

Issue: Group II Written Notice with suspension (failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy); Hearing Date: May 18, 2005; Decision Date: May 26, 2005; Agency: Department of Corrections; Hearing Officer: Thomas J. McCarthy, Jr., Esquire; Case Number: 8062

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

**In re: Case Number 8062**

**Hearing Date: May 18, 2005**

**Decision Issued: May 26, 2005**

**APPEARANCES**

Grievant  
Grievant Representative  
Agency Representative  
1 Witness for Grievant  
4 Witnesses for Agency

**ISSUE**

1. “Was the issuance to Grievant of a Group II written notice with 5 days suspension without pay proper? Was there, by Grievant, failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy?”

**FINDINGS OF FACTS**

The Grievant filed a timely appeal from a Group II Written Notice with 5 day suspension issued on February 2, 2005, for, “Failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy.”

Grievant was hired as an Officer on July 1, 1998, and promoted to Senior Officer on December 10, 1999. She served as a Certified Substance Abuse Counselor as an additional duty.

Grievant worked in District “blank” and was assigned to the District Satellite Office in July of 2000. District “blank” office is located approximately 40 minutes driving time from the satellite office.

On January 13, 2005, a review team of Chief and Senior Officers met in the District “blank” office to review the Grievant’s files. Grievant was told to deliver her files to the team. Thirteen files were not available upon the team’s arrival. Grievant had to go to the satellite office to pick up files locked in a file cabinet with a key broken off in the lock. Several files were found in the district office and Grievant had to drill the lock on the satellite office file cabinet to retrieve the files therein. The review teams had left

by the time the Grievant drilled open the locked cabinet and transported the files to the district office. The review team's report indicates that they did not understand the locked file cabinet incident. Testimony revealed that the cabinet was locked and the key broken off during the move to the new satellite office facility.

The review of the files available showed that five files had significant compliance issues (Commonwealth Exhibit 9, Review Team Report - Item 11) with some minimal problems in some of the remainder. A PB-15 was issued without supervisor approval in the file. The review teams report stated that as to non-compliance "Many of the above may be district wide occurrences because not all of the above files were only supervised by [Grievant].

Testimony was heard that superiors in the regional office met with Grievant's Chief Officer more than once to discuss disciplining Grievant after the review.

One of the Chief Officers testified that he had never issued a Group II write-up. Another Chief Probation Officer and member of the review team testified that there was a pattern of deficiencies in the satellite office files in general. He testified that Grievant often "went beyond the call" but she did not always document her actions. He testified that Grievant found out on the day of the audit that she needed to bring her files to the district office, and that the review team did not wait for her to bring a small number of her files which were located at the satellite office to the main office once she drilled the satellite office cabinet open.

One Chief Officer testified that over any period of time officers will have deficiencies.

The audit report showed a PB-15 was issued without a supervisor's approval. Testimony corroborated this, but testimony was uncontroverted that Grievant had been told when public safety was in question, Officers were to use their own judgment in issuing PB-15's.

Grievant testified that she called the main office to tell the review team that she had gotten the files from the locked cabinet after drilling the lock, and she was on her way to the main office from the satellite office. The team did not wait for her.

Grievant also testified that she had not been taught how to document files and did not know subject's pictures were required or that VCINS were not allowed in the files.

Grievant's Chief Officer who issued the Group II Written Notice with 5 days suspension without pay testified he felt he was "ordered to do it." "I didn't feel it was justified. Other people's files were in the same shape."

The reviewers report concludes with the statements that, "Many of the problems in my opinion are very fixable. However, the supervisors should also take part in the solutions."

The Agency's evidence was that Grievant's work was well regarded by the Court System and the Commonwealth's Attorney.

In the Performance Evaluation completed as Part VI of the Employee Work Profile signed by Grievant on October 18, 2004, signed by the Regional Director on October 15, 2004 and signed by Grievant's Chief Officer on October 18, 2004, Grievant was rated as "contributor" overall with an "exceeds contribution" for supervising and assisting her cases.

Grievant has an exemplary record under less than optimal conditions.

### **APPLICABLE LAW AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to the 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 the workplace." Murray v. Stokes, 237 Va. 653, 656 (1989).

Code Section 2.2-3000 et seq. sets forth the Commonwealth's grievance procedure and provides, in 2.2-3000A:

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 Section 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.

The Agency Procedures Manual in Chapter Five: Human Resources contains the "Standards of Conduct". Grievant was issued a Group II Written Notice with five days suspension without pay. Section 5-10.16 of the Agency's Standards of Conduct provide that Group II offenses include ... 1. Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy.

## DECISION

The Agency has not shown by a preponderance of the evidence presented that the Group II Written Notice with five days suspension without pay was warranted or appropriate in this matter.

The failure to produce files as directed was mitigated by the short notice to produce them and the fact that the lock on a file cabinet in the satellite office had to be opened by drilling it. The PB-15 issuance without supervisors approval was mitigated by the direction to the officers on PB-15 matters to use your judgment in matters of public safety. The other file problems were "very fixable" in the words of the reviewers report.

The Chief Officer who issued the Group II Written Notice with five days suspension, felt it was not warranted, but that the Regional Office required it be issued. Other Officers' files were in the same shape and they were not issued Group II Written Notices or suspended without pay.

The Group II Written Notice to Grievant issued February 2, 2005 is ordered rescinded and the suspension is ordered vacated, both as inconsistently applied discipline and unwarranted discipline.

## APPEAL RIGHTS

As Sections 7.1 through 7.3 of the *Grievance Procedure Manual* set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

### *Administrative Review*

This hearing decision is subject to three types of administrative review, depending upon the nature of the alleged defect with the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or

agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and **received** by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

### **Judicial Review of Final Hearing Decision**

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Thomas J. McCarthy, Jr.  
Hearing Officer