Issue: Group II Written Notice (failure to follow supervisory instructions, perform assigned work or otherwise comply with applicable established written policy); Hearing Date: 08/07/06; Decision Issued: 08/08/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8390; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8390

Hearing Date: August 7, 2006
Decision Issued: August 8, 2006

PROCEDURAL ISSUES

The agency failed to comply with the Hearing Officer's Order to produce the investigation report. The agency is hereby instructed that documents ordered by a hearing officer must be produced as ordered. If the agency believes production should be barred for some legal reason (such as relevancy, or privacy concerns), the agency representative should promptly contact the hearing officer and make known the agency's objection so that the hearing officer can consider the arguments and issue a ruling.

Grievant requested as part of his relief that there be no retaliation against him or any of the witnesses who testified on his behalf. The second-step respondent denied this relief. However, the third-step respondent assured grievant in writing that there will be no retaliation for anyone involved in this grievance procedure. State law prohibits retaliation against employees for using or participating in the grievance process. If any participant in this grievance process believes retaliation has occurred, that person may ask the Department of

Employment Dispute Resolution (EDR) to investigate and take action as provided in the grievance procedure.[1]

APPEARANCES

Grievant
Attorney for Grievant
Four witnesses for Grievant
Warden
Advocate for Agency
One witness for Agency

ISSUES

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?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group II Written Notice for failure to follow supervisory instructions, perform assigned work or otherwise comply with applicable established written policy.[2] 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.[3] The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for 13 years. He is currently a corrections lieutenant. Grievant is a cousin of the warden who disciplined him.

Agency policy requires employees to report serious or unusual incidents.[4] The general procedure specifies that incidents shall be reported to *appropriate* supervisory or administrative personnel.[5] An incident is defined as an actual or threatened event outside the ordinary routine that involves the life, health and safety of an offender. Employees are required to submit a written report to the Warden by the next day following an incident in which force is used to control offenders.[6] Grievant's position as an operations supervisor is regulated by a

[1] § 1.5, EDR *Grievance Procedure Manual*, Retaliation Investigation, effective August 30, 2004.
[2] Agency Exhibit 1. Group II Written Notice, issued April 22, 2006.
[3] Agency Exhibit 2. Grievance Form A, filed May 18, 2006.
[4] Agency Exhibit 5. Operating Procedure 038.1, *Reporting Serious or Unusual Incidents*, May 15, 2005.
[5] Section IV.A, *Id.*
[6] Section IV.E.3, *Id.*

facility post order which requires him to immediately report any unusual incident and complete a written incident report before the end of the shift.[7]

On April 7, 2006, a corrections officer reported an inmate for using vulgar language when he questioned her instruction to remove his shoes before going through a metal detector. She filed her written report with the watch commander; the report was subsequently destroyed. The watch commander (a captain) ordered both the inmate and the corrections officer to report to the watch office. Grievant and a sergeant were also present in the watch office. When the captain (Captain J) asked the corrections officer to describe the incident, the inmate interrupted her and the captain told him to shut up. When the inmate interrupted a second time, the captain grabbed the inmate by both collars, pushed him against a wall, and slapped him in the face two times. When the incident ended, the captain ordered the inmate back to his building. Shortly thereafter, the captain went next door to the assistant warden's office. When the captain returned to the watch office, he told grievant that he had told the assistant warden what happened.

The assistant warden denied that the captain reported the incident to him. He asserts that he first learned about the incident the following day, April 8, 2006, when the evening shift captain reported that the inmate had filed a written complaint against Captain J. The assistant warden was unable to contact the warden that day because the warden was on vacation. On April 9, 2006, the warden learned about the incident and spoke with all employees who had been present during the incident. When the warden called grievant, grievant said that he had told his wife that he should have reported the incident himself. Captain J denied that he ever put his hands on the inmate. Grievant, the sergeant, and the corrections officer all corroborated the inmate's charge that the captain had slapped him. After the warden spoke with Captain J, Captain J called grievant and asked him to change his account of the incident to reflect that the captain did not hit the inmate; grievant refused to change his account of the incident. Captain J was subsequently disciplined and removed from state employment. The warden counseled the corrections officer about her failure to report the incident.[8]

Over a significant period of time at different muster meetings, Captain J had made various comments about using force on inmates. The comments Captain J made included, "I have no problem pecking inmates on the head" if they disrespect staff, "I can do what I want because I'm the watch commander," and, "If you don't like the way I do things, don't come to the watch office." Staff understood these comments to mean that the captain would hit or strike inmates.

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[7] Agency Exhibit 4. Specific Post Duty 13, Security Post Order 3, *Operations Supervisor*, April 11, 2005.

[8] Any informal discussion between an employee and a supervisor regarding problems with the employee's performance or behavior is categorized as Counseling pursuant to Section III of Standards of Conduct Operating Procedure 135.1.

The assistant warden was present at most of these meetings and never corrected or contradicted Captain J's statements. The assistant warden acknowledged that he has been a close and loyal friend of Captain J for 25 years.

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 his evidence first and must prove his claim by a preponderance of the evidence.[9]

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

[9] § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.

normally should warrant removal from employment.[10] 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 XI of the DOC *Standards of Conduct* addresses Group II offenses, which are defined identically to the DHRM *Standards of Conduct*.[11] Failure to follow supervisory instructions, perform assigned work or otherwise comply with established written policy is a Group II offense.

Grievant knows that incidents are normally to be reported to the supervisor. Grievant contends that he reported this incident to his supervisor – Captain J. However, in this case, Captain J was the offender who had assaulted an inmate. Grievant knew, or reasonably should have known, that in such a circumstance, it would be pointless to report the offense to the very person who committed the offense. One of grievant's own witnesses testified that part of basic academy training instructs new employees to go to the next higher level if the person to be reported is your own supervisor. Grievant reasonably should have known that he had a duty to report this incident to a person above the captain in the chain of command (major, assistant warden, or warden). In fact, grievant admitted that he knew this when he spoke with the warden on April 9, 2006 and admitted, "I told my wife I should have reported this incident." Grievant's admission to the warden was a *mea culpa* sufficient to conclude that grievant knew that he had not complied with policy.

Accordingly, it is undisputed that grievant did not report his supervisor's assault of the inmate to anyone above his supervisor. He acknowledged the incident only when the warden called him two days later to investigate the inmate's written complaint. Grievant has not shown or even asserted that he had any intention of reporting this serious incident. In view of grievant's position as a lieutenant supervising some 80 corrections officers, he had a duty and obligation to set a good example by following procedure and policy. The agency would be derelict in its duty if it failed to take appropriate corrective action to assure that grievant will behave differently in any future similar situation.

Grievant contends that he did not have to submit an incident report because Specific Duty 20 of Post Order 3 states, "Investigate and submit incident reports when directed to do so by the Watch Commander." Grievant assumes that he did not have to report this incident because the offender (Watch Commander) did not direct him to do so; this interpretation of the rule is erroneous. Each specific duty in the Post Order stands alone. The instruction clearly refers to a situation where the Watch Commander tells an employee to submit a report because that employee may have relevant information bearing on an incident. It does <u>not</u> mean that an employee cannot submit a report unless directed to do so. In fact, Specific Duty 13 unambiguously directs the employee to report unusual incidents *immediately*. Any employee who witnesses an

[10] Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[11] Agency Exhibit 6. Operating Procedure 135.1*, Standards of Conduct,* September 1, 2005.

unusual event is required to report it immediately without waiting for direction from above.

Grievant argued that the assistant warden violated policy by not reporting the incident via e-mail and instead telephoned the regional director. Grievant relies on operating procedure 038.1 which states that an inmate allegation of staff assault is an incident not requiring telephone solicitation. Grievant's interpretation of procedure 038.1 is incorrect. Merely because a particular incident does not *require* telephone notification does not mean that telephone notification is prohibited. Telephone notification is permissible but not *required*. In any case, the assistant warden learned of the incident on Saturday evening when the warden was on vacation and the regional director was at home. The assistant warden telephoned the regional director at home because it was the most expeditious means of notification; an e-mail to the regional director would not have been seen until Monday at the earliest. Therefore, the assistant director's decision to use telephone rather than e-mail was appropriate and reasonable under the circumstances. In any case, this issue is a red herring because it has no bearing on grievant's failure to report the incident.

Grievant also argues that the assistant warden should have conducted a preliminary investigation before reporting the incident. All of the employees who witnessed the incident were not working on Saturday because their shift was on a three-day break. Accordingly, the assistant warden could not have conducted an investigation until these employees returned to work the following week.

Grievant contends that the warden violated policy by disciplining grievant before Internal Affairs (IA) had completed an investigation of the matter. IA conducted an investigation that focused primarily on Captain J's assault of the inmate. However, grievant failed to proffer any written policy or other evidence that requires a warden to issue discipline only after completion of the IA investigation. The warden maintains that he had sufficient evidence from his own investigation to conclude that grievant had failed to report the incident.

Grievant correctly observes that four witnesses testified under oath that the assistant warden had repeatedly heard Captain J make statements to the effect that he would strike inmates who disrespected staff. Their sworn testimony outweighs the assistant warden's denial. While the assistant warden's denial appears to be untruthful, he is not the subject of this grievance. Moreover, his denial does not change the fact that grievant failed to report the incident to an appropriate management person.

Grievant objected to the fact that the policy he violated was not noted on the Written Notice. There is no requirement to list a specific policy on a written notice; a brief description of the offense and explanation of the evidence is all that is required. Similarly, there is no requirement to include extensive details of the offense

Finally, grievant also correctly observes that the agency failed to comply with the Hearing Officer's Order to produce the investigation report. Based on the entirety of the evidence produced during the hearing, there is no reason to conclude that the investigation would have resulted in a different outcome in this case. The evidence with respect to grievant's failure to report the evidence is clear. Grievant has not proffered any credible argument that the investigation report would overcome that fact.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice and up to 10 days suspension. The policy provides for 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 both long service and otherwise satisfactory work performance. The agency took these factors into consideration by not suspending grievant. In view of grievant's position as a lieutenant, he must be held to a higher standard than a relatively inexperienced corrections officer. Therefore, it is concluded that the agency's decision was within the limits of reasonableness.

DECISION

The decision of the agency is affirmed.

The Group II Written Notice issued on April 22, 2006 is 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.

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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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]

S/David J. Latham

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David J. Latham, Esq.
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.