

Issue: Group III Written Notice with termination (breach of security); Hearing Date: 07/07/05; Decision Issued: 07/15/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8101



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8101**

Hearing Date: July 7, 2005  
Decision Issued: July 15, 2005

**PROCEDURAL HISTORY**

On December 2, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Violation of Standards of Conduct: [Breach] of Security. Tools assigned to [Grievant] were left out accessible to inmates.*

On December 13, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 9, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 7, 2005, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for breach of security.

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employed Grievant as a HVAC Supervisor until his removal effective December 3, 2004. He had been employed by the Agency for approximately six years. Grievant received a Group I Written Notice on September 3, 2004 for unsatisfactory job performance.<sup>1</sup>

The purpose of Grievant’s position was:

Maintains heating, ventilation, air conditioning systems, refrigeration systems for the entire complex, and 3 state houses.<sup>2</sup>

Grievant’s Employee Work Profile required him to “maintain all keys and tools.”<sup>3</sup>

As part of his Phase I Training, Grievant received instruction in how to handle tools. The Agency’s Tool Control Trainer Outline provides:

8(a). All maintenance vehicles entering the security compound will be closely monitored to prevent the loss of tools.

8(c). All tools on maintenance vehicles will be stored in securely locked cabinets or compartments.<sup>4</sup>

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<sup>1</sup> Agency Exhibit 8.

<sup>2</sup> Agency Exhibit 7.

<sup>3</sup> Agency Exhibit 7.

<sup>4</sup> Agency Exhibit 5.

On November 30, 2004, Mr. J was talking down the walkway inside the Institution on his way towards the dining hall. He looked to the side and observed Grievant park his Maintenance Mighty Mite Truck adjacent to the inmate dining hall. Grievant left the vehicle and entered the laundry area of the building approximately 25 to 30 yards from the vehicle. As Mr. J approached the vehicle, he observed a bag of hand tools in the back of the truck. The bag had an open zipper and was about the size of a small duffel bag. The tools were unsecured. On top of the tool bag was a pair of cutting pliers. Inside the tool bag was another pair of cutting pliers. There were at least five or six screw drivers and three wrenches inside the bag.

Any inmate walking by the truck, who observed the tools, could have removed the tools. Inmates were in the dining hall within close proximity of the vehicle.

Mr. J removed the bag from the vehicle and carried it into the Watch Commander's office located at the other part of the building. Photographs were taken of the tools.

If a tool is missing, Institution managers shut down Institutional operations until the tool is located. All individuals and areas inside the Institution are subject to search until the tool is obtained.

The Building and Grounds Superintendent had previously counseled Grievant to remind Grievant of his obligation to ensure that tools were secured at all times.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

DOCPM § 5-10.7(C) states, "The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head, although not listed in the procedure, undermines the effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of this procedure."

In the Agency's judgment, Grievant's behavior was such a breach of security as to justify issuance of a Group III Written Notice with removal. The evidence is sufficient

to support the Agency's conclusion. Metal screw drivers, wrenches, and pliers make ready weapons in the hands of inmates. They can also be used to tamper with locks. If tools are missing, the Institution must suspend its operations until the tools are found. These considerations represent a sufficient breach of security such that one occurrence would normally result in removal. The Agency's issuance of a Group III Written Notice with removal must be upheld.<sup>5</sup>

Grievant argues the tools inside the bag were Class B tools which did not pose a security risk. Class B tools are tools which "need close supervision but which are not considered to pose an extreme hazard to the security of the institution ...." These tools include: hammer, wrench, shove, screw driver, and ladder less than six feet in height.<sup>6</sup> Although the Class B tools were not an extreme hazard to the security of the Institution, they presented a hazard to the Institution in the event they came into the position of inmates. The hazard presented represented a real and serious danger to inmates and staff.

Grievant argues the Agency is inconsistently disciplining employees. On a prior occasion, a plumber working inside the Institution handed tools to inmates and then left those inmates unattended. The inmates could have easily converted the tools for their own benefit. The plumber did not receive disciplinary action. The Warden testified, however, that she was not aware of this incident. No one within the chain of command brought to her attention the plumber's actions. Based on the evidence presented, it appears that a reason disciplinary action was not taken against the plumber was because Institution supervisors did not bring the matter to the Warden's attention. The Hearing Officer cannot conclude that the Agency has taken inconsistent disciplinary action when the Warden taking disciplinary action in this grievance was not aware of other similar behavior.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **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:

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<sup>5</sup> No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

<sup>6</sup> Agency Exhibit 5, p 3.

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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that 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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 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. 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>7</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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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.