

Issues: Group II Written Notice with suspension (failure to follow instructions and/or policy, and assignment of duties); Hearing Date: 09/10/07; Decision Issued: 09/17/07; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 8680; Outcome: No Relief, Agency Upheld in Full

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 8680

Hearing Officer Appointment: August 13, 2007

Hearing Date: September 10, 2007

Decision Issued: September 17, 2007

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group II Written Notice issued on May 16, 2007 by Management of the Department of Corrections (the “Department” or “Agency”), as described in the Grievance Form A dated June 1, 2007. The hearing officer was appointed on August 13, 2007. The hearing officer scheduled a pre-hearing telephone conference call at 11:00 a.m. on August 16, 2007. The Grievant’s attorney, the Agency’s advocate and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant, by counsel, confirmed that he is challenging the issuance of the Group II Written Notice for the reasons provided in his Grievance Form A and is seeking the relief requested in his Grievance Form A, including having the written notice permanently removed from his personnel file and being returned to his previous work assignment.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the agency was represented by an advocate and the Warden at one of the Department’s local correctional facilities. The grievant was represented by his attorney. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on August 16, 2007, which is incorporated herein by this reference.

Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely all exhibits in the Agency’s binder, Exhibits 1 through 7.<sup>1</sup>

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<sup>1</sup> References to the agency’s exhibits will be designated AE followed by the exhibit number.

## APPEARANCES

Representative for Agency  
Two Additional Witnesses for Agency  
Grievant  
One Agency Witness called by Grievant

## FINDINGS OF FACT

1. The grievant is a Corrections Officer Senior (“C/O”) employed by the agency. AE 1 and 3.
2. The grievant was so employed on May 6, 2007 when he was working off-ward at the time of the incident at issue in this administrative proceeding in a civilian wing of a local hospital amongst civilians and civilian medical staff.
3. On May 6, 2007, the grievant began his shift with a Department muster formation at approximately 6:30 a.m. He was assigned to a secure ward at the local civilian hospital but part of his job duties also included assisting other C/O’s “off-ward” in civilian parts of the hospital. His assigned shift was from 7:00 a.m. to 7:00 p.m.
4. At approximately 3:45 p.m. on May 6, 2007, the grievant was assigned to relieve a fellow C/O off-ward (“C/O 1”).
5. Upon entering the room, the grievant discovered C/O 1 was asleep. C/O 1 had a weapon and was guarding one of two felons in the hospital room.
6. The other C/O (“C/O 2”) who was guarding the second felon in the hospital room was talking on the telephone when the grievant entered.
7. Each of the grievant, C/O 1 and C/O 2 were disciplined by the agency for their actions and/or inactions concerning this matter.
8. The grievant did not wake the sleeping C/O 1 but he was awakened by a civilian nurse administrator employed by the local hospital, who reported the incident to the grievant’s supervisor. AE 2.
9. The grievant did not timely report the incident to his supervisor.
10. Additionally, shortly after the incident, when asked by one of his superior officers did he wake up C/O 1, the grievant responded no he “did not want him waking up swinging on me.” AE 2.

11. In his Grievance Form A, the grievant stated “The only reason I didn’t contact [my supervisor] right away is because I was actively trying to wake my fellow officer and immediately after the nurse administrator left the room [a C/O] picked up the phone and called [my supervisor] telling him of the incident.” AE 1.
12. However, during the hearing the grievant’s attorney directly asked the grievant why he did not call his supervisor about the incident rather than try to wake up C/O 1 and the grievant responded that he was trying to wake up C/O 1 so as to help his fellow officer so C/O 1 would not get in trouble. Tape 2 of Hearing.
13. In muster formations, the grievant has frequently been informed by his superior officers that “timely” reporting of incidents at this local hospital means immediately calling his watch commander where the incident involves security situations. This incident obviously involved a security situation.
14. For a different, previous disciplinary infraction, the grievant was issued a Group III Written Notice by the agency on October 3, 2005 for sleeping during working hours. AE 5. This Written Notice remains active until October 3, 2009. AE 5.
15. The grievant failed to provide proper documentation and notification to his supervisor concerning the incident at issue.
16. The grievant failed to comply with established written policy concerning documentation and notification of incidents to his supervisor as outlined in policy.
17. The grievant provided conflicting and inconsistent accounts about the incident.
18. The incident involved an actual threat to the safety of persons, including civilians, at the hospital.
19. The Department’s actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
20. The Department’s actions concerning this grievance were reasonable and consistent with law and policy.
21. The testimony of the Agency witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

#### 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).

*Va. 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances 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 and to provide appropriate corrective action.

Pursuant to Departmental Policy 135.1 (AE 6) and consistent with the Standards of Conduct Policy, the grievant's infraction can clearly constitute a Group II offense.

#### SECOND GROUP OFFENSES (GROUP II).

- A. These 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.
- B. *Group II* offenses include, but are not limited to:
  - 1. failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy;

Directive 038 *Incident Reporting* and Operating Procedure 038.1 *Reporting Serious or Unusual Incidents* provide, amongst other things, as follows:

**“Incident”:** An actual or threatened event or occurrence outside the ordinary routine that involves the life, health and safety of employees, volunteers, guests, or offenders (incarcerated or under Community supervision), damage to state property, or disrupts or threatens security, good order and discipline of a facility or organizational unit. Directive 038 *Incident Reporting*

I. PURPOSE.

Timely and accurate reporting of incidents that occur in the Department of Corrections is essential for proper management and administration. Since incident reports are frequently used in litigation proceedings, the importance of writing clear, concise, factual and complete reports cannot be over emphasized. Incident reports allow the Department’s executive staff to make decisions concerning directive and operational changes, and to keep other officials informed as necessary.

This establishes a uniform operating procedure to ensure effective communications and reporting of incidents involving Department employees, offenders or physical assets. Incident reporting shall be required for any situation or event that involves the life, health or safety of employees, volunteers, visitors, or offenders; damages to state property; or a situation that has the potential of subjecting the agency to public comment. Incident reporting also provides informed and timely responses to public and administrative inquiries. Operating Procedure 038.1 *Reporting Serious or Unusual Incidents*

**Incident** – An actual or threatened event or occurrence outside the ordinary routine that involves the life, health and safety or employees, volunteers, guests, or offenders (incarcerated or under Community supervision), damage to state property, or disrupts or threatens security, good order and discipline of a facility or organizational unit. Operating Procedure 038.1 *Reporting Serious or Unusual Incidents*

IV. GENERAL PROCEDURES.

A. Incidents shall be reported to appropriate supervisory or administrative personnel. Internal Incident Reports may be used to gather information from all staff involved in, or

witness to, the incident. Incident Reports shall be submitted on Attachment #2.

B. Incident Reports should at a minimum include:

- Whether or not the incident was videotaped
- Date of incident
- Names and positions of persons involved
- Location of incident
- Synopsis of incident (i.e. the type of force used, the type of weapon used, the type of canine used)
- Names, title, organizational unit, telephone number of person preparing the report
- Date of report submission

Operating Procedure 038.1 *Reporting Serious or Unusual Incidents*

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors as a Group III Written Notice and/or termination was certainly within the realm of possibility. Additionally, the Grievant was only suspended for one work day. The grievant's apparent refusal to recognize and

accept the seriousness of his violations of Agency policy and procedures preclude a lesser sanction. AE 1. The hearing officer agrees.

### DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in issuing the Group II Written Notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

### 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. 14<sup>th</sup> Street, 12<sup>th</sup> 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 Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 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 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 of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **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.

ENTER:

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John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).