

Issue: Group III Written Notice and termination (conduct undermining effectiveness of a Security Officer, and falsification of a written report); Hearing  
Date: 04/14/05; Decision Issued: 04/15/06; Agency: DMHMRSAS; AHO:  
David J. Latham, Esq.; Case No. 8032



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8032

Hearing Date: April 14, 2005  
Decision Issued: April 15, 2005

APPEARANCES

Grievant  
Assistant Director of Administration  
Advocate for Agency  
Four witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the Commonwealth of Virginia 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 for conduct undermining effectiveness as a security officer and falsification of a

written report.<sup>1</sup> As part of the disciplinary action, grievant was removed from state employment effective February 9, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.<sup>2</sup> The Virginia Center for Behavioral Rehabilitation (Hereinafter referred to as "agency") has employed grievant as a security officer for one and a half years. The grievant has no prior disciplinary actions. The chief of security acknowledged that grievant was a conscientious employee who is particularly observant of small details. In the past, grievant has reported residents who had come into possession of prohibited items.

Agency policy provides that fraternization, non-professional relationships, improprieties, or the appearance of improprieties between employees and residents is prohibited.<sup>3</sup>

Within the facility a rumor had surfaced that grievant and a male resident were chummier than deemed appropriate for a security officer. It appeared to one agency witness that the male resident took an interest in grievant and attempted to be protective of her. Grievant had made a request at one point that she not be assigned to the male resident's wing so that she would not have regular daily contact with him. Top management directed that other security officers watch grievant and report anything unusual regarding her contacts with the male resident. In November 2004, a security officer reported that she was suspicious that grievant had given cigarettes to the male resident.<sup>4</sup> Grievant's sergeant questioned her about the allegation and grievant explained that she had dropped some cigarettes on the ground outside the building in the dark. She picked up those she saw but could not be certain she retrieved all of the cigarettes. Grievant was *not* counseled or disciplined for the incident.

In early December 2004, the same security officer who reported grievant in November again reported grievant, this time for being out of camera view when she was outside on the patio with the male resident.<sup>5</sup> Grievant's sergeant subsequently verbally counseled her about the potential danger of being out of the security camera's view. Three days later, the same security officer again reported grievant, this time for smoking with the male resident on the patio.<sup>6</sup> The security chief verbally counseled grievant that she should not smoke with residents.<sup>7</sup> The security chief arrived at this facility in August 2004. Prior to his

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<sup>1</sup> Exhibit 1. Written Notice, issued February 9, 2005.

<sup>2</sup> Exhibit 2. *Grievance Form A*, filed March 1, 2005.

<sup>3</sup> Exhibit 4. Agency Policy 522(HR), *Rules of Conduct Governing Employee Relationships with Residents*, January 1, 2005.

<sup>4</sup> Exhibit 5. Incident report, November 26, 2004.

<sup>5</sup> Exhibit 5. Incident report, December 1, 2004.

<sup>6</sup> Exhibit 5. Unusual occurrence report, December 4, 2004.

<sup>7</sup> Residents are allowed to smoke and have cigarettes. However, they are permitted to obtain cigarettes only 1) by purchasing them at the commissary or, 2) by receiving them from visitors or mail after they are checked by security officers. Employees and security officers are not permitted to give cigarettes to residents.

arrival, smoking with residents had not been prohibited. Grievant was unaware that the new chief enforced such a prohibition until he counseled her in December.

At the end of grievant's evening shift on January 25, 2004, an oncoming officer relieved her at the control cage. Grievant walked into the dayroom, bent over a table containing newspapers, riffled briefly through a newspaper, picked it up and left the dayroom. She walked to other wing of the building and waved the newspaper at a group of residents playing cards. The same male resident referred to above noticed grievant, got up, and took the newspaper from grievant. Grievant then left the wing and went home. The male resident was observed opening the newspaper sections and shaking them as if he expected something to be inside the newspaper.<sup>8</sup> Nothing was observed falling out of the newspaper. None of the three officers who were aware of the newspaper being given to the male resident approached grievant to prevent passing of the newspaper. None of them went to the resident to determine whether he had received cigarettes or any other contraband.

#### 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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the

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<sup>8</sup> Exhibit 3. Unusual occurrence report, January 26, 2005.

circumstances. In all other actions the grievant must present her evidence first and prove her claim by a preponderance of the evidence.<sup>9</sup>

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 effective September 16, 1993. The policy provides 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. of the policy provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.<sup>10</sup> Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents is an example of a Group III offense. Section V.A. establishes that any offense that, in the judgment of agency heads, undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with Section V.

The evidence reflects that grievant has been counseled verbally in the past for inappropriate conduct with a male resident. While the agency cited this prior counseling as background information in support of its decision to remove grievant from employment, the offense for which she was disciplined is the one that purportedly occurred on January 25, 2005. Therefore, the agency's case must rise or fall on whether the allegation against grievant actually occurred. After carefully considering the agency's evidence, it is concluded for the following reasons that the agency has not borne the burden of proof to demonstrate, by a preponderance of evidence, that grievant committed the alleged offense.

As part of its evidence during the hearing, the agency showed a security camera videotape (converted to digital format for computer viewing). The quality of the videotape is indistinct and very grainy. The tape shows grievant leaving the cage, coming into the dayroom and walking over to a table with newspapers on it. It appears that grievant riffled through several pages of the paper for three to five seconds and then picked the paper up. Because of the poor quality of the image, it is not even possible to determine which hand grievant was using. One cannot ascertain from the videotape whether grievant did or did not insert anything into the newspaper. The agency witnesses who have seen the videotape acknowledged that its quality is so poor that it is not probative of whether anything was placed inside the paper.

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

<sup>10</sup> Exhibit 6. Section V.B.3, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

The agency acknowledges that another videotape recorded the male resident looking through the newspaper after receiving it from grievant. However, the agency felt during its investigation that the tape was inconclusive and erased it for reuse. Since this evidence was destroyed by the agency, it is unavailable for review. When a party fails to present potentially relevant evidence, a presumption must be made against that party that the evidence would not have been favorable to the party. Accordingly, it must be presumed that the second videotape did not show the male resident receiving cigarettes or anything else in the newspaper.

The videotape that was offered shows a resident sitting directly next to the table from which grievant picked up the newspaper. He was able to see firsthand whatever grievant did with the newspaper. The agency did not interview this resident during the investigation and did not offer him as a witness. The chief of security testified that he never questions residents during investigations because he rarely finds them to be truthful. While it recognized that incarcerated persons frequently have self-interest uppermost in their consciousness, this witness might have been able to shed light on the case, especially since he had no direct interest in the outcome.

The security officer who reported this incident testified during the hearing that she saw grievant placing individual cigarettes between the pages of the newspaper. However, her testimony is inconsistent with the statement she wrote the day after the incident. In that statement she wrote that grievant put an "unknown object" in the newspaper.<sup>11</sup> It is more likely than not that if she actually saw individual cigarettes, she would not have referred to them as an "unknown object" and would have used the plural rather than the singular. The videotape shows that this security officer was standing approximately 20 feet away from grievant with the seated resident between her and grievant. In general, a contemporaneous written statement is more reliable than oral testimony given months later. Accordingly, relatively little evidentiary weight is given to this witness's evidence.

Another security officer who was in the cage wrote a statement claiming that, on her video monitor, she saw grievant put cigarettes into the newspaper.<sup>12</sup> However, as noted above, the quality of the video is so poor that it is impossible to make out such detail on the video screen. The distance from the video camera to where grievant was looking at the newspaper appears to be about 45-50 feet. This witness did not testify at the hearing. In view of the fact that this witness viewed the incident on a small video monitor screen and considering the poor quality of the video picture, it was not possible for this witness to have seen what she claims to have seen.

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<sup>11</sup> Exhibit 3. Officer T's Unusual occurrence report, January 26, 2005.

<sup>12</sup> Exhibit 3. Officer B's Unusual occurrence report, January 26, 2005.

The officer who observed the male resident opening the newspaper did not see him take any objects from the paper and did not see anything fall out of the paper as he went through the pages. Although the resident's actions were consistent with an *expectation* of something being in the newspaper, there is no evidence to support a conclusion that there was anything in the paper. If there had been loose cigarettes in the newspaper, the resident would have had to gather them up and either put them into a pocket or an empty cigarette pack. The officer who observed him opening the paper did not see him put anything into his pockets or a cigarette pack. While the resident is allowed to have cigarettes, it must be assumed that he keeps them in a pack until use. If the resident had been searched immediately, it would have been relatively easy to detect loose cigarettes in a pocket or stuffed into an empty package.

According to agency testimony, if the security officers who saw this incident believed that grievant was about to deliver or had delivered suspected contraband to a resident, those officers should have immediately intervened so as to prevent delivery and recover the contraband. None of the security officers intervened, even after they knew that the newspaper had been delivered to the male resident. This raises a question of whether those officers actually believed that contraband was being delivered. Although one officer reported the incident to a supervisor (sergeant), the supervisor also took no action to recover the alleged contraband.

### Summary

At most, the evidence presented in this case raises a suspicion that grievant *may* have placed an unknown object in the newspaper. However, there is no proof of what that object may have been, and certainly no proof that grievant gave *anything* other than the newspaper to the male resident. The agency's own witness testified that she not see anything come out of the newspaper as the resident examined it. There was no testimony that the male resident placed anything in his pockets after looking at the paper. No one ever bothered to search the resident. There was only suspicion and an inference of wrongdoing. In this case, the suspicion and inference do not constitute a preponderance of evidence. The allegation that grievant falsified a written report because she denied the charge against her is unsupported by the evidence. Because the charge of delivering contraband is unsustainable, grievant's denial of wrongdoing is not a disciplinable offense.

It certainly appears that grievant should have made more effort in the past to avoid unnecessary contact with the male resident. She could have taken her smoke breaks at different times than he did and she could have assured that she remained in camera view at all times when around this resident. However, grievant was counseled about these concerns and, after December 4, 2004, no further incidents were reported until the incident that precipitated this grievance.

## DECISION

The disciplinary action of the agency is reversed.

The Group III Written Notice and grievant's removal from employment on February 9, 2005 are hereby **RESCINDED**. Grievant is reinstated to her former position or, if occupied, to an objectively similar position. Grievant is awarded full back pay and her benefits and seniority are restored. The award of back pay must be offset by any interim earnings.

## 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 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>13</sup> 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.<sup>14</sup>

[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]

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David J. Latham, Esq.  
Hearing Officer

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<sup>13</sup> 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).

<sup>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.