

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice (falsifying records), Group II Written Notice (failure to follow policy) and termination; Hearing Date: 11/27/07; Decision Issued: 12/04/07; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 8743; Outcome: No Relief – Agency Upheld in Full.

BEFORE THE VIRGINIA DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO. 8743 (DEPARTMENT OF CORRECTIONS)

DECISION OF HEARING OFFICER

HEARING DATE: NOVEMBER 27, 2007

DECISION ISSUED: DECEMBER 4, 2007

PROCEDURAL MATTERS

The grievant initiated these proceedings on August 24, 2007 after receiving three Written Notices. I was appointed as hearing officer for this matter on October 29, 2007 and received the letter of appointment on October 31, 2007. A pre-hearing conference call was scheduled with the parties for November 5. The grievant failed to make himself available for that call. On November 12, 2007 I issued a Pre-hearing Order setting the matter for hearing and requiring an exchange of witness lists and documents by 4:30 p.m. on November 20, 2007. The grievant failed to provide that information in a timely manner, but did provide a witness list on November 21. Because the request for the appearance of certain witnesses was not timely made, no Orders for the appearance of those witnesses were entered. The hearing was conducted on November 27, 2007 at the former work site of the grievant with the agency.

APPEARANCES

Agency Advocate

Warden of the work site

Seven witnesses for the agency, including the Warden

Grievant

ISSUES

Whether the agency issued the disciplinary notices and terminated the grievant:

- A. In violation of his due process rights;
- B. As a result of a misapplication or unfair application of policy;
- C. Due to workplace harassment of the grievant?

FACTS

On or about July 3, 2007 a Major at the prison received information from a Correctional Officer that the grievant had been bringing a personal cell phone inside the institution on a consistent basis. The institutional investigator began an investigation, including the observation of the grievant. On July 8, the grievant reported for work but then asked to leave early due to illness. A discussion between the grievant, a tenant, and a captain ensued. The grievant was allowed to leave work early in spite of a question being raised about whether he had any remaining leave time which could be used.

On July 12 the grievant was observed sitting in a pod office not supervising inmates while they were on the floor of the pod. On that same date, the grievant made incorrect entries, or failed to complete all required entries, on certain security logs.

The investigator observed the grievant on July 16 escorting inmates on the floor of the pod without proper restraints. On the following day he observed the grievant reading a magazine while on duty. The evidence was that it is not uncommon for magazines to be present in security locations, despite there being a clear policy against such.

Also on July 17, the grievant was observed holding what appeared to be a cell phone in his hand and then placing it into his left front pants pocket. When the object was observed, the investigator has another

officer place a call to the cell phone number of the grievant. The call was not answered but a voice mail message was left. Shortly thereafter, the grievant was interviewed by the Assistant Warden by regarding the phone. The grievant admitted having possession of the phone while on duty on that date and on previous dates. The grievant was directed to leave the facility. He then called back to the prison administration and said that the object which had been seen was not a cell phone but his wallet.

The grievant had been issued a Group II Notice on February 4, 2005 which remained active at all relevant times. He also had been issued a Group I Notice on April 6, 2006, which Notice does not become inactive until April 6, 2008.

The events in July of this year resulted in the issuance of three separate Written Notices. On July 25 a Group II was issued for failure to follow a supervisors instructions based on the inadequate restraining or supervising of inmates. Also on July 25 a Group III was issued for falsifying records based on the improper keeping of the logs. Finally, the grievant was issued a Group II Notice for failing to follow established policy by having a personal cell phone while working at his post. The grievant was terminated from his employment on July 25, 2007.

APPLICABLE LAW AND DISCUSSION

This matter is governed by the provisions of the Virginia Personnel Act, Code of Virginia §2.2-2900, *et seq.* Because this matter involves a disciplinary action against the grievant, the agency has the burden of going forward with the evidence and the burden of proving the charges by a preponderance of the evidence.

The grievant argued at the hearing that he had been denied his due process right in the issuance of the Notices. In particular, he believes that the agency acted improperly in not providing him with his rights under the third step of the grievance procedure. I find that the grievant failed to comply with §6.3 of the Grievance Procedural Manual which requires any procedural non-compliance objection to be made in writing to the

hearing officer. Assuming, without deciding, that the statements by the grievant in his attachments to his Grievance Form A are sufficient to satisfy that provision, I further find that the grievant has waived his right to pursue this argument by proceeding with the hearing. See DEDR Ruling No. 2008-1765. In short, the hearing itself provided the grievant the process to which he was due.

The grievant further argues that the agency has misapplied or unfairly applied its policies. I am also unconvinced by this argument. Although the grievant provided opening and closing statements and cross-examined the witnesses for the agency, he neither called any witnesses on his own behalf nor did he testify under oath. The evidence establishes the violation of policy and a Standards of Conduct alleged by the agency. He made the argument that on July 12 when he was seen not diligently observing the pod floor no inmates were on the pod floor. Even if that were the case, the grievant could still have been cited for that level of offense for “violating safety rules when there is not a threat of bodily harm. Instead, the agency lumped that offense together with violations on July 16 (improper restraining of inmates) and July 17 (reading a magazine in the gun post). These three separate violations could have resulted in separate notices with regard to the improper restraining charge.

The grievant attempted to shift blame to another officer in the control room for improperly opening the cell doors. He did not deny that he had failed to follow policy in the manner of restraint. He further did not deny that he was reading a magazine as observed, but merely proved through cross-examination that magazines were commonly kept at various locations in the facility. This is similar to his attempted defense of the improper entries, or incomplete entries on the security logs. The grievant feels that he has been singled out because that of the fact that other officers are obviously engaging in the same or similar activities and have not been similarly punished.

An unfair application of a policy is not sufficient grounds for a hearing officer to rescind a disciplinary notice. At most, it can be considered in mitigation of the punishment. Section VI (B) of the Rules for

Conducting Grievance Hearing specifies that a hearing officer shall determine whether a grievant has been treated reasonably when compared to “other similarly situated employees.” Here, the grievant has failed to show that the other employees who he alleges have committed the same or similar offenses are similarly situated. Admittedly, a grievant is hamstrung in this effort by the confidentiality policies in place and the lack of access to personnel records of other employees. The grievant was merely able to bring out that one of his co-workers who had also failed to keep the log books correctly had received a lesser amount of punishment. The evidence established that this was due to that employee not having a prior disciplinary record, unlike the grievant.

The grievant made a belated attempt to deny having the cell phone with him at his post after having admitted to possession on July 17 as well as earlier dates. This after thought by him compounds the offense in my opinion. Not only did he commit the offense but then misrepresented his guilt after having had ample opportunity to establish his innocence by way of consenting to a pat-down search. It is unclear why no such search was conducted, but I do not believe that it was necessary in light of the admissions by the grievant.

The last argument raised by the grievant is that he received these notices as part of a pattern of workplace harassment. Aside from the argument regarding his taking of leave on July 8, the grievant pointed to no specific event constituting harassment, at least not subsequent to his receiving the two prior disciplinary notices. Therefore, I must reject this argument by him as well.

DECISION

For the reasons stated above, I uphold the three Written Notices issued to the grievant on July 25 and his termination from employment pursuant to them. The Written Notice issued to the grievant on July 30, 2007 is not listed on the Form A submitted by the grievant. I have treated that as being subsumed and merged into the Written Notice issued on July 25, 2007 which describes the identical violation by the grievant on July 16, 2007.

APPEAL RIGHTS

As the Grievant 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** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director=s authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14th St., 12th Floor, Richmond, VA 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 E. Main St., Suite 400, Richmond, VA 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 the original hearing decision**. 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 court shall award reasonable attorneys= fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code ' 17.1-405.

ENTERED this December 4, 2007.

/s/ Thomas P. Walk
Thomas P. Walk, Hearing Officer