

Issue: Group II Written Notice with suspension (failure to follow applicable written policy); Hearing Date: 09/08/05; Decision Issued: 09/28/05; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No.8125

DECISION OF HEARING OFFICER

In re:

Case No: 8125

Hearing Date: September 8, 2005
Decision Issued: September 28, 2005

PROCEDURAL ISSUES

The Grievant filed a timely grievance from a Termination Notice of April 28, 2005. Grievant continued through a second step hearing held on May 13, 2005 at which time the discipline was mitigated to a Group II Written Notice with ten (10) days suspension.¹ Grievant's request for a hearing before a hearing officer was qualified on June 14, 2005 and a pre-trial conference was scheduled for August 25, 2005. The hearing commenced on September 8th, 2005 at 11:00am.

APPEARANCES

Agency representative
Attorney for Grievant
Four witnesses for Grievant
Grievant

ISSUES

Did Grievant violate a written standard of conduct, that being Post Order 19? If so, was it sufficient grounds for a Group II disciplinary action? Should the disciplinary action be dismissed because Grievant had no control over the actions of fellow workers? Should the disciplinary action be dismissed because Grievant's failure to follow Post Order

¹ Agency Ex.2b second step finding

19 was a common practice among other similarly situated officers? Should Grievant receive back pay and attorney's fees expended in his suit?

FACTS

In the early morning hours of April 24, 2005, an incarcerated inmate committed suicide while in a segregated cell.² Assigned to this inmate's pod were two Floor Officers and one Control Officer. Among other duties the Floor Officers were charged with checking on inmates every twenty-nine (29) minutes.³ The Control Officer had an overview of all cells. Among other duties, the Control Officer was charged with the locking and unlocking of doors, checking of equipment, noting emergency situations, noting whether or not floor officers were making regular rounds, and so forth.⁴ The Control Officer was of the same rank as the Floor Officers and had no authority to order Floor Officers to perform their duties. The Control Officer was charged with reporting to his supervisor any unusual activities in his area of watch.

It was established by the evidence that Floor Officers were not making twenty-nine (29) minute checks on the April 23rd/24th night shift. The Control Officer was aware of this.⁵ It was also noted by several called witnesses that many times, Floor Officers do not make the twenty-nine (29) minute shift rounds, and customarily, it was not reported by the Control Officer to the Supervisor.

² Agency Ex 4 stmt of Grievant 4-24-05

³ Agency Ex 4 "

⁴ Agency Ex 3 Post Order 19

⁵ Agency Ex 4 stmt of Grievant 4-26-05

Both Floor Officers and the Control Officer were initially dismissed from their positions. Upon the Agency reviewing video tape evidence that failure to make required rounds was a common occurrence among all Officers both day and evening shifts, the Agency mitigated the disciplinary action at least for the Control Officer to a Group II Notice with 10 days suspended from the job without pay.⁶

APPLICABLE LAW AND OPINION

Pursuant to §2.2-1201 of the Code of Virginia, 1950, as amended, the Agency is to promote written Standards of Conduct in keeping with Standards set by the Department of Human Resource Management and advise employees of their policy. 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 conduct, to distinguish between less serious and more serious actions of misconduct, and to provide appropriate corrective action.

The Agency in this case relied on Post Order 19. Post Orders are directives to employees which are reviewed by employees and their supervisor prior to shift work. They are signed by the employee to indicate they have been read. The Agency relied on the directives of Post Order 19⁷, acknowledged and signed by Grievant,⁸ as its basis for the disciplinary action. Additionally, Grievant signed a statement made shortly after April 23rd

⁶ Agency Ex 2b

⁷ Agency Ex 3

⁸ Agency Ex 5 [pg 2]

indicating that he noticed an "unusual" occurrence.⁹ These facts were the basis for the Agency's Group II Action.

The Department of Corrections procedural manual chapter 5 5-10.16(b)¹⁰ states in part that a Group II offense is:

"Group II offenses include, but are not limited to:

1.failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy;"¹¹

Violation of Post Order 19, regardless of how many other times it had been disregarded, did not diminish the fact that Grievant did violate the rule. The fact that Grievant did or did not have the authority to directly order performance from his co-workers is irrelevant to the violation. The Control Officer's duty was to report to his Supervisor, which the he did not do. Grievant also avers that the word "unusual" was too vague to give him direction, yet "unusual" was the very word he used in his statement to describe the failure to make twenty-nine (29) minute rounds. It is understandable that Grievant feels singled out for punishment. It is also true that, but for the suicide on the particular shift of April 23/24, the infraction may have gone unnoticed. It is; however, true that Grievant did not follow the direction of Post Order 19 and this lack of compliance is the reason he was disciplined. By rule 5.8(2) issued by the Department of Employment Dispute Resolution, *"...in disciplinary actions and dismissals for unsatisfactory performance, the Agency must present its evidence first and must show by a*

⁹ Agency Ex 4

¹⁰ Grievant Ex A Dep't of Corrections procedural manual, Chapter 5

preponderance of the evidence that the action was warranted and appropriate under the circumstance;" All evidence pointed to the fact that the Control Officer did not make report of unusual events to his Supervisor.

Rule 5.9 in part states, *"In hearings contesting formal discipline, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the agency's discipline exceeds the limits of reasonableness."* There is no basis for changing the Agency's discipline of Grievant.

DECISION

Grievant did violate Post Order 19 which was sufficient grounds for a Group II disciplinary action. Grievant's lack of control over the actions of Floor Officers is irrelevant to Grievant's failure to report to his superior. The fact that many others were violating the Post Order would be relevant to mitigation only and the disciplinary action was already mitigated by this fact. Back pay and attorney's fees are not awarded. The Group II Notice by the Agency with the mitigated discipline issued as a second level decision on May 13, 2005 is affirmed.

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 was 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 Street, 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.¹² 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.¹³

[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.

Judicial Review of Final Hearing Decision

Within thirty (30) 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.

Sondra K. Alan, Hearing Officer

¹² 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).

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.