

Issue: Group II Written Notice with suspension (failure to perform assigned work or follow established written policy); Hearing Date: 10/16/06; Decision Issued: 10/17/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8433; Outcome: Employee granted full relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8433

Hearing Date: October 16, 2006

Decision Issued: October 17, 2006

APPEARANCES

Grievant
Representative for Grievant
Four witnesses for Grievant
Director
Advocate 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 issued for failing to properly control the activity of two inmates who participated in sexual

activity with two employees.¹ As part of the disciplinary action, grievant was suspended for five 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 16 years. He is a correctional enterprises production supervisor.

Grievant is employed in a correctional center tailor shop that employs 60-65 inmates who make uniforms for corrections officers and inmate clothing. His role is to train and supervise inmates in production and safety techniques for manufacture of quality clothing products within required schedules and in accordance with guidelines and procedures. His core responsibilities include: implementing quality control procedures, supervision of inmates, managing inmate evaluations and disciplinary actions, and maintaining safety within the shop.³ There are two other production supervisors (both female) who, oversee sewing operations and also supervise inmates. One corrections officer is assigned to the building; he primarily stays at a desk outside the shop manager's office but does make rounds through the shop several times per day.

The tailor shop is approximately 15,000+ square feet.⁴ A seven-foot high cinder block wall runs down the middle of the building with three openings as shown on Grievant Exhibit 2. The manager's office is located in the upper right corner of the diagram; the supply room area is located at the diagonally opposite corner of the building in the lower left corner of the diagram. Grievant's desk is approximately 63 feet from the entrance to the supply room. The storage cage has cinder block walls on three sides and a wire mesh fence on the fourth side. Only employees have keys to the storage cage gate. The tailor shop has long-standing security concerns. Visibility into the storage cage was very limited by poor lighting and shelves/boxes blocking the view from outside the cage. The wall down the middle of the floor severely restricts viewing large portions of the shop. A May 2005 survey of the facility by the manager of another tailor shop resulted in recommendations that the wall be reduced in height and that mirrors be installed at several blind and hidden spots.⁵ Subsequently, some mirrors were installed but the wall was not reduced in height.

On June 20, 2006, the chief of security received an anonymous note alleging that the two female production supervisors were engaging in sexual activity with two inmates (at separate times) in a storage area of the shop.⁶ The Inspector General assigned a special agent to investigate. The special agent

¹ Agency Exhibit 1. Group II Written Notice, issued June 30, 2006.

² Agency Exhibit 1. Grievance Form A, filed July 24, 2006.

³ Agency Exhibit 3. Grievant's Employee Work Profile (EWP) Work Description, November 2004.

⁴ Grievant Exhibit 2. This diagram of the tailor shop with outside dimensions of 216' x 71' was submitted by grievant and admitted as evidence without agency objection.

⁵ Grievant Exhibit 1. Memorandum from a shop manager to VCE Director, May 26, 2005.

⁶ Agency Exhibit 3. Anonymous note. [NOTE: Although the investigation report states that the note was received on June 20, the note bears a date stamp of June 13.]

installed a motion-activated video surveillance camera in the storage area on June 21, 2006. He subsequently recovered the equipment and found videotape of an inmate and a female production supervisor engaging in sexual activity. He interviewed all employees of the tailor shop, as well as the two inmates. The two female production supervisors and two inmates admitted that they had engaged in various consensual sexual acts since at least April 2006.⁷ One of the two female supervisors resigned shortly after her offense was discovered; the other female supervisor was removed from employment. Both employees will be prosecuted for felony carnal knowledge of an inmate.⁸

In the past, the shop manager has terminated the employment of two other production supervisors; the first was removed eight years ago while the second was terminated in February 2006. Both were removed from employment because they had appeared overly friendly with inmates by talking to them for too long and in too friendly a manner and, for getting familiar with them by putting an arm around the inmates' shoulders. In March 2006, during a staff safety meeting with the three production supervisors, the shop manager advised them to be conscious of personal safety while in the supply room.⁹

Grievant's responsibilities often take him out of the cutting area. He operates a fork lift to load product on trucks weekly; this task takes two to three hours. His daily work frequently takes him to the sewing side of the tailor shop where he is unable to see the storage cage. At times, he conducts inmate interviews in the area near the shop manager's office during which time he is unable to see what is occurring in and around the storage cage. Other responsibilities such as safety meetings, going to the warehouse for supplies, and working in the tool cage also take him either out of the building or out of sight of the storage cage.

Grievant circulated throughout the tailor shop several times a day but did not observe anything other than too much conversation occurring between one female supervisor and an inmate. On one occasion when the manager was absent, grievant spoke to the supervisor, moved her to a different area of the shop, and later mentioned it to the shop manager. However, as the anonymous note states, those involved in the illicit activity kept watch for each other and were able to warn each other when grievant, the shop manager, or the security officer made rounds. Grievant did not supervise either of the two inmates. One of the two inmates was a lead man reporting to one of the female supervisors. It is normal that a supervisor will converse more about work with the lead man than with other inmates. Two security guards (different shifts) who frequently circulate

⁷ Agency Exhibit 2. Report of Investigation by special agent, August 14, 2006.

⁸ Va. Code § 18.2-64.2 provides that felony carnal knowledge of an inmate by an employee of a state correctional facility, *inter alia*, is a class 6 felony.

⁹ Agency Exhibit 5. Memorandum of meeting notes, March 27, 2006. [NOTE: Although the text of the note indicates that the meeting occurred in March 2005, unrebutted testimony at the hearing established that this was a typographical error and that the meeting actually occurred on March 27, 2006.]

through the building during the day testified that they never observed any suspicious activity or liaisons between the supervisors and inmates.

Since this behavior was discovered, the agency has taken proactive steps to prevent a recurrence by removing unnecessary material from the storage cage, rearranging material to eliminate blind spots, adding more mirrors, and other security steps. Neither human resources nor the Department of Human Resource Management was consulted prior to issuance of the disciplinary action.

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.¹⁰

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

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

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.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 XI of the DOC *Standards of Conduct* addresses Group II offenses, which are defined identically to the DHRM *Standards of Conduct*.¹² Failure to perform assigned work and failure to comply with applicable established written policy are examples of a Group II offense.

The agency contends that grievant was “aware of the activity to some extent and failed to bring the suspected activity to the attention of a responsible person.” However, the agency failed to prove this contention. Grievant did, in fact, mention to the shop manager on one occasion that he had reassigned one of the female supervisors to a different area because she was talking too much with her lead inmate. While the illicit sexual conduct of the two supervisors was criminal and reprehensible, grievant was not involved in such conduct. Moreover, the agency has not proven that he was aware of the activity. The agency’s allegation against grievant is that he was aware to “some extent” but the evidence fails to support the allegation.

The agency argues that grievant was too focused on production and therefore did not supervise inmates sufficiently well enough to have prevented the illicit activity. However, the preponderance of evidence established that the tailor shop was extremely busy, was expected to meet production deadlines, and was sometimes not given production orders until after the deadline had already passed. Thus, the evidence demonstrates that production was a high priority for grievant and the other employees.

The preponderance of evidence also indicates that the four participants in the illicit activity were not only participating consensually but were cooperating with each other in order to avoid detection. It also appears more likely than not that other inmates cooperated in alerting the participants when any employee or security officer appeared to be heading in the direction of the storage cage. Since grievant was often out of the area for legitimate business reasons, the participants had ample opportunity for quick dalliances in the storage cage. The security officers who frequently circulate through the tailor shop throughout the day are charged with maintaining security and their focus is to prevent illegal and inappropriate inmate behavior. However, both security officers testified that they never observed any illicit behavior in the storage cage and did not suspect that such activity was occurring.

¹¹ Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹² Agency Exhibit 4. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

The agency has acknowledged that additional security measures were needed in the tailor shop and that it should have implemented such measures before the illicit activity occurred. This is corroborated by the fact that the agency has already implemented, and is the process of implementing, many new security measures. The agency suggests that grievant failed to implement measures such as removing unnecessary material in the storage cage. However, there is no evidence that management directed him to do so. Moreover, grievant's work description neither holds him accountable for security measures nor mentions security as part of his work description. Grievant's work description requires him to supervise production and safety in the manufacture of textile goods. The Department of Corrections is responsible for the security of inmates. Granted, as an employee working within a correctional center, grievant should be more alert to security situations than if he were working in the private sector. However, he is neither a correctional officer nor a security expert.

In evaluating grievant's conduct, one must conclude that the agency has failed to show any deliberate or willful behavior that would constitute a Group II offense. Further, one must assure *consistent* application of discipline by examining the nature of his conduct vis-à-vis the examples of offenses in the Standards of Conduct. Group II offenses involve deliberate and willful acts. The agency has not shown that grievant's conduct was deliberately or willfully in disregard of his responsibilities. At most, grievant should be counseled to be more alert to potential inappropriate behavior and to report such activity to the manager. If the behavior continues, he should report it to DOC security officers.

DECISION

The decision of the agency is reversed.

The Group II Written Notice is hereby RESCINDED. The agency shall reimburse grievant for the five days of suspension.

Grievant should be counseled, in writing, regarding the need to promptly report any suspicious activity involving inmates and or staff.

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.¹³ 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.¹⁴ 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

¹³ 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).

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer