

Issue: Group II Written Notice with suspension (failure to follow instructions/policy);
Hearing Date; 12/11/07; Decision Issued: 12/14/07; Agency: DOC; AHO: John V.
Robinson, Esq.; Case No. 8750; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8750

Hearing Officer Appointment: November 9, 2007

Hearing Date: December 11, 2007

Decision Issued: December 14, 2007

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group II Written Notice issued on June 29, 2007 (late turning in a major offense report and 40-hour suspension) by Management of the Department of Corrections (the “Department” or “Agency”), as described in the Grievance Form A dated July 18, 2007. The hearing officer was appointed on November 9, 2007. The parties held a pre-hearing telephone conference call at 12:45 p.m. on November 14, 2007. The Grievant, the agency representative and the hearing officer participated in the pre-hearing conference call. The Grievant 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 Group II Written Notice removed and receiving back pay for the 40-hour suspension.

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 maximum security correctional facilities. The grievant represented himself. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on November 15, 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 4.¹

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

At the Grievant's request, the hearing officer issued an order for production of documents and an order for an Agency witness. No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

APPEARANCES

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

FINDINGS OF FACT

1. The grievant is a Corrections Sergeant ("C/O") employed by the agency. AE 1 and 3.
2. The grievant was so employed on June 14, 2007 when he turned in to the facility's Inmate Hearings Officer (the "IHO") a major offense report concerning an inmate who has been particularly troublesome to the Department.
3. When the Grievant had initially written the charge, the inmate was put in pre-hearing detention ("PHD") and the Grievant should pursuant to Departmental written policy have delivered the charge to the IHO's charge box so that the IHO could process it for hearing.
4. However, the Grievant admitted to the Warden and Assistant Warden, at the hearing and throughout the period relevant to this proceeding that he inadvertently lost the charge in his paperwork on his desk until he discovered it on June 14, 2007.
5. June 14, 2007 constituted the 15th day that the inmate had been assigned to PHD.
6. Division Operating Procedure 861.1 Section XI, #8 provides that "if the offender has been placed on PHD or any other detention status for the disciplinary report, the hearing should be held no sooner than midnight of the second working day and no later than 15 calendar days after service of the disciplinary report, unless a valid reason exists. If an offender has been returned to general population before the expiration of the 15 day time limit, the time limit for hearing the disciplinary report will be 30 calendar days. AE 1.
7. There was no valid reason not to hold the hearing within the 15 calendar day period after service of the disciplinary report. AE 1.

8. Accordingly, the Department was prejudiced by the resultant loss of time concerning any release of the inmate to the general population or concerning a hearing to be scheduled and heard by the IHO while the inmate was still in PHD. AE 1.
9. The Grievant argues that “other supervisors mess up charges and never got any type of action done with them (AE 1).” However, when the Warden came to this particular facility about two years ago, the Warden recognized that there existed an institutional problem concerning supervisors following DOP 861 and she determined to correct the problem.
10. Accordingly, the Warden organized related training for supervisors, including the Grievant, which included trainings in 2006, on April 3 and 4, 2007 and April 26, 2007, all attended by the Grievant. AE 1 and 2.
11. Since the time that the Warden has adopted a more serious approach toward infractions of DOP 861 and has notified supervisors of the need to take DOP 861 more seriously, other correctional officers have had disciplinary action taken against them concerning asserted violations of DOP 861.
12. The Department’s actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
13. The Department’s actions concerning this grievance were reasonable and consistent with law and policy.
14. 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 4) 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;

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 (4th 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 Grievant argues that the Agency’s punishment was too severe for a first offense and should be reduced. 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. The significant training concerning DOP 861, the advanced warnings concerning the more serious approach by Management toward infractions of this policy, the maximum security status of the facility where the Grievant is a supervisor and the Grievant’s apparent failure to understand 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. 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 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:

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).