Issue: Group III Written Notice with suspension and demotion (gross negligence in performance of duties); Hearing Date: 10/04/06; Decision Issued: 10/13/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8434; Outcome: Employee granted partial relief.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8434

Hearing Date: October 4, 2006
Decision Issued: October 13, 2006

APPEARANCES

Grievant
Attorney for Grievant
Seven witnesses for Grievant
Director
Advocate for Agency
Two witnesses 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 III Written Notice issued for lack of attention to supervision because two employees have been charged with

committing felony offenses at work.[1] As part of the disciplinary action, grievant was suspended for ten days and demoted with a reduction in salary of ten percent. 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 20 years. She was a correctional enterprises supervisor at the time of the incident that precipitated discipline. Grievant managed a correctional center tailor shop that employs 60-65 inmates who make uniforms for corrections officers and inmate clothing. Her role is total management of the administrative and operational aspects of the tailoring and manufacturing services. Her core responsibilities include: directing operations, compliance with governmental requirements; maintaining productivity and customer satisfaction; interaction with customers, management and vendors; budget compliance; overseeing equipment and facility maintenance; and records maintenance.[3] Grievant supervises three production supervisors (one male and two female) who, in turn, supervise the inmates. There is also an office assistant whose time is divided between the tailor shop and another nearby correctional enterprises workshop. One corrections officer is assigned to the building. He primarily stays at a desk outside grievant's office but does make rounds through the shop about 12 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 Exhibit 4. The manager's (grievant) 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 office is elevated approximately two feet above the work floor (three steps lead up to her office door). The supply room has cinder block walls on three sides and a wire mesh fence on the fourth side. Only employees have keys to the storage room gate. The tailor shop has long-standing security concerns. The warden feels that more corrections officers should be assigned to the shop but is not able to do so under the current budget. Visibility into the storage room 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. Subsequently, some mirrors were installed but the wall was not reduced in height.

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[1] Agency Exhibit 1. Group III Written Notice, issued June 30, 2006.
[2] Agency Exhibit 1. Grievance Form A, filed July 15, 2006.
[3] Agency Exhibit 4. Grievant's Employee Work Profile (EWP) Work Description, November 1, 2005.
[4] Exhibit 6. This diagram of the tailor shop with outside dimensions of 216' x 71' was submitted by grievant and admitted as evidence without agency objection.

On June 20, 2006, the chief of security received an anonymous note alleging that two female employees in the tailor shop were engaging in sexual activity with two inmates (at separate times) in a storage area of the shop.[5] The note was given to the Inspector General who assigned a special agent to investigate. The special agent 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 then interviewed all employees of the tailor shop, as well as two inmates. The two female production supervisors and two inmates all admitted that they had engaged in various sexual acts during the past few months.[6] 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.[7]

In the past, grievant has previously 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, grievant advised them to be conscious of personal safety while in the supply room.[8]

The investigator states that grievant told him she had counseled one of the female supervisors on two occasions about talking and spending too much time with one inmate. Grievant denied this during the hearing stating that she had only raised this subject once - during the staff meeting on March 27, 2006. Grievant acknowledged that she did not report her concerns to a corrections officer or to the Chief of Security. Instead she felt that she could handle this matter by herself. One corrections officer had reported to his sergeant that the two female supervisors spent too much time talking with the two inmates; however, the sergeant apparently took no further action on this report.

Grievant circulated throughout the tailor shop several times a day but did not observe anything other than too much conversation occurring between the female supervisors and the inmates. Whenever she was close enough to hear the conversations, they were discussing work issues. However, as the anonymous note states, those involved in the illicit activity kept watch for each other and were able to warn those in the storage area when grievant or the

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[5] 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.]

[6] Agency Exhibit 3. Report of Investigation by special agent, August 14, 2006.

[7] 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.

[8] Agency Exhibit 2. 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.]

security officer made rounds. One of the two inmates was a lead man whom the female supervisor supervised. It is normal that a supervisor will converse more about work with the lead man than with other inmates. Three different security guards (who work different shifts) who frequently circulate through the building during the day all testified that they never observed any suspicious activity or liaisons between the supervisors and inmates.

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 her evidence first and must prove her 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

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

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 III offenses include acts and behavior of such a serious nature that a first occurrence 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 XII of the DOC *Standards of Conduct* addresses Group III offenses, which are defined identically to the DHRM *Standards of Conduct*.[11] The offenses listed in the Standards of Conduct are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head undermines the effectiveness of the agency's activities or the employee's performance should be treated *consistent with* the provisions of the Standards of Conduct.[12]

The agency has shown, and grievant has admitted, that she did not report to any corrections staff her concern about the female supervisor talking too much with one inmate. The agency has not proven that grievant was aware of the sexual activity between two female production supervisors and two inmates.

The agency contends that grievant was "grossly negligent" in the performance of her duties and that such negligence is sufficient to warrant a Group III Written Notice. Virginia law recognizes three degrees of negligence, (1) ordinary or simple, (2) gross, and (3) willful, wanton and reckless. Ordinary or simple negligence is the failure to use "that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another."[13] Gross negligence is defined as "that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of another. It must be such a degree of negligence as would shock fair minded men although something less than willful recklessness."[14]

The evidence in this case is insufficient to demonstrate gross negligence. While the conduct of the two supervisors was criminal and reprehensible, grievant was not involved in such conduct. Moreover, the agency has not proven that she was even aware of the sexual activity. The agency's allegation against grievant is that she "should have been aware" of this conduct. It faults her for "lack of attention to supervision." Assuming that grievant did not devote sufficient attention to supervising the physical whereabouts of her employees, that degree of negligence is not shocking. Further, the evidence shows that grievant was very cognizant of the need to prevent fraternization between her staff and

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[10] Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[11] Agency Exhibit 5. Operating Procedure 135.1*, Standards of Conduct,* September 1, 2005.
[12] Agency Exhibit 5. Section IV.C, *Id.*
[13] *Griffin v. Shively*, 227 Va.317, 32, 315 S.E.2d p. 212-13 (1984).
[14] *Griffin*, 227 Va. at 321, 315 S.E.2d at 213, quoting *Ferguson v. Ferguson*, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971).

inmates. She had previously terminated the employment of two supervisors because they had been too friendly (talking too much and putting an arm around the shoulder) with inmates. Accordingly, if grievant had known that the much more serious offense of sexual activity was occurring, there is no doubt that grievant would have terminated the employment of the perpetrators.

In addition, grievant was aware that one of the supervisors was talking too much with an inmate and had counseled her about it. Her demonstrated willingness to terminate other employees for even the appearance of fraternization shows that she was not indifferent to this issue. It is apparent from grievant's EWP Work Description that she has significant responsibilities that keep her very busy. Grievant proffered a list of 24 specific duties that amplify the practical aspects of her regular responsibilities.[15] If grievant was properly fulfilling all of her duties and responsibilities (and the agency did not attempt to prove otherwise), it is impossible for her to "know the whereabouts of every staff member at all times." It is also impossible for her to be "moving around the floor almost all the time." Yet, these were the agency's expectations of grievant that were used to justify the disciplinary action. On the other hand, since the illicit activity had been occurring for several months, it appears that grievant could have become more proactive in acting on her suspicions about the increased conversation between one of her production supervisors and the inmate. On balance, therefore, it must be concluded that grievant's lack of attention to supervision was ordinary or simple negligence. Simple negligence in performing one's work amounts to inadequate or unsatisfactory job performance.

In evaluating the seriousness of grievant's offense, one must assure *consistent* application of discipline by examining the nature of her offense vis-à-vis the examples of offenses in the Standards of Conduct. Virtually all the examples of Group III offenses involve acts and behaviors that are deliberate, willful, criminal, grossly negligent, insubordinate, or some combination thereof. Group II offenses also involve deliberate and willful acts but of a less serious nature than Group III. The agency has not shown that grievant's failure to be more attentive was criminal, grossly negligent, insubordinate, deliberate or willful. Accordingly this analysis also leads to the conclusion that grievant's simple negligence was unsatisfactory job performance – a Group I offense.

Mitigation

The normal disciplinary action for a Group I offense is a Written Notice. 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. Counterbalancing these mitigating factors are the serious consequences that flowed from grievant's failure to supervise more effectively.

[15] Agency Exhibit 2. Two-page list of duties (originally grievant's attachment B of her grievance).

Therefore, it is concluded that a Group I Written Notice is within the limits of reasonableness.

DECISION

The decision of the agency is modified.

The Group III Written Notice is hereby REDUCED to a Group I Written Notice for unsatisfactory job performance.

The agency shall reinstate grievant to her former position, restore her salary to its predisciplinary level retroactive to July 10, 2006, and reimburse her for the 10 days 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 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.[16] 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.[17] 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

[16] 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).

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