

Issue: Group II Written Notice with suspension (failure to perform assigned work and failure to comply with applicable established written policy); Hearing Date: 03/01/06; Decision Issued: 03/02/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8275; Outcome: Agency upheld in full



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8275

Hearing Date:	March 1, 2006
Decision Issued:	March 2, 2006

PROCEDURAL ISSUE

Grievant was under the mistaken impression that she had been suspended for five days. In fact, prior to the issuance of discipline the agency had placed grievant on three days of administrative leave during which time the matter was under investigation. Grievant was paid her regular salary during the three days of administrative leave. Therefore, grievant was on suspension without pay for only two days.

APPEARANCES

Grievant
Two advocates for Grievant
One witness for Grievant
Assistant Warden
Advocate for Agency
One witness for Agency

ISSUE

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Was there favoritism?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group II Written Notice for failing to report that an inmate was not complying with instructions, failing to notify her supervisor of the incident, failing to write up the inmate, and failing to order the inmate to return to his housing unit.¹ As part of the disciplinary action, grievant was suspended for two days. The grievance proceeded through the resolution steps; 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.³ Grievant has two active prior disciplinary actions, both Group II Written Notices.

Grievant is assigned as a floor patrol officer on the second floor of a housing unit. Floor patrol officers are responsible for complying with Security Post Order 19, which requires continuous custody and control of inmates. That order provides that grievant has the specific duties, *inter alia*, of observing and supervising all activity in her assigned area, and reporting any unusual incident to her supervisor or shift commander.⁴ One of the general post duties provides that every employee is responsible for security, custody and control of inmates. Some of these duties are also part of grievant's work description.⁵

On September 21, 2005, grievant had continuing difficulty with inmate F. In the morning, the inmate had asked for barber shears to cut his hair. After grievant advised him that he was not allowed to have shears, the inmate continued to argue with grievant. At about 11:30 a.m., there was a lockdown of all inmates for the midday population count. Inmate F initially refused to go to his cell and grievant had to call another corrections officer to assist her. In the afternoon at outdoor recreation time, inmate asked grievant for a basketball. She gave him the basketball and told him not to bounce the ball until he went outside the building. Despite grievant's instruction, the inmate bounced the ball in the hallway as he left the building. Grievant did not report any of these incidents to her supervisor or the watch commander and did not file written reports on the inmate. At her post grievant had both a radio and a telephone with which she could have reported any of these incidents.

¹ Agency Exhibit 1. Written Notice, issued September 29, 2005.

² Agency Exhibit 1. Grievance Form A, filed October 26, 2005.

³ Agency Exhibit 3. Employee Work Profile Work Description, effective October 25, 2005.

⁴ Agency Exhibit 2. Security Post Order 19, June 1, 2005.

⁵ Agency Exhibit 3. *Ibid.*

At 5:30 p.m., inmate F came to the control booth and asked for trash bags. Inmate F had been a designated houseman with responsibility for taking trash outside the building just before the end of day shift. On this occasion, grievant told inmate F that she had assigned another inmate to take out the trash. The inmate began arguing with grievant but eventually left the immediate area of the control booth. Grievant was then relieved by the oncoming night shift officers and told three of them not to allow the inmate to take trash out. She then started down the staircase to the first floor. The inmate then got the trash bags from an incoming officer and followed grievant down the stairs. Grievant told the inmate to go back to the second floor but he refused to do so. He approached grievant and was within inches of her face when another officer came out of the first floor control booth. The other officer observed that grievant did not tell the inmate to back off and she concluded that grievant was in shock. The other officer told inmate F to back off and he did so after a few moments. The inmate then dropped the trash bags and ran to the watch commander's office where he told the watch commander that grievant and others had been calling him a child molester.

Inmates are not permitted to come to the watch commander's office unless they have obtained permission from, or are directed by, a sergeant or above. Grievant has never written up the inmate for this incident or for any of the incidents that occurred on September 21, 2005.

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, such as claims of favoritism and intimidation, the employee must present her evidence first and must prove her 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 of Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.⁷ 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*.⁸ Failure to perform assigned work, and failure to comply with applicable established written policy are two examples of a Group II offense.

Disruptive and uncooperative inmates are considered a potential threat to the security and normal operation of the facility. If an inmate is allowed to be argumentative and noncompliant on multiple occasions, the inmate can become emboldened to be even more noncompliant in future situations. It is essential that corrections officers maintain continuous control of inmates at all times so that inmates are not misled into believing that they run the facility. Accordingly, noncompliant inmates should be promptly and decisively dealt with by asking for assistance from other officers, or by writing up the inmate's behavior so that it can be addressed by the proper person(s).

The agency has demonstrated, largely on the basis of grievant's own written statement, that inmate F was unruly, argumentative, and refused to comply with grievant's orders on September 21, 2005. In the first incident that day, the inmate was merely argumentative after being told he could not have barber shears. In the second incident, the inmate became noncompliant when told to go to his cell during a midday count lockdown. In the third incident, the inmate became more noncompliant when he deliberately disobeyed grievant's order not to bounce a basketball inside the building. In the fourth incident at the

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

⁷ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

⁸ Agency Exhibit 4. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

end of the day, the inmate was even more noncompliant when he contravened grievant's order not to take out the trash, and then to return to the second floor. Despite the inmate's escalation of his unruly and insubordinate behavior, grievant failed to take any corrective action with the inmate, failed to request assistance from other officers, failed to report the first three events to her supervisor, and failed to write up the inmate for disciplinary action. To date she has still not written up the inmate for his behavior. In the last incident, another officer who voluntarily came to grievant's assistance stated that grievant appeared to be in a state of shock.

Accordingly, the agency has shown by a preponderance of evidence that grievant failed to maintain continuous control of the disruptive inmate on multiple occasions on September 21, 2005. As a result, his behavior escalated to the point where, at the end of the day, he disobeyed one direct order to stay on the second floor and a second order to return to the second floor after disobeying the first order. By this time, grievant had completely lost control of the inmate and he ran to the watch commander's office. Grievant did not request help, appeared to be in shock, and another officer had to leave her post to come to grievant's assistance. Thus, grievant failed both to perform her assigned work and to comply with applicable established written policy – both of which are Group II offenses.

Grievant alleged during the hearing that her radio was not working on the day of this incident. However, prior to this hearing, grievant had never raised this allegation with her supervisor, the assistant warden, or in her written statement. If an inoperative radio had been a factor in grievant not reporting the inmate's unruly behavior, it is less than credible that she would not have raised this issue prior to this hearing. Moreover, even if grievant's radio was not working, she had access to a telephone, and to other corrections officers who had radios. She also had ample opportunity during the day to report the inmate's behavior to her supervisor.

Favoritism

Grievant alleged in her written grievance that she was subjected to favoritism. Favoritism can be defined as the unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees. Grievant asserted that in 2005, she felt that her supervisor and lieutenant were constantly assigning her to a less favorable post than other officers. Grievant took her complaint to a high-level management person in the central office. That person investigated her concern and took action to reassign certain employees, which resolved grievant's concern. Grievant stipulated that favoritism is no longer an issue in this grievance.

Intimidation

Grievant also alleged that the assistant warden had intimidated her. However, grievant failed to offer any testimony or evidence to support her allegation. There is more to proving such a claim than merely making an unsupported allegation.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice, or a Written Notice and up to 10 days of suspension. The normal disciplinary action for an accumulation of two Group II offenses is removal from employment. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has accumulated *three* Group II Written Notices.⁹ It is unusual that an employee who has accumulated this much discipline is retained in state employment. Although the agency did not list any mitigating circumstances on the Written Notice, the assistant warden stated she decided to reduce grievant's discipline because of her five years of service and, because she wanted to give her one more chance. Based on the totality of the evidence, the hearing officer has no basis to change the agency's application of the mitigation provision.

DECISION

The decision of the agency is affirmed.

The Group II Written Notice and two-day suspension issued on September 29, 2005 are hereby 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 contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

⁹ Grievant's previous two Written Notices were for behaviors that are, by policy, Group III offenses (sleeping on the job, and fraternization with an inmate) for which she could have been removed for employment on each occasion.

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.¹⁰ 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.¹¹

[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

¹⁰ 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).

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.