

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 12/20/06; Decision Issued: 12/21/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8471; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8471

Hearing Date: December 20, 2006
Decision Issued: December 21, 2006

APPEARANCES

Grievant
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?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group I Written Notice for unsatisfactory job performance.¹ As part of the disciplinary action, grievant was

¹ Agency Exhibit 1. Group I Written Notice, issued August 2, 2006.

removed from his assignment to the strike force. 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 17 years. He is currently a corrections sergeant.³

Agency policy provides that maintaining an accurate count of all offenders assigned to a facility is a basic and essential element of good facility operations.⁴ Agency operating procedure details the method for counting inmates.⁵ One correctional officer (lead officer) moves down the cellblock and counts the number of inmates in each cell. A second correctional officer (the verifying officer) follows the first officer at a distance of no less than four cells from the first officer and makes an independent count of inmates. After each section is counted, the two officers stop and compare their counts to determine if the totals agree. Grievant was trained on the count procedures soon after being hired.⁶ Grievant has previously been disciplined for unsatisfactory job performance when he miscounted inmates.⁷ Grievant has been counseled on other occasions for failure to follow various established written procedures.⁸

On July 22, 2006, grievant was performing the verifying officer function during the midday count, which began at 11:30 a.m. After the lead officer and grievant finished their independent count of inmates in the 300 pod, both agreed that 82 was the total number of inmates in the pod. Grievant called in this count to the building supervisor who told grievant that his count was one person too high. Six minutes later, grievant called back and stated that his count of 82 was correct.⁹ Grievant did not go back and conduct a physical recount of the section; he also did not review the accountability sheet in the control room. The count figure of 82 was called in to the facility Control supervisor. Since the count for the facility showed one person too many, the Control supervisor called a recount. When grievant and the other officer recounted inmates in the 300 pod, they discovered that they had both counted one inmate too many in cell 332.¹⁰ The count finally cleared at 12:38 p.m.

Two correctional officers (the lead officer and a control room officer) were counseled as a result of this incident because they did not properly check the accountability sheet. Because grievant is a supervisor who is responsible to assure accuracy of the counts in his area of supervision, the agency holds him to a higher standard than corrections officers. Accordingly, he was given a Group I

² Agency Exhibit 1. Grievance Form A, filed August 29, 2006.

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

⁴ Agency Exhibit 4. Directive 410, *Facility Counts and Movement Control*, May 15, 2004.

⁵ Agency Exhibit 4. Operating Procedure 410.2, *Count Procedures*, June 15, 2004.

⁶ Agency Exhibit 5. *Correctional Officer Training Report*, June 25, 1990.

⁷ Agency Exhibit 6. Group I Written Notice, June 24, 1996.

⁸ Agency Exhibit 1. Section IV, Group III Written Notice, August 2, 2006.

⁹ Agency Exhibit 2. Building supervisor's written statement, July 22, 2006.

¹⁰ Agency Exhibit 2. E-mail from grievant to supervisor, July 22, 2006.

Written Notice. During the past year, three other supervisors who miscounted inmates received Group I Written Notices.

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.¹¹

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 I offenses are the least severe.¹² 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.

¹¹ § 5.8, *EDR Grievance Procedure Manual*, effective August 30, 2004.

¹² Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Section X of the DOC *Standards of Conduct* addresses Group I offenses, which are defined identically to the DHRM *Standards of Conduct*.¹³ Unsatisfactory job performance is a Group I offense.

The facts in this case are undisputed. Grievant admits that he counted two inmates in cell 332 when, in fact, there was only one inmate in the cell during the midday count. Grievant also did not dispute that when the error first came to light, he did not go back and recount the inmates, nor did he properly review the accountability sheets. Instead, he maintained that his count was accurate and reported it to the building supervisor. It was not until the Control supervisor required a facility-wide recount that grievant actually recounted the inmates and recognized the error he had made in the initial count.

Mitigation

Grievant's complaint in this case is that he considers the disciplinary action to be unfair and inconsistent because two of his subordinates were only counseled and not disciplined. The facility's discipline of grievant was based on the fact that it has consistently followed a policy of holding supervisory employees (such as a sergeant) to a higher standard than it does corrections officers. It is reasonable to hold those in a position of higher authority and responsibility to a higher standard of expectations. Because supervisors must oversee subordinates and assure that they comply with policy, it is even more important that the supervisor set an appropriate example by complying with policy at all times. As corroboration of this policy, the agency noted that three other supervisors who miscounted inmates during the past year were all disciplined with Group I Written Notices.

The normal disciplinary action for a Group I offense is a Written Notice. 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 both long service and an otherwise satisfactory performance record. However, there are aggravating circumstances that counterbalance the mitigating circumstances. Grievant has been repeatedly counseled in the past about failing to comply with established written procedures. He has also received a previous disciplinary action for a miscount when he was a corrections officer. Now that he has subsequently been promoted to a supervisory position, the disciplinary action for the same offense should certainly not be any less than it was when he was a corrections officer. Based on the totality of the evidence, the hearing officer concludes that the agency properly applied the mitigation provision.

¹³ Agency Exhibit 7. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

DECISION

The decision of the agency is affirmed.

The Group I Written Notice issued on August 2, 2006 is hereby UPHELD.

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.¹⁴ 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.¹⁵ 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

David J. Latham, Esq.
Hearing Officer

¹⁴ 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).

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.