

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow written policy); Hearing Date: 01/10/07; Decision Issued: 01/11/07; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8496; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8496

Hearing Date: January 10, 2007
Decision Issued: January 11, 2007

PROCEDURAL ISSUE

Grievant requested as part of his relief that he be allowed to resign in lieu of being discharged. A hearing officer does not have authority to require the agency to offer resignation in lieu of discharge.¹ Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government." Grievant may ask the agency to consider his request, but the agency has the final authority to decide whether to grant the request.

APPEARANCES

Grievant
Warden
Advocate for Agency

¹ § 5.9(b)6 & 7. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

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 written policy regarding count procedures.² As part of the disciplinary action, grievant's employment with the state was terminated due to the accumulation of active disciplinary actions. 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 as a corrections officer for six years. Grievant has two prior active disciplinary actions – a Group III Written Notice for sleeping on post, and a Group II Written Notice for refusing to work overtime.⁴ Grievant did not file grievances with regard to either of the two prior disciplinary actions.

The post order applicable to a corrections officer in the dormitory requires that the officer ensure that inmate counts are accurate and in accordance with Operating Procedure 410.2.⁵ Operating Procedure 410.2 requires that if a disturbance occurs, the officer must start the count over rather than carry on from the point of distraction.⁶ Inmate counts are taken at least five times per day to assure accountability for all inmates. The counts are considered vital to fulfill the agency's mission of protecting public safety.

At about 8:40 p.m. on August 21, 2006, grievant and another corrections officer were conducting a count in a dormitory holding 98 inmates. Midway through the count, a physical altercation erupted between two inmates. Both officers responded immediately and separated the inmates. Grievant took one of the inmates outside the dormitory where other officers placed him in a holding area. Grievant returned to the dormitory and both officers resumed their count from the point where they had stopped at the time of the altercation. The officers compared their individual counts, reported the results to a supervisor, and the facility count cleared.

² Agency Exhibit 1. Group II Written Notice, issued October 6, 2006.

³ Agency Exhibit 2. Grievance Form A, filed September 15, 2006.

⁴ Agency Exhibit 6. Group III Written Notice, issued May 15, 2006, and Group II Written Notice, issued May 15, 2006.

⁵ Agency Exhibit 3. Post Order 316, January 15, 2005.

⁶ Agency Exhibit 4. Sections IV.A. 15 & 16, Operating Procedure 410.2, *Count Procedures*, March 31, 2006.

On August 22, 2006, the warden was informed of the incident when he arrived at the facility. In an effort to determine whether they had been interactions between the two inmates prior to their physical altercation, the warden reviewed the Rapid Eye video recording of the dormitory. While reviewing the tape, he noted that grievant and the other officer had not followed the proper count procedure of starting the count over after the disturbance was quelled. He assigned an assistant warden to conduct an investigation. During grievant's interview with the assistant warden, he admitted that when he resumed the count he was excited and not thinking clearly. He also admitted that he knew should have started the count over.⁷

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.⁸

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

⁷ Agency Exhibit 2. Memorandum from assistant warden to warden, September 19, 2006, and, grievant's written statements of August 22, 2006, September 5, 2006, and September 19, 2006.

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

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.⁹ 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*.¹⁰ Failure to follow written policy is a Group II offense.

The evidence in this case is undisputed. Grievant admits, and the Rapid Eye video recording corroborates, that he failed to follow proper count procedure on August 21, 1006. He knew that, after an inmate disturbance in which he had to leave the dormitory, grievant should have restarted the inmate count from the beginning to assure that inmates had not moved around during the time of the disturbance. Therefore, a preponderance of evidence establishes that grievant committed the Group II offense of failing to comply with established written policy.

Grievant suggested that the shift supervisor (a Lieutenant) should have been disciplined because he did not tell grievant to recount from the beginning. However, there is no evidence that the shift supervisor knew that grievant had not done a complete recount. While grievant notes that the lieutenant could have seen that from the video recording, there is no evidence that the lieutenant was looking at the video cameras at the time of the incident, or that he viewed the video recording immediately after the event. Absent such evidence, there is no proof that the lieutenant's actions warrant discipline.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice or, a Written Notice and up to 10 days suspension. The normal disciplinary action for the accumulation of two active Group II Written Notices and an active Group III Written Notice is removal from state employment. 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 long service. However, there are aggravating circumstances. Grievant has two prior active

⁹ Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁰ Agency Exhibit 7. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

disciplinary actions within the past year – both for the very severe offenses of sleeping on post and, refusing to work overtime. The totality of grievant's disciplinary actions substantially outweigh the mitigating effect of his length of service. 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 and removal from state employment effective October 6, 2006 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.
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.¹¹ 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.¹² 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

¹¹ 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).

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.