

Issues: Group III Written Notice with termination (violation of Safety Rule – leaving security door open); Hearing Date: 04/02/07; Decision Issued: 04/03/07; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8552; Outcome: Agency upheld in full.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8552

Hearing Date: April 2, 2007  
Decision Issued: April 3, 2007

**APPEARANCES**

Grievant  
Representative for Grievant  
Warden  
Advocate for Agency  
One witness 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 for weakening security by leaving a control room door open on multiple occasions.<sup>1</sup>

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<sup>1</sup> Agency Exhibit 1. Group III Written Notice, issued December 7, 2006.

As part of the disciplinary action, and because of an accumulation of active disciplinary actions, grievant was removed from state employment effective December 7, 2006. 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.<sup>2</sup> The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for two and one half years as a corrections officer.<sup>3</sup> Grievant has two active prior disciplinary actions – one for unsatisfactory job performance, and one for disruptive behavior.<sup>4</sup> During the past year, grievant has been cited on four occasions for improvement needed/substandard performance for improper dress, improper uniform, excessive use of leave time, and tardiness.<sup>5</sup>

Correction officer are responsible for familiarizing themselves with institutional operating procedures even though such policies are covered during training.<sup>6</sup> The Post Order for a correctional officer lists among the specific duties the following:

4. Ensure the Control Room door shall never be opened when the pod gate or sally port gate is open or an inmate is in the area.
5. Ensure only one access door is opened at a time. The pod door is to be secured when not in use.

The general duties in the same post order include the following:

12. Report all breaches of security to your supervisor, follow his instructions regarding handling of the situation, and submit an Internal Incident Report.<sup>7</sup>

During the course of an investigation into a matter not involving grievant, the agency reviewed the Rapid Eye Camera recordings for the night of September 26, 2006. While no evidence regarding that investigation was found, the reviewing officer noticed that there had been multiple breaches of pod security. The lower control booth door was not operating properly. Grievant and three other officers were observed entering and exiting the control booth without following standard lockdown procedures. A transcript of the Rapid Eye recording revealed that grievant left the control booth door or a pod open when entering or exiting on eight occasions at 12:36 a.m., 1:19 a.m., 1:34 a.m., 1:43 a.m., 1:45 a.m., 1:46 a.m., 1:47 a.m., and 1:48 a.m.<sup>8</sup> Specifically, grievant closed the door but left it ajar on the lock instead of fully closing and locking the door. Grievant

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<sup>2</sup> Agency Exhibit 1 Grievance Form A, filed December 27, 2006.

<sup>3</sup> Agency Exhibit 4. Grievant's Employee Work Profile Work Description, October 25, 2006.

<sup>4</sup> Agency Exhibit 5. Two Group I Written Notices, issued March 17, 2006.

<sup>5</sup> Agency Exhibit 5. Notices of Improvement Needed/Substandard Performance, issued July 11, 2006, September 20, 2006, September 24, 2006, and October 18, 2006.

<sup>6</sup> Agency Exhibit 6. Conditions of Employment, signed August 30, 2004.

<sup>7</sup> Agency Exhibit 3. Post Order, Correctional Officer, revised December 15, 2005.

<sup>8</sup> Agency Exhibit 2. Attachment to memorandum, from Chief of Security to Warden, December 21, 2006.

neither reported the malfunctioning door nor filed an incident report. During the pre-disciplinary meeting, grievant acknowledged that she breached security and failed to report the malfunctioning door. Grievant knew the proper procedure and had followed it in the past.

Two of the other corrections officers were disciplined with Group III Written Notices; one probationary officer was new and was given additional training on security procedures. Grievant was disciplined with a Group III Written Notice and removed from employment because of the accumulation of active disciplinary actions and because her job performance had become substandard in multiple areas.

### 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.<sup>9</sup>

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

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<sup>9</sup> § 5.8, Department of Employment Dispute Resolution (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 III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.<sup>10</sup> 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*.<sup>11</sup> Violating safety rules where there is a threat of physical harm is one example of a Group III offense.

The facts in this case are undisputed. The agency has demonstrated, by a preponderance of evidence, and grievant has acknowledged, that she breached security on multiple occasions on September 26, 2006. Such breaches of security could have resulted in inmates gaining access to the control room and then allowing all inmates to leave the building. The institution's procedure regarding the locking of doors and the need for security is clear and unambiguous. Grievant's knowing and deliberate failure to comply with the procedure is a violation of a safety rule that could have resulted in physical harm – a Group III offense.

Grievant asserts that another corrections officer asked her to leave the door open. The other corrections officer is the same rank as grievant and is not a supervisor. Since that officer had no authority over grievant, grievant could have and should have decided for herself whether the other officer's request was appropriate or whether it violated procedure. Obviously, the request was a procedural violation and grievant should not have agreed to leave the door open. Moreover, grievant had a general duty in her post order to report the malfunctioning door as a security breach, and to write an Incident Report; grievant failed to comply with either of these directives.

Grievant stated that she understands and agrees with the agency's reasoning in this case for issuing discipline. She further asserts that she has learned from her mistake, seeks leniency, and needs employment. A hearing officer does not have authority to apply leniency or restore employment based solely on a grievant's assertion that she has learned her lesson. The hearing officer's authority is limited to determining whether the agency's disciplinary action was appropriate for the offense.

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<sup>10</sup> Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>11</sup> Agency Exhibit 7. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

## Mitigation

The normal disciplinary action for a Group III offense is a Written Notice and 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 does not have long state service and her work performance has been substandard, particularly during the six months preceding her removal from employment. There are no other mitigating circumstances. There are aggravating circumstances in the form of two active disciplinary actions during 2006. Based on the totality of the evidence, the hearing officer concludes that the agency's disciplinary action was within the tolerable limits of reasonableness.<sup>12</sup>

## DECISION

The decision of the agency is affirmed.

The Group III Written Notice and grievant's removal from state employment effective December 7, 2006 are 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:

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<sup>12</sup> Cf. *Davis v. Dept. of Treasury*, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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

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<sup>13</sup> 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).

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