

Issue: Group III Written Notice with suspension (participating in a collective work
stoppage); Hearing Date: 03/11/05; Decision Issued: 03/14/05; Agency:
DJJ; AHO: David J. Latham, Esq.; Case No. 8005



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8005

Hearing Date: March 11, 2005
Decision Issued: March 14, 2005

PROCEDURAL ISSUE

Grievant's request for a hearing was qualified at the same time as the requests of two other grievants, both of whom had participated in the same work stoppage at the same time as grievant. For administrative efficiency, it appeared that consolidation of the three grievances for the purpose of hearing the case would be appropriate. The Director of the Department of Employment Dispute Resolution ruled that the hearings should be consolidated, and the cases were heard together.¹ However, separate decisions are being issued for each grievant in order to address the merits of each grievance individually.

APPEARANCES

Three Grievants
Representative for Agency

¹ Department of Employment Dispute Resolution (EDR) *Compliance Ruling of Director*, Ruling Numbers 2005-975, 2005-976, and 2005-977, March 10, 2005.

Three witnesses for Agency

ISSUES

Was the grievant's conduct such as to 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 III Written Notice issued for participating in a collective work stoppage.² As part of the disciplinary action, grievant was suspended for ten workdays. 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 Juvenile Justice (Hereinafter referred to as "agency") has employed grievant for five years. He is currently a juvenile correctional officer.⁴ Grievant has one prior active disciplinary action – a Group I Written Notice for excessive tardiness.⁵

The agency has designated as "essential personnel" certain groups of employees such as all security staff, including juvenile correctional officers.⁶ Essential personnel are designated to work in the event of an authorized closing. Juvenile detention centers are designed to detain juvenile offenders in a secure environment for the dual purposes of rehabilitation and the protection of public safety. Each facility has a security staff and is operated as a paramilitary organization. As such, security staff is required to obey all reasonable orders of superior officers and institution management. Because security posts must be staffed 24 hours per day, seven days per week, it is mandatory that at least one correctional officer be at each post at all times.

On October 25, 2004, during the day there had been a 20-minute disturbance among approximately 15 wards when officers had to forcibly remove one ward from his room. On October 26, 2004, grievant reported for his scheduled day shift – 6:45 a.m. to 7:15 p.m. During the morning debriefing, the night shift commander reported that some wards had been out of their rooms during the night and that he personally was scared by the occurrence. After

² Agency Exhibit 1. Group III Written Notice, issued November 18, 2004.

³ Agency Exhibit 1. Grievance Form A, filed December 16, 2004.

⁴ Agency Exhibit 3. Employee Work Profile, October 1, 2004.

⁵ Agency Exhibit 16. Group I Written Notice, issued August 14, 2003.

⁶ Agency Exhibit 13. Standard Operating Procedure SOP-104, *Essential Personnel*, December 17, 1997. The institution at which grievant is employed has a similar policy. See Agency exhibit 14. Institution Operating Procedure IOP-104, *Essential Personnel/Inclement Weather*, July 19, 2004.

hearing this, grievant refused to go to his post. At about 7:00 a.m., the day shift commander (a lieutenant) read post assignments to the 23 correctional officers and directed them to go to their posts.⁷ Grievant and the other officers refused to go to their post. The shift commander directed the officers for a second time to report to their posts; they all refused. The shift commander called the administrator on call (assistant superintendent for operations) who directed the lieutenant to tell the officers to report to their posts. The lieutenant ordered the officers for a third time to report and again they refused, demanding to speak with the superintendent.

By 7:15 a.m., it had become necessary to hold the night shift employees over to stay at their posts. Some of these employees had to be paid overtime pay and some had to be given compensatory time off because of the extra hours they were required to work. It also became necessary to call in about ten officers from other institutions to help staff security posts; most of those officers arrived by about 10:00 a.m. Because of the work stoppage, meals for wards were delayed and school classes for wards were cancelled for the morning. The superintendent arrived at the facility sometime around 8:30 a.m., at which time the institution was placed on lockdown.⁸ The administrator on call arrived about 9:30 a.m. The superintendent and the administrator on call spoke with the recalcitrant officers from about 10:30 to 11:15 a.m.; grievant and the other officers reported to their posts shortly after that time.

An investigation into the work stoppage revealed that there may have been some preplanning and coordination of this incident on the evening of October 25, 2004 among some correctional officers. Grievant denied any knowledge of such prior planning. Grievant expressed a number of concerns during an interview after the incident.⁹

All classified employees who participated in the work stoppage were disciplined with a Group III Written Notice.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

⁷ Agency Exhibit 4. Daily Assignment Sheet, October 26, 2004.

⁸ Agency Exhibit 5. Serious Incident Report, October 26, 2004.

⁹ Agency Exhibit 7. Notes from grievant's interview, October 28, 2004.

¹⁰ In addition to the Written Notice, the agency suspended grievant without pay for ten work days because of his prior disciplinary action. Probationary employees are not subject to the disciplinary sanction of the Standards of Conduct; however, three probationary officers were reprimanded in writing and their probationary period was extended by six months.

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.

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.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 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* Standards of Conduct 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 Participating in any kind of work slowdown or similar concerted interference with state operations is a Group III offense.¹³ Grievant received training on the Standards of Conduct when he was hired and certified that the Standards had been reviewed with him.¹⁴

As a paramilitary organization, the agency must require security staff to comply with all reasonable orders. If officers were allowed to choose when and where they work, a juvenile detention center simply could not function as it must.

¹¹ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

¹² Agency Exhibit 10. Section V.B.3, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹³ Agency Exhibit 10. Section V.B.3.i, *Ibid*.

¹⁴ Agency Exhibit 8. Receipt and certification for Standards of Conduct, signed by grievant January 27, 1999.

The General Assembly has recognized the need to assure that state government operations continue uninterrupted for the public benefit by passing legislation that prohibits work slowdowns and stoppages. State law provides that any employee of any agency of the Commonwealth who willfully refuses to perform the duties of his employment shall be deemed to have terminated his employment and is thereafter ineligible for employment by the Commonwealth for any position for 12 months.¹⁵ In the instant case, the agency cannot tolerate the anarchic type of behavior engaged in by grievant and the other officers.

Grievant had available multiple options to bring his concerns to the attention of agency management. First, grievant could have followed his chain of command until he reached a level at which someone had authority to correct the perceived problems.¹⁶ Grievant avers that he did bring some of his concerns to the attention of his shift commander but that the shift commander could not correct the problems. However, grievant has not shown that he followed the chain of command by bringing his concerns to the attention of the Chief of Security or the superintendent. Second, grievant had access to facility management including the superintendent, as well as the deputy director for institutions, or the agency director. Third, grievant could have brought his concerns to the attention of the human resources department. Fourth, grievant could have filed a complaint through the governor's hotline. Fifth, grievant could have utilized the grievance procedure to pursue his concerns.

Grievant argues that he was following a post order, which states that an officer can contact the next supervisor in the chain of command if following the order of his supervisor would cause a serious breach in security.¹⁷ However, grievant has not proven that following the lieutenant's order to report to his assigned post would cause a security breach. To the contrary, the fact is that grievant's failure to report to his assigned post for four hours had the potential for creating a breach in security. As stated above, grievant could have contacted the next person in the chain of command or pursued his concern in other ways. However, *at the time of a shift change*, the order to report to an assigned post must take precedence over grievant's desire to speak to someone higher on the chain of command. Grievant could have reported to his assigned post, then requested to speak with the next person in the chain of command, allowed reasonable time for a relief officer to take his place, and then have spoken with the next higher supervisor.

¹⁵ Agency Exhibit 17. Va. Code § 40.1-55. **Employee striking terminates, and becomes temporarily ineligible for public employment.** Any employee of the Commonwealth or of any county, city, town or other political subdivision thereof, or of any agency of any one of them, who, in concert with two or more other such employees, for the purpose of obstructing, impeding or suspending any activity or operation of his employing agency or any other governmental agency, strikes or willfully refuses to perform the duties of his employment shall, by such action, be deemed to have terminated his employment and shall thereafter be ineligible for employment in any position or capacity during the next twelve months by the Commonwealth, or any county, city, town or other political subdivision of the Commonwealth, or by any department or agency of any of them.

¹⁶ Agency Exhibit 12. Memorandum from superintendent to all employees, August 8, 2004.

¹⁷ Grievant Exhibit 1. Security Post Order 15, undated.

The agency has shown by a preponderance of evidence, and grievant has acknowledged, that he participated in a work stoppage of over four hours duration on October 26, 2004. Pursuant to state law, grievant could have been removed from state employment. The agency instead chose to discipline grievant in writing and suspend him for ten work days. Given the circumstances in this case, the agency's disciplinary action was measured and reasonable.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued on November 18, 2004 and the ten-day suspension are 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.¹⁸ 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.¹⁹

[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

¹⁸ 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).

¹⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.