Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 06/09/08; Decision Issued: 06/11/08; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq; Case No. 8851; Outcome: No Relief – Agency Upheld in Full.

# *COMMONWEALTH of VIRGINIA*

## ***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case Nos. 8851

Hearing Date: June 9, 2008
Decision Issued: June 11, 2008

PROCEDURAL HISTORY

On January 28, 2008, Grievant was issued a Group II Written Notice of disciplinary action without suspension for "failure to follow a supervisor's instructions, perform assigned work, . . ." Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 12, 2008, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). On June 9, 2008, the grievance hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Advocate for Grievant
Five witness for Grievant (including Grievant)
Advocate for Agency
Representative for Agency
Three witnesses for Agency (including Representative)

ISSUES

Did Grievant's conduct warrant disciplinary action under the Standards of Conduct and Agency policy? If so, what was the appropriate level of disciplinary action for the conduct at issue?

The Grievant requests rescission of the Group II Written Notice.

## BURDEN OF PROOF

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, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. In this disciplinary action, the burden of proof is on the Agency. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## 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.

Department of Corrections ("DOC") Operating Procedure 135.1(XI) defines Group II offenses to include acts and behavior that are more severe in nature (than a Group I) and are such that an accumulation of two Group II offenses normally should warrant removal. Group II offenses specifically include, "failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy."

### The Offense

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities for several years prior to the date of the offense, January 17, 2008. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

On the morning of January 17, 2008, the Grievant refused an order or instruction to take inmate work gang #9 to its work location, via Agency van. The weather that morning was inclement, including a mixture of rain, freezing rain and/or sleet. Although the Grievant and another officer who refused a similar assignment testified that temperatures at ground level were freezing, the Agency presented a weather history printout that showed the area temperatures that morning were above freezing. Several other inmate work gangs were transported that morning without incident. One work gang returned because the corrections officer reported the van's defroster was not functioning, and that driver reported some sliding of the van on the roads. The other officer who refused the transportation assignment was also given a Group II Written Notice.

The Grievant admitted he refused the order to transport the inmate work gang. The Grievant advanced throughout his grievance that the weather simply was too bad to undertake the trip, and that he did not want to risk his personal automobile insurance increasing if he were involved in an accident. The Grievant also stated he was concerned for his and the inmates' safety. The Grievant testified that this is the first and only time he ever refused such an order.

For the grievance hearing, the Grievant also advanced the issue that the order for him to transport the inmate work gang was against Agency policy because he had not completed Vehicle Operations Training required by DOC Operating Procedure 411.1. The witnesses testifying on this subject were not definitively clear on whether this training requirement applied to drivers of inmate work gangs. Upon review of the Operating Procedure 411.1, however, I find that it expressly exempts Agency staff transporting inmates to work or school assignments and does not render the transportation order against Agency policy.[1]

Security Post Order #9 addresses the duties of a work gang officer, and it includes items 9, 10 and 11:

> 9. Obey an order given to you by your supervisor. If there is any problem with the order, report same to the next person in the chain of command. (Exception: #10 & #11.)

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[1] DOC Operating Procedure 411.1, Offender Transportation, provides in Section III, definition of "Offender Transportation:"

> All transportation of incarcerated offenders by Department of Corrections Staff off state property with the exception of transport to work or school assignments.

DOC Operating Procedure 411.1, Section V (D) states "The vehicle operator must have successfully completed *Vehicle Operations Training* as required by the DOC and mandated by the Department of Criminal Justice Services (6VAC20-100-20)."

10. Do not obey any order that will cause a breach of security, or possible injury to yourself or others.

11. Do not take orders from anyone under duress.

The Grievant essentially asserts that he should be excused or found justified in refusing to transport the inmate work gang during inclement weather. The question for the hearing officer is whether the Grievant's compliance with the order would have caused a breach of security or possible injury to himself or others. For a corrections officer to disregard or refuse an order from a superior officer, the justification must be compelling.

A junior officer does not have the discretion to ignore any order based on the junior officer's substitution of his discretion for that of the superior officer's. Indeed, in the context of a corrections facility, almost any order could conceivably put a corrections officer or others at risk of possible injury. I find that the justification for refusing an order on this basis must be a clear and unreasonable risk or condition. The Agency has met its burden of showing the Grievant committed the violation. Under the circumstances presented, the burden of showing the justifiable excuse rests with the Grievant. The Agency showed that the temperature that morning was above freezing, minimizing the risk presented by any frozen precipitation.

There is no evidence presented that, for example, any warnings were issued by the State Police or Department of Transportation of hazardous travel conditions. There is no evidence that local school divisions either canceled or delayed schools because of the weather. Likewise, there is no evidence of Agency employees having difficulty either coming to or going from work because of the weather. The evidence preponderates in showing that the weather may have been inclement, but not severe. On the evidence presented, I find the transportation order reasonable and not likely to cause undue risk or injury. Naturally, driving precautions are in order for wet or slippery roadways, but a need for driving precautions does not rise to a justification to refuse the transportation order. The Grievant's refusal lacked sufficient excuse or justification for the Grievant to disobey the transportation order.

## Mitigation

The agency has proved (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1 (alteration in original).

A suspension of up to 10 workdays is the normal disciplinary action for Group II Written Notices unless mitigation weighs in favor of a reduction of discipline. Under the *Rules for Conducting Grievance Hearings*, an employee's length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action. However, the warden testified that he mitigated the discipline to impose no suspension because of the Grievant's otherwise good work record and tenure.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In this case, the Agency's action of already imposing no suspension is a reasonable mitigation by the Agency, consistent with law and policy. In light of the applicable standards, the Hearing Officer finds no evidence that warrants any further mitigation to reduce or rescind the disciplinary action.

## DECISION

For the reasons stated herein, I uphold the Agency's Group II Written Notice without suspension.

## 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 Street, 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.** (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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

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Cecil H. Creasey, Jr.
Hearing Officer