and repetitive. However, an essential part of any corrections officer's responsibility is to be constantly vigilant and alert to out-of-the-ordinary situations which occur only once in a while. Even, more importantly, when such an unusual situation does occur, the corrections officer must promptly take appropriate action to deal with that situation. The oft-quoted analogy is the job of an airplane pilot. It is said that a pilot truly proves his mettle when something goes wrong and he manages to successfully cope with that unusual circumstance. When a flight is smooth and on time, the pilot's job is relatively easy; however, when an engine fails in mid-flight, the pilot must respond decisively and immediately or lives may be lost.

Grievant asserts that she just "shut down" and didn't know what to do. While that may be an understandable reaction in the first seconds or minutes after her discovery, it does not explain why she never took any action until the shift commander contacted her the following day. A few minutes after the incident, grievant spoke with a fellow corrections officer in the break room who correctly advised her to report the incident but she failed to heed the advice. Grievant even asked the inmate later in the day whether he had been alone in the lounge. Grievant was not "shut down" at that point but she still failed to report the incident.

In this case, grievant failed to act promptly and appropriately. In view of what grievant did not know about what was happening in the lounge, she should have taken immediate and decisive action to find out, or to at least report the incident so that a supervisor could take appropriate action. Her lack of action compromised security. More significantly, her failure to voluntarily report the incident and take prompt action undermined her effectiveness to fulfill a corrections officer's duties in the future. The agency can no longer rely on grievant to act appropriately in some future unexpected situation because of her admitted tendency to shut down. In the dangerous environment of a correctional facility, "shutting down" is simply unacceptable.

Grievant argues disparate treatment because another officer was not disciplined when he failed to immediately report a somewhat similar situation in May 2003. In that

case, a corrections officer had opened a chemical closet (small storage closet for cleaning supplies) and observed a female corrections officer getting up from the lap of an inmate. Although the officer did not report the incident immediately, he did voluntarily come forward and report it several hours later. There are two factors that distinguish this incident from the one in which grievant was involved. First, as soon as the officer opened the closet door it was immediately apparent that the female officer and the inmate were involved in consensual activity. Thus, there was no apparent immediate danger to either participant. However, in grievant's incident, the inmate prevented her from entering the lounge and, therefore, grievant had no idea who was inside or what was happening. Grievant did not know whether the presumed sexual activity was consensual, whether someone was being raped, whether there was more than one inmate, whether some other illegal activity was going on or, whether this was a possible hostage situation. Thus, there was a potentially dangerous situation occurring that grievant just walked away from.

Second, the officer who opened the closet voluntarily came forward and reported the incident after he thought about it for a few hours. No one else was aware of the incident and, if he had not voluntarily come forward, the incident would never have come to light. Grievant, on the other hand, never voluntarily came forward to report the incident. It was only after another officer reported what grievant had told him, that facility management became aware of the incident and contacted grievant. If the other officer had not reported the incident, there is no evidence that grievant would ever have reported it.

In addition to reducing her own effectiveness, grievant failed to report the potential security breach. Not only did she fail to report promptly, but she did not voluntarily report at all until directed to do so by the shift commander. Most significantly, grievant failed to maintain control of the situation. As a corrections officer, grievant was responsible to control the situation when she observed suspicious activity. Instead, grievant allowed the inmate to control the situation by preventing her from entering the lounge. She then totally relinquished control to the inmate by walking away and allowing him to do whatever he was doing inside the lounge. The sum total of grievant's actions and inactions constitute a Group III offense with removal from employment.

Grievant asserts that the agency did not reduce the discipline for mitigating circumstances. Agencies are required to *consider* mitigating circumstances such as length of service, satisfactory performance, and the absence of any prior disciplinary action. However, *consideration* of mitigating circumstances does not mean that the agency is *required* to reduce discipline in every case. In some cases, the offense may be sufficiently egregious that it simply cannot be mitigated despite circumstances that might have warranted reduction if the offense were less serious.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice and removal from employment issued on January 29, 2004 are 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.¹⁴ You must file a notice of appeal with the clerk of the circuit court in the

¹⁴ 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).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁵

[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

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.