

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 01/05/05; Decision Issued: 01/06/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 7934



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7934

Hearing Date: January 5, 2005
Decision Issued: January 6, 2005

PROCEDURAL ISSUES

Grievant requested as part of the relief she seeks that discipline be administered to another employee. A hearing officer does not have authority to take any adverse action against any employee.¹ Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

Grievant participated in a pre-hearing telephone conference on December 6, 2004 during which she and the agency representative agreed to a hearing date of January 5, 2005. The hearing officer mailed a notice of hearing confirming the hearing date to the parties on December 7, 2004. On January 3, 2005, the hearing officer received a message that the grievant had called during the preceding week to request a postponement because she wanted more time to prepare her case. The hearing officer called grievant and left a voice mail

¹ § 5.9(b)6. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.

message denying the postponement request because grievant had known since November 10, 2004 that her case had been qualified for hearing; she therefore had ample time to prepare what was a relatively straightforward case.

On the hearing date, the grievant did not appear at the hearing or call the agency to advise that she would not appear. The hearing officer called grievant who said that she would not attend the hearing because she was going to a scheduled doctor's appointment at 10:30 a.m. Grievant said that her family physician had, on the day before the hearing, arranged the appointment with a second physician. Grievant did not request that the appointment be made at a time and date that would not conflict with her hearing. Grievant did not submit either documentation or a witness list prior to the hearing. Based on the totality of these circumstances, the hearing officer decided to conduct the hearing with those witnesses who had appeared at the hearing site.

APPEARANCES

Warden Senior
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 at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group I Written Notice issued for unsatisfactory job performance.² Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³ The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for five years as a corrections officer.

Corrections officers must agree to certain Conditions of Employment when hired for the position. One such condition states, "Corrections Officers must be willing to work any shift and **any post**."⁴ (Emphasis added). Grievant signed the Conditions of Employment at the time of hire, indicating her acceptance of the conditions by her signature. Watch commanders have authority to reassign

² Exhibit 5. Written Notice, issued June 14, 2004.

³ Exhibit 8. Grievance Form A, filed July 13, 2004.

⁴ Exhibit 6. Conditions of Employment, signed by grievant January 25, 1999.

corrections officers from one post to another in order to accomplish agency goals and objectives, and to respond to changing staffing needs.

On June 8, 2004, the watch commander (a captain) had a staffing shortage in one housing unit. She telephoned grievant and directed her to report to the housing unit with the staffing shortage. Instead of following the instruction, grievant said, "I'll see you up front." Grievant then left her post and came to the administration building where the watch commander's office is located. The watch commander again directed grievant to report to the housing unit but grievant refused.⁵ The watch commander then told grievant to either report to the housing unit or leave the facility and see the Warden in the morning; grievant elected to leave the facility. Grievant did not give any reason for not wanting to work in the housing unit.

The grievant met with the Chief of Security on June 14, 2004. Grievant contended that the housing unit in question is a "tough unit" and she did not want to work there. Grievant did not give any other reason for not wanting to work in the unit.

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.

⁵ Exhibit 1. Email from watch commander to Chief of Security, June 8, 2004.

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 claim by a preponderance of the evidence.⁶

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.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group I offenses include acts and behavior of the least serious nature.⁷ 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 5-10.15 of the DOC Standards of Conduct addresses Group I offenses, which are defined almost identically to the DHRM Standards of Conduct.⁸ Unsatisfactory job performance is one example of a Group I offense.

The agency has demonstrated by a preponderance of evidence that the watch commander gave grievant a legal and reasonable instruction by reassigning her from one post to another as the result of a staffing shortage. Further, grievant refused to comply with the instruction when directed during a telephone call. Then, when she confronted the watch commander in person, grievant refused a second time to follow the instruction, even after being told she would have to go home and later face the Warden if she did not comply. Failure to follow a supervisor's instructions is a Group II offense.

Grievant contends that she did not want to go the housing unit because she knows one of the inmates. She states that the inmate is from her old neighborhood and she does not care to be around him. Grievant did not tell this to either the watch commander on June 8, 2004 or the Chief of Security on June 14, 2004. However, even if grievant had told the watch commander about her knowledge of the inmate, the watch commander would nevertheless have assigned grievant to that housing unit. The Chief of Security pointed out that many corrections officers know inmates but the general rule is that simply knowing an inmate is not sufficient reason to not assign a corrections officer to a

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

⁷ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

⁸ Exhibit 9. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

particular unit. If a corrections officer has previously had a close or intimate relationship with an inmate, the officer is required to submit a written request not to be assigned over the inmate. Once the agency has investigated and verified the past relationship, only then would it make an exception to the general rule. In this case, grievant has not claimed that she had any relationship with the inmate.

Grievant spuriously argues that the watch commander did not give her a direct order but gave her a "choice" (report to the housing unit or leave the facility and face the warden the next day). In fact, during her telephone call to grievant, the watch commander gave grievant a clear and unambiguous instruction to report to the housing unit. It was only when grievant refused to comply with the instruction and came to the administration building that the watch commander gave grievant an ultimatum. Moreover, it is clear from the so-called "choice" that the watch commander was simply informing grievant that if she did not report to the housing unit, she would have to face the warden. In other words, the watch commander told the grievant to either follow instructions or face possible disciplinary action.

The agency was especially lenient in disciplining grievant. Even though grievant's failure to comply with supervisory instructions was insubordination (for which the usual discipline is a Group II Written Notice), the agency elected to issue only a Group I Written Notice. Under the circumstances, a Group I Written Notice for unsatisfactory conduct is very reasonable.

DECISION

The decision of the agency is affirmed.

The Group I Written Notice issued on June 14, 2004 is hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.⁹ 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.¹⁰

[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

⁹ 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).

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.