

Issues: Group II Written Notice (misuse and damage of State records), and Suspension; Hearing Date: 05/15/07; Decision Issued: 05/30/07; Agency: DOC; AHO: John R. Hooe, III, Esq.; Case No. 8607; Outcome: Agency Upheld in Full; **Administrative Review: DHRM Ruling Request received 06/13/07; DHRM form letter issued 06/19/07 (no policy violation identified – Original Decision Affirmed);** **Administrative Review: EDR Ruling Request received 06/13/07; EDR Ruling #2007-1716 issued 07/06/07; Outcome: Remanded to HO.**

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

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of: Case No. 8607

Hearing Date: May 15, 2007
Decision Issued: May 30, 2007

PROCEDURAL ISSUE

Although Grievant's written request for a hearing claimed workplace harassment, false allegations and retaliation, at the conclusion of the evidence presented at the Grievance Hearing, the Grievant elected not to proceed with those claims and requested the Hearing Officer to only address the request that the Group II written notice and penalty imposed by the Agency be reversed.

APPEARANCES

Grievant
Attorney for Grievant
Representative for Agency
Agency Advocate
Three Witnesses for Agency

ISSUE

Was the Grievant's admitted act of shredding an inmate's appeal paperwork a violation of the Virginia Department of Corrections Operating Procedure and Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

EXHIBITS

The Agency Exhibits admitted into evidence were contained in a single notebook with the following contents:

- Tab 1 - The written notice, the Grievant's Form A and related documents
- Tab 2 - Report of investigation and related documents
- Tab 3 - Grievant performance evaluations
- Tab 4 - Operating Procedure 861.1
- Tab 5 - Operating Procedure 135.1/Standards of Conduct

FINDINGS OF FACT

The Grievant filed a timely appeal from a Group II Written Notice issued on January 11, 2007 for violation of Policy 135.1 Standards of Conduct for the unauthorized removal of state records, state property or property of other persons (i.e. shredding an inmate's appeal documents). The Group II Written Notice cited the fact that the behavior was a Group III offense which was reduced to a Group II offense due to the Grievant's length of service. The Group II Written Notice included a five day suspension. Following the failure to resolve the matter at the third resolution step, the grievance was qualified for a hearing.

In the course of an investigation regarding the mishandling of certain inmates' appeals, the Grievant admitted shredding the paperwork for an appeal of an inmate who was not included in the initial investigation. As a result of the admission, the Grievant was given the Group II Written Notice and a five day suspension.

The Warden testified that he might have treated the matter as a Group I offense if the Grievant had come to him immediately after shredding the inmate's appeal paperwork and admitted her conduct.

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 (A) 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.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management 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 to provide appropriate corrective action.

The Virginia Department of Corrections Operating Procedure No. 135.1 sets out its Standards of Conduct under the authority of the Code of Virginia § 2.2-1201. Operating Procedure 135.1 sets out at XII. Third Group Offenses (Group III), B.4. that the unauthorized removal of state records, state property, or property of other persons is a Group III offense. Subsection C.1. provides that discipline should normally take the form of the notice and removal or notice and up to 30 work days maximum suspension without pay in lieu of removal.

Grievant contends that the Grievant's prior work record should mitigate this offense and result in no more than a Group I written notice with no suspension.

The Agency has demonstrated, by a preponderance of the evidence, that the Grievant did shred the inmate's appeal paperwork, a Group III offense. According to the DOC Operating Procedure and the Standards of Conduct, the Agency could have issued a Group III written notice and terminated the Grievant's employment. Even with mitigation, the operating procedure suggests a Group III written notice and up to 30 work days maximum suspension without pay in lieu of removal.

DECISION

The disciplinary action of the Agency is affirmed. The Group II Written Notice issued to the Grievant on January 11, 2007 and the five day suspension imposed are **AFFIRMED**.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis

for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capital Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (8-4) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first 5 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

John R. Hooe, III
Hearing Officer

June 19, 2007

RE: **Grievance of “Grievant” v. Department of Corrections**
Case No. 8607

Dear Grievant:

The Agency head, Ms. Sara R. Wilson, has asked that I respond to your request for an administrative review of the hearing officer’s decision in the above referenced case. Please note that, as advised on page 4 of the hearing decision and in the Grievance Procedure Manual, either party to the grievance may file for an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of the Department of Employment Dispute Resolution (EDR) to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You have not identified any Department of Human Resource Management or Department of Corrections policy with which the hearing officer’s decision is inconsistent or violates. The sections of the Code of VA you cited are related to the state employee grievance procedure. This Agency has no authority to interpret or to administer the grievance procedure. Rather, that authority rests with the, and we are referring your appeal to that agency. In addition, it appears that the issues you raised are related to how

the hearing officer assessed the evidence and how much weight he placed on that evidence.

The authority of DHRM is restricted to reviewing issues related to the application and interpretation of policy. Because you have not identified any specific DHRM or DOC human resource policy that the hearing officer violated or misapplied in making his decision, this Agency has no basis to interfere with the application of this decision.

If you have any questions regarding this correspondence, please contact me at (804) 225-2136 or 1 (800) 533-1414.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity Services

c: Sara R. Wilson, Director, DHRM
Claudia T. Farr, Director, EDR
John R. Hooe III, Esquire
Beatrice L. Anderson, HR Analyst