Issue: Group II Written Notice (failure to follow established written policy); Hearing Date: 01/25/07; Decision Issued: 01/29/07; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8498; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8498

Hearing Date: January 25, 2007
Decision Issued: January 29, 2007

APPEARANCES

Grievant
Warden
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 for failure to follow established written policy.[1] The grievance proceeded through the

[1] Agency Exhibit 1. Group II Written Notice, issued October 5, 2006.

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 as a corrections officer for nine years. Grievant has one prior active disciplinary action – a Group II Written Notice for coercing a supervisor into an act of physical violence or fighting.[3]

Agency policy prohibits improprieties or the appearance of improprieties, fraternization, or other nonprofessional association by and between employees and offenders. Associations between staff and offenders that may compromise security or undermine the employee's effectiveness to carry out his responsibilities may be treated as a Group III offense.[4]

From the beginning of his training as a correctional officer and periodically throughout his employment, grievant was trained that correctional officers must never accept anything from an inmate nor give anything to an inmate. Even small items of little value exchanged between inmates and correctional officers are perceived by inmates as giving them leverage over the correctional officers. The post order applicable to the inmate visiting room provides that inmates may not receive food from other inmates or take food out of the visiting room. Inmates and their families may purchase food from vending machines in the visiting room but must either consume the food while in the visiting room or leave it behind. Inmates are strip-searched after leaving the visiting room to assure that they have not obtained contraband from families or other inmates. After visitors and inmates have left the visiting room, correctional officers must collect any leftover food and place it in secure trash receptacles.

In June 2006, the Chief of Security received information from an inmate that a correctional officer had confiscated food from inmates during a weekend visitation and had kept it for her personal consumption. A special agent was assigned to investigate the allegation. During the initial investigation other correctional officers, including grievant, and another inmate were implicated as also having violated policy with regard to food left in the visiting room. The agent interviewed two inmates and 18 correctional officers and supervisors during the next two months. The investigation concluded that seven people, including grievant, had violated policy. All were given Group II Written Notices and one supervisor was demoted.

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[2] Agency Exhibit 1. Grievance Form A, filed October 19, 2006.

[3] Agency Exhibit 5. Group II Written Notice, issued June 25, 2004.

[4] Agency Exhibit 4. Section V.B, Agency Operating Procedure Number 130.1, *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*, February 15, 2004, states: "Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and inmates, probationers, or parolees or families of inmates, probationers, or parolees is prohibited. Associations between staff and inmates, probationers, or parolees which may compromise security or which undermine the employee's effective to carry out his responsibilities may be treated as a Group III offense under the Department's *Standards of Conduct and Performance*."

Grievant admitted during the investigation that one inmate collected extra food left by visitors which he laid out on one table. Grievant also admitted that on two occasions he had eaten some of the food collected by the inmate.[5] The investigation concluded that grievant had violated the fraternization provisions of Operating Procedure (OP) 130.1.[6]

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.[7]

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

[5] Agency Exhibit 2. Grievant's signed interview, August 1, 2006.
[6] Agency Exhibit 2. Report of Investigation, August 30, 2006.
[7] § 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 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.[8] 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*.[9] Failure to follow written policy is a Group II offense.

Grievant admitted in a signed statement that, on more than one occasion, he had eaten food collected from visitors by a specific inmate. During the hearing, grievant averred that he does not know that inmate and that he did not know the inmate left food on the table in the visiting room. Grievant explains the inconsistencies between his testimony and his signed statement by asserting that he did not read the statement when he signed it. Grievant's recanting of his signed statement is not credible for three reasons. First, the statement consists of only three sentences and would have taken only a few seconds to read at the time he signed it. Second, in addition to signing the statement, grievant affixed his initials in three other locations on the document to verify the date and time, and at the end of the three sentences to show that he had read them. Third, grievant signed the statement in reasonably close proximity to the event and *prior* to issuance of discipline. For these reasons, it is more likely than not that grievant's signed statement is a more accurate reflection of what occurred than his changed testimony more than half a year later and *after* discipline has been imposed. Accordingly, the agency has shown, by a preponderance of evidence, that grievant did eat food that a specific inmate had collected and left in the visiting room for him.

Eating food that has been collected and left by an inmate creates an appearance of impropriety because the inmate will perceive that the correctional officer has accepted a favor from the inmate. The officer, knowing that he is prohibited from accepting anything (either material items or favors) from an inmate, knows that he has accepted a favor from the inmate and is therefore, beholden to the inmate. While one instance of a small food item may appear insignificant, repetition of such behavior can lead to the correctional officer being asked by the inmate for a favor in return. At this point, the inmate has gained leverage over the officer and may convince the officer to bring him some form of contraband or violate policy in some other way. Such small favors can eventually compromise security. Pursuant to OP 130.1, this type of association between staff and offenders may be treated as a Group III offense.

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

[9] Agency Exhibit 4. Operating Procedure 135.1*, Standards of Conduct,* September 1, 2005.

In this case, the agency elected not to treat the offense as a Group III offense. Instead, in recognition of grievant's longevity with the agency and his otherwise good record (except for one prior disciplinary action), the agency opted to characterize the offense as a failure to comply with established written policy – a Group II offense. The agency also did not suspend grievant from work although it could have suspended him for up to ten days. Moreover, the agency did not remove grievant from state employment even though a second active disciplinary action normally results in termination of employment. Given the totality of the circumstances, grievant's discipline was fair and reasonable.

Mitigation

The normal disciplinary action for a second active Group II offense 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 is also an aggravating circumstance. Grievant has one prior active disciplinary action for provoking a supervisor into an act of physical violence. This prior discipline counterbalances the mitigating effect of his length of service. Therefore, it is concluded that the agency's decision was within the limits of reasonableness and that no further reduction of discipline is warranted.

DECISION

The decision of the agency is affirmed.

The Group II Written Notice effective October 5, 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.[10] 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.[11] 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

[10] 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).

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