

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 01/28/05; Decision Issued: 01/31/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 7952



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7952

Hearing Date: January 28, 2005
Decision Issued: January 31, 2005

PROCEDURAL ISSUE

Grievant requested as part of the relief he seeks to be protected from any form of retaliation. The grievance procedure protects all employees from retaliation as the result of their use of or participation in the grievance procedure.¹ The Grievance Procedure Manual explains how an employee should report allegations of retaliation. In the instant case, the issue has become moot because grievant is no longer employed by the agency.²

APPEARANCES

Grievant
Representative for Grievant
Assistant Warden

¹ §1.5 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

² Grievant's employment was terminated in December 2004 for reasons unrelated to this case.

Four 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.³ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁴ The Department of Corrections (DOC) (Hereinafter referred to as "agency") employed grievant for six years as a Trades Technician IV (HVAC Installation and Repair Supervisor).⁵

On August 16, 2004, grievant reported for work at his scheduled starting time of 7:30 a.m. He first came to the administration building to obtain his keys and then drove to the Buildings & Grounds office located outside the compound fence at the rear of the facility. Grievant is assigned a radio that allows him to be contacted at all times during the workday. He is expected to respond to all radio calls to his call sign.⁶ Grievant took his radio, which was functional, and drove back to the administration building to begin his daily inspection at about 8:00 a.m. During this same time period, a fire alarm had sounded in one of the buildings inside the compound. The facility's Chief of Security (a Major) and the Buildings and Grounds (B&G) Supervisor went to the building to investigate. It appeared that a sensor inside a ventilation duct had activated for an unknown reason and had to be reset.

The B&G Supervisor did not have his radio but the Major did. The Major knew that grievant had a key to access the room in which the alarm sensor was located. The Major called grievant on his radio using his own call sign and grievant's call sign. Grievant did not respond after multiple calls. The Major called again using both grievant's call sign and grievant's name but grievant still did not respond. A corrections officer in the administration building heard the radio call and noticed that grievant was not responding. She approached grievant and told him that the Major wanted him on the radio. Grievant asked

³ Agency Exhibit 10. Written Notice, issued September 3, 2004.

⁴ Agency Exhibit 11. Grievance Form A, filed September 8, 2004.

⁵ Agency Exhibit 17. Employee Work Profile Work Description, November 1, 2003.

⁶ Agency Exhibit 7. Memorandum from B&G Supervisor to Assistant Warden, August 16, 2004.

what the Major wanted; the officer said she did not know. Grievant said, "I don't work for the Major," and left the administration building.⁷

Grievant did not ask the corrections officer to call the Major on her radio. He did not attempt to determine where the Major was or what he wanted. He did not attempt to contact the Major by telephone. Instead, grievant drove back to the B&G building where he obtained his tools. He approached the sally port to enter the compound and begin his routine workday. An officer at the sally port told him that grievant's supervisor had called and directed grievant to report to the administration building.

In March 2001, grievant had been strip searched by the Major before grievant was allowed to enter the compound. Although employees are advised at the time of hire that they are subject to searches, certain aspects of the search were contrary to procedure including apparent videotaping of the search. Grievant felt humiliated and degraded by the search and subsequently filed a grievance. A hearing officer sustained the grievance and ordered the agency to destroy the videotape and to comply with search procedures.⁸ Since that time, grievant has believed that the Major "has it in for him" and has been harassing him about minor infractions. For example, the Major has repeatedly counseled grievant about wearing his hat backward and, for driving a utility cart on grass rather than on the pavement.

Grievant's immediate supervisor reports to the Assistant Warden. The Major does not have direct daily supervisory responsibility over grievant. However, as the facility's Chief of Security, the Major is responsible for the safety and security of both inmates and employees at the facility. Accordingly, he has direct authority over security staff and indirect authority over non-security employees. All employees, whether security or non-security, are expected to comply with the Major's instructions and respond to his radio calls.

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).

⁷ Agency Exhibit 8. Incident Report filed by corrections officer, August 16, 2004.

⁸ Grievant Exhibit 1. Case # 5373, EDR *Decision of Hearing Officer*, February 7, 2002.

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 claim by a preponderance of the evidence.⁹

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.¹⁰ 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.¹¹ Unsatisfactory job performance is one example of a Group I offense.

Grievant maintains that he had his radio with him and that it was functional but claims that he did not hear the Major's repeated calls for him. The corrections officer who notified grievant about the Major's call believes that grievant did not have his radio with him. However, the real issue is whether grievant received notice of the call. The undisputed evidence establishes that he was notified of the Major's call when the corrections officer advised him.

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

¹⁰ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹¹ Agency Exhibit 19. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

Accordingly, whether grievant had his radio, whether the radio was functional, and whether he heard the call on his own radio are all moot. The fact is that he was told that the Major was attempting to contact him via radio.

The agency has demonstrated, by a preponderance of evidence, that grievant was told that the facility's Chief of Security was calling him on the radio and wanted grievant to respond. Grievant chose not to return the Major's call, either by radio or telephone, and chose not to find out why the Major was calling for him. Instead, grievant chose to ignore the call and instead began his daily work routine. Grievant's failure to comply with supervisory instructions to return a call is a Group II offense.

Grievant's primary defense is that the Major was not his direct supervisor. He contends that he should only have to respond to instructions and calls from his direct supervisor or someone in his direct chain of command. The Department of Corrections is not a typical employer. Although the facility has both security and non-security employees, the agency is a paramilitary organization. By the very nature of its mission, such a paramilitary organization operates differently from non-governmental employers and even from most governmental agencies. The Chief of Security of a correctional center has overarching responsibility to ensure the safety and security of all those who come within its security fence – including inmates, security staff, non-security staff, and visitors. Grievant has worked in the agency for several years and knew, or reasonably should have known, the unique authority of the Chief of Security.

When grievant learned that the Major wanted him to return a radio call, he had a duty and obligation to return the call. Grievant did not know why the Major wanted him and therefore had no basis to ignore the call. Grievant did not know whether the call was for a routine matter or for an emergency situation. However, grievant should have known that the Major would not call him without some reason the Major deemed significant. Therefore, at the very least, grievant should have returned the call to learn what the Major wanted. His failure to do so was derelict and certainly constitutes unsatisfactory job performance.

Grievant believes that the Major had been harassing him about minor infractions since his grievance a few years earlier. Grievant did not allege harassment in his written grievance and, therefore, cannot now add this claim to his grievance. In any case, the evidence is insufficient to determine whether the Major's actions constituted harassment or whether he was just rigidly enforcing all rules and regulations. However, for the sake of argument, even if the Major had been harassing grievant in the past, there is no evidence that the radio call on August 16, 2004 constituted harassment. The call was simply a call to grievant to respond and call the Major back. This was a reasonable request from the facility's Chief of Security to a maintenance employee.

Based on grievant's deliberate and knowing failure to comply with instructions, the agency could have issued a Group II Written Notice. Instead, the agency elected to discipline grievant with a lesser Group I offense for unsatisfactory performance. Based on the offense committed, the agency's disciplinary action was reasonable.

DECISION

The decision of the agency is affirmed.

The Group I Written Notice issued on September 3, 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.¹² 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.¹³

[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

¹² 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).

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.