

Issue: Group II Written Notice with suspension (behavior which undermined the agency's effectiveness); Hearing Date: 10/24/05; Decision Issued: 10/25/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8188



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8188

Hearing Date: October 24, 2005
Decision Issued: October 25, 2005

APPEARANCES

Grievant
Five witnesses for Grievant
Chief of Security
Advocate for Agency

ISSUE

Was 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

Grievant timely filed a grievance of a disciplinary action for behavior that undermined the effectiveness of the agency's activities.¹ As part of the disciplinary action, grievant was suspended from work for two workdays. When the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.² The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for five years as a corrections officer.

Departmental operating procedure provides that a "master pass list" must be issued daily and is the authority for offenders to proceed to designated areas at specific times on specific days. Employees whose posts specifically include traffic control and/or movement control responsibilities shall examine inmate passes and the daily master pass list to verify proper authorization of all inmate movement.³ Among the specific duties of a dormitory officer are requirements to maintain post log books and make entries of routine events and, to strictly control inmate movements by using passes and master pass lists.⁴ Movement of inmates must be restricted unless the inmate is summoned by staff (trip pass used), movement is scheduled (master pass list used), or there is an emergency.⁵ If an officer responsible for inmate movement does not have a master pass list, she is responsible to contact the watch commander to obtain the list. If there is no list, then the activity is not to take place.

On June 10, 2005, grievant was assigned as a dormitory landing control officer from 6:00 p.m. to 6:00 a.m. Among her responsibilities were those listed in the preceding paragraph. A Bible study class was scheduled in the basement of her dormitory during the evening of June 10th. A master pass list had been prepared, designating those inmates who had been approved for the class.⁶ The watch commander announced over the public address system that the Bible study class was at 6:30 p.m. In addition, the basement control officer announced on the public address system that the basement was open for showers and for indoor recreation in the exercise room. Grievant did not have a copy of the master pass list and she allowed entry to the basement of all inmates who came to the landing. A group⁷ of inmates who entered the basement, ostensibly for the class or for showers or recreation, went to a small room and had a birthday party for one of the inmates. Grievant did not document in the logbook that the basement had been opened for showers or recreation.⁸

¹ Exhibit 1. Group II Written Notice, issued July 25, 2005.

² Exhibit 1. Grievance Form A, filed August 22, 2005.

³ Exhibit 4. Operating Procedure 410.3, *Inmate Movement Control*, July 1, 2004.

⁴ Exhibit 3. Security Post Order #3 & #4, *A/B Dormitory Officer*.

⁵ *Ibid.*

⁶ Exhibit 1. Master pass list, June 10-11, 2005.

⁷ The group was variously estimated to be 8-15 inmates.

⁸ Exhibit 6. Logbook for June 10, 2005.

Birthday parties for inmates are not an approved activity at any time, and no such party had been approved for the evening of June 10, 2005. Showers are an approved routine event provided they are logged in the logbook. If the opening and closing of showers are not logged, then showers are considered not to have been approved.

Grievant asserts that the watch commander had repeatedly instructed officers that anyone wanting to attend religious functions could do so, even in the absence of a master pass list. This is corroborated by a July 25, 2005 logbook entry in which grievant noted the absence of a master pass list on that date; the same watch commander verbally instructed grievant that anyone could go to the religious function even if the grievant did not have a list, and even if they were not on the list. Moreover, by his own entry in a logbook, it is clear that the same watch commander was still not enforcing use of the master pass list.⁹

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 circumstances. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁰

⁹ Exhibit 8. Watch commander's logbook, July 25, 2005.

¹⁰ § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.

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. 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 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.¹¹ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses Group III offenses, which are defined identically to the DHRM Standards of Conduct.¹²

The agency has shown, and it is undisputed, that grievant did not record the opening of the basement for showers and recreation. It is also undisputed that grievant did not use the master pass list to monitor inmate movement.

The agency asserts that grievant's actions constituted a Group III offense, but found grievant's otherwise good work performance to be a mitigating circumstance and reduced the level of discipline to a Group II Written Notice. Grievant's offense is not listed among the examples of a Group III offense found in Procedure 5-10. The definition of a Group III offense is an offense that is so serious that a first occurrence should normally warrant removal from state employment. The agency has failed to show that grievant's offense rose to such a serious level. At most, grievant's offense might be categorized as a failure to comply with applicable established written policy – a Group II offense.

However, in this case, there are more mitigating circumstances than just grievant's otherwise good work performance.¹³ First, the lieutenant watch commander verbally instructed grievant to allow inmates into the basement even though she did not have the master pass list. While grievant should have obtained a copy of the master pass list to determine who was authorized, the watch commander's verbal instruction effectively countermanded the written policy. Second, grievant was unaware that some inmates were going into the basement to have a birthday party for a fellow inmate; it was the basement corrections officer, not grievant, who permitted that unauthorized function to occur. The lieutenant's knowing order to not use the master pass list was an intentional and willful countermanding of written policy. The basement officer knew, or should have known, that a birthday party was taking place; her decision

¹¹ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹² Exhibit 5. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

¹³ Cited by the agency as a mitigating circumstance on the Written Notice.

not to prevent it was also a willful and knowing violation of policy. Both the lieutenant's violation and the basement officer's violations were more serious than grievant's offense and therefore grievant's level of discipline should be less than the discipline of the other two.

Considering all of these mitigating circumstances, if the actions of the lieutenant and basement officer each warranted a Group II Written Notice, grievant's less serious offense is much more akin to unsatisfactory work performance and warrants a Group I Written Notice.

DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice issued on July 25, 2005 is hereby REDUCED to a Group I Written Notice. The agency shall reimburse grievant for the 24 hours of suspension.

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.¹⁴ 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.¹⁵

[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

¹⁴ 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).

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.