

Issue: Group II Written Notice with suspension (failure to follow supervisor's instructions); Hearing Date: 02/22/05; Decision Issued: 02/23/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 7984



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7984

Hearing Date: February 22, 2005
Decision Issued: February 23, 2005

APPEARANCES

Grievant
Three witnesses for Grievant
Assistant Warden
Advocate for Agency
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?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice issued for failure to follow a supervisor's instructions.¹ As part of the disciplinary action, grievant was suspended from work for 24 hours (two 12-hour shifts). 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 as a Corrections Officer for over four years. Grievant has one prior active Written Notice for using obscene or abusive language.³ She was counseled in September 2004 for unprofessionalism in handling an inmate situation.⁴

The agency has promulgated Post Orders and General Duties with which all corrections officers must comply. Order No. 10 states: "Obey all orders given to you by your supervisor. If you cannot, for some reason, follow the order as issued, report this to the supervisor who is next in the chain of command."⁵ The only exceptions to this order involve orders that would cause a security breach or serious injury to someone, or if the person giving the order is a hostage or otherwise under duress. Because the facility houses criminals, and the mission of the agency is to protect public safety, the agency is a paramilitary organization. Employees present at the facility, whether on duty or off duty, must follow all orders from supervisors as stated in the Post Orders.

On November 3, 2004, grievant was off duty. Her cousin was scheduled to visit the facility that day for a physical examination for possible employment. Grievant arrived at the facility with her cousin and called the captain from the lobby. The captain granted permission for grievant to accompany her cousin to the medical department. While the cousin was in the medical department at the facility, grievant went to the control room of a housing unit to speak with a coworker. A lieutenant was making his rounds and noticed grievant in the control room. Although grievant was wearing her uniform pants and blouse, she was not in full uniform because she did not have her utility belt, chevrons, name tag, tie, cap, and other accoutrements required to be worn with the uniform.⁶

The lieutenant knew that grievant was not scheduled to work that day and was puzzled by her presence at the facility. He finished his rounds, went to the watch office, and asked the captain about grievant's presence at the facility and reported that she was not in full uniform. The captain explained that he had authorized grievant to accompany her cousin to the medical department. He

¹ Exhibit 1. Group II Written Notice, issued November 12, 2004.

² Exhibit 1. Grievance Form A, filed December 2, 2004.

³ Exhibit 5. Group I Written Notice, August 30, 2003.

⁴ Exhibit 5. Memoranda from sergeant to lieutenant, and lieutenant to major, September 17, 2004.

⁵ Exhibit 3. Post Order 2-69, *General Duties*, December 12, 2000.

⁶ The recollections of various witnesses vary as to precisely which items of the uniform grievant was not wearing. However, this question does not require resolution because the agency did not discipline grievant for violating the Employee Uniform policy (Exhibit 3 – IOP 402); it disciplined grievant only for failing to follow a supervisor's instructions.

directed the lieutenant to tell grievant that she must either stay with her cousin in the medical department, or wait in the lobby. The lieutenant telephoned the control room of the building in which he had seen grievant and relayed the captain's instructions to her. Grievant was upset and became argumentative and asked the lieutenant why he hadn't told her that when he first saw her; she then hung up the telephone. The lieutenant called the control room again and spoke with the control room officer who said that grievant was on her way to the medical department.

The lieutenant then left the watch office and walked to the housing unit where grievant was so that he could speak with her about her argumentative attitude and hanging up on him. From the outside door, the lieutenant could see that grievant was still in the control booth but appeared to be leaving. He waited outside until grievant exited the unit and instructed her to come with him to the watch office. Grievant ignored his instruction and walked past him towards the medical department.⁷ The lieutenant twice more ordered grievant to come with him but grievant ignored him and went to the medical department.

The lieutenant returned to the watch office to report what had happened to the captain. During that conversation, grievant called the captain from the medical department and attempted to tell the captain her version of the incident. The captain told her to immediately report to his office. He had to repeat his instruction three times because she became loud and belligerent.⁸ Grievant then hung up the telephone. Grievant then came to the captain's office where she argued to the captain that she had not been bothering anyone when she was in the housing unit control room. During the discussion, the captain asked grievant for the name of her cousin but grievant refused to tell him.⁹ The captain then instructed her to go to her vehicle until her cousin was ready to leave.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

⁷ Exhibit 2. Memorandum from lieutenant to captain, November 3, 2004.

⁸ Grievant asserts that she made three separate calls to the captain, each time attempting to explain her version of the incident. Each time he would not let her finish and directed her to report to his office immediately. Whether there was one call or three calls, the evidence is clear that the captain ordered grievant to report to him immediately and that she continued to refuse by attempting to discuss the matter on the telephone.

⁹ Exhibit 8. Grievant's Internal Incident Report, November 3, 2004.

¹⁰ Exhibit 2. Memorandum from captain to Chief of Security, November 3, 2004.

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.

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 her evidence first and must prove her claims by a preponderance of the evidence.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.2 of the Standards of Conduct policy provides that Group II offenses include acts and behavior that are more severe in nature than Group I offenses and are such that an accumulation of two Group II offenses 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 5-10.16 of the DOC Standards of Conduct addresses Group II offenses, which are defined identically to the DHRM Standards of Conduct.¹³ One example of a Group II offense is failure to follow a supervisor's instructions.

The agency has shown, by a preponderance of evidence, that grievant refused to follow the instructions of both a lieutenant and a captain. She refused

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 6. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

three times to follow the lieutenant's instruction to come with him to the watch office. She twice refused to follow the captain's order to come to the watch office. During the meeting in the watch office, grievant also refused to respond to the captain's request for her cousin's name. Moreover, grievant has admitted in writing that she refused to follow the lieutenant's order.¹⁴ Such repeated refusals were insubordinate and constitute a Group Two offense.

Grievant defends her insubordination on the basis that she didn't like the "intensity" in the lieutenant's voice and found his posture (hands on hips) physically intimidating. Grievant's argument is not persuasive. In a paramilitary organization, orders must be followed even when one disagrees with the order or the manner in which it was delivered. In this case, testimony confirms that the lieutenant was visibly upset after grievant hung up during his telephone call to her and, when he subsequently found her still in the housing unit. His demeanor was undoubtedly stern and authoritative. However, in view of grievant's insubordinate behavior on the telephone, and her failure to promptly go to the medical unit, the lieutenant had some justification for being upset. A preponderance of evidence indicates that he gave grievant a reasonable and unambiguous order to come with him to the watch office. Once she had been so ordered, grievant's refusal to comply was insubordination.

Of course, if the lieutenant handled the situation inappropriately, he was not justified in doing so. And, if grievant believed the lieutenant had behaved inappropriately, she could have reported it to his superior officer and through the chain of command, or to human resources. However, while grievant could report the matter afterwards, she had a duty to follow the order when it was issued.

Grievant argues that the lieutenant said only "Come with me now," and did not say "Come with me to the watch office." Whether the lieutenant specified that the watch office was the destination is irrelevant. His order was direct, clear and should have been followed. In any case, when later instructed by the captain to report to the watch office, grievant twice refused to do; the captain had to instruct her three times (during three telephone three calls, according to grievant) before she complied with his order.

In summary, a preponderance of evidence, as well as grievant's admission, shows that she repeatedly failed to follow supervisory instructions – a Group II offense. The fact that she did not like the manner in which the order was issued is not sufficient reason to deliberately disobey an order.

DECISION

The decision of the agency is affirmed.

¹⁴ Exhibit 2. Unit Incident Report completed by grievant, November 3, 2004.

The Group II Written Notice and 24-hour suspension issued on November 12, 2004 is 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 **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.¹⁵ You must file a notice of appeal with the clerk of the circuit court in the

¹⁵ 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

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁶

[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

that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.