

Issue: Group II Written Notice with suspension (failure to follow supervisory instructions, perform assigned work or otherwise comply with applicable established written policy); Hearing Date: 02/07/06; Decision Issued: 02/09/06; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 8248; Outcome: Agency upheld in full; **Administrative Review: EDR Ruling Request received 02/24/06; EDR Ruling No. 2006-1290 issued 04/25/06; Outcome: Remanded to Hearing Officer; Reconsideration Decision issued 05/01/06; Outcome: Original decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8248

Hearing Date: February 7, 2006
Decision Issued February 9, 2006

APPEARANCES

Grievant
Warden
Advocate for Agency
Seven (7) Witnesses for Agency

ISSUES

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 failure to follow a supervisor's instruction, perform assigned work or otherwise comply with applicable established written policy.¹ As part of the disciplinary action, Grievant was suspended from work for thirty-two (32) hours. When the parties failed to resolve the grievance at the second 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 approximately eleven (11) years as a corrections officer.

The facility where the Grievant worked periodically provided visitation between the inmates and their family or friends. At the end of that visitation, the visitors were escorted from

¹ Agency Exhibit 1 Tab 1 - Group II Written Notice issued September 8, 2005

² Agency Exhibit 1 Tab 2- Grievance Form A filed December 14, 2005

the common visiting room. Immediately prior to the visitors leaving, the inmates were placed in two (2) shake-down rooms in order to separate visitors and inmates. As soon as the visitors had left, the inmates were returned to the visitors room and then a procedure commenced whereby each inmate was strip searched in the shake-down area prior to allowing him to return to the general population. A diagram of the visiting room and the shake-down area is found in Grievant's Exhibit 1.³ This diagram is not to scale but provides a general conceptual idea of the area that is in question.

On August 7, 2005, the Grievant was one (1) of the officers conducting the appropriate strip searches of the inmates. During that process, the Grievant alleges that an inmate became loud and angry and stated to the Grievant that he should not bump the inmate again and he should not hit the inmate with the door.⁴ At this time, the Grievant brought the inmate to the Sergeant who was in charge of this procedure and the inmate told the Sergeant that he had not been bumped with the door. The Sergeant directed the Grievant to return and continue shaking down the inmates. The Grievant determined that there might be a possibility that either he or the inmate could be injured in an altercation due to the aggressive condition that he thought existed between himself and the inmate. The Grievant explained these concerns to the Sergeant and the Sergeant explained that he would personally take control of the inmate in question and the Grievant was again instructed to return to the shake-down area and commence the shake-down with the remaining inmates. The Grievant then asked to speak to the watch commander and telephoned the watch commander from the visitation room. The watch commander asked to speak to the Sergeant who told the watch commander that things were under control and the Sergeant instructed another correctional officer to replace the Grievant in the shake-down area.

On September 8, 2005, the Grievant was issued the Group II Written Notice and suspended for thirty-two (32) hours without pay. The Grievant alleges that he complied with his post orders in that he felt that he was unable to follow the order of the Sergeant and therefore he reported this to the supervisor who was next in the chain of command. Further, he did not follow the order of the Sergeant because the post orders specifically stated that you should not obey instructions issued by someone where following the order would cause a breach in security or serious injury to yourself or others.⁵

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 with 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.

³ Grievant's Exhibit Grievant's Diagram of Visitation room

⁴ Agency Exhibit 1 Tab 2 - Grievance Form A

⁵ Agency Exhibit 1 Tab 2 - Security Post Orders General Job Duties #5

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 his evidence first and prove his claim by a preponderance of the evidence.⁶

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.2 of Policy No. 1.60 provides that Group II offenses are more severe in nature than Group I offenses and are such that an accumulation of two (2) Group II offenses normally would warrant removal. 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 5-10.16 of the DOC Standards of Conduct addresses Group II offenses, which are defined identically to the DHRM Standards of Conduct.⁷

The Grievant asserts that his Post Orders allowed him to disobey the order given to him multiple times by his commanding Sergeant. The totality of the evidence makes it very clear that, if there was a problem with an inmate on that day, the commanding Sergeant clearly stated to the Grievant that he would take charge of that inmate and that the Grievant should return to his post and continue with the shake-down process. At all times, the Grievant refused to do so. The Agency has clearly shown that the Grievant refused to follow his supervisors instructions and to

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

⁷Procedure Number 5-10, *Standards of Conduct*, June 15, 2002

perform the assigned work that had been given to him and his failure to comply with written policy. While the Post Orders clearly gave the Grievant the right to question the order by contacting his next higher supervisor, those orders did not allow him to arbitrarily refuse to follow subsequent orders. The Hearing Officer finds it highly unusual that the Grievant never pursued any institutional action against the inmate who allegedly caused the Grievant to fear for his safety.

DECISION

The disciplinary action of the Agency is affirmed by the Hearing Officer.

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 Resource Management
101 N. 14th Street, 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
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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.⁸ 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.⁹

[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]

William S. Davidson
Hearing Officer

⁸An 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).

⁹Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling number 2006-1290

May 1, 2006

RULING

The Hearing Officer, pursuant to a ruling by Claudia T. Farr, Director of the Department of Employee Dispute Resolution, has been ordered to, “clarify his written decision to identify any mitigating (and, if appropriate, aggravating) circumstances and address whether those circumstances warrant mitigation of the disciplinary action in this case.”

The Hearing Officer finds that there were no mitigating circumstances or aggravating circumstances in this matter. The Grievant alleges that “lack of notice” was a mitigating circumstance. The Grievant followed his post orders and contacted the next higher superior officer who then spoke with the Sergeant who had issued an order with which the Grievant disagreed. The Sergeant then told the Grievant that he did not have to deal with the issue that had caused him such concern and he refused that order. He then refused several subsequent orders. Clearly, “lack of notice” was not an issue.

Accordingly, the Hearing Officer finds that there were no mitigating or aggravating circumstances that needed to be considered in this hearing.

William S. Davidson
Hearing Officer