

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 06/25/08;  
Decision Issued: 07/10/08; Agency: ABC; AHO: John V. Robinson, Esq.; Case No.  
8869; Outcome: Full Relief. **Corrected Decision Issued 07/16/08.**

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 8869

Hearing Officer Appointment: June 2, 2008

Hearing Date: June 25, 2008

Decision Issued: July 10, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group I Written Notice issued on January 15, 2008 by Management of the Department of Alcoholic Beverage Control (the “Department” or “Agency”), as described in the Grievance Form A dated January 16, 2008. The hearing officer was appointed on June 2, 2008. The hearing officer scheduled a pre-hearing telephone conference call at 4:00 p.m. on June 5, 2008. During the call, the Grievant confirmed that he is challenging the issuance of the Group I Written Notice for the reasons provided in his Grievance Form A and is seeking the relief requested in his Grievance Form A, including total removal of Group I notice.

The hearing was scheduled for and was duly held on June 25, 2008. At the hearing, the Agency was represented by its advocate, and the Grievant represented himself. 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 Grievant’s exhibit binder and Agency Exhibits 1 through 5.<sup>1</sup>

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.

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

## APPEARANCES

Representative for Agency  
Grievant  
Witnesses

## FINDINGS OF FACT

1. The Grievant has been employed by the Department as a security officer for about 14 years and by all accounts performs his overall security duties well.

2. An internal auditor (the "Complainant") formerly employed by the Agency for about a year from June 2007 to June 2008, complained about the Grievant's alleged unprofessional attitude and manner toward her on October 21, 2007 and December 9, 2007.

3. The Director of Security of the Department instructed the Grievant's supervisor to investigate the two (2) incidents and to report back to him. The Director relied on the investigator for his findings.

4. After the investigation was completed on January 15, 2008, the Department issued a Group I written notice to the Grievant for:

Unsatisfactory job performance. Subsequent to receiving a Letter of Counseling dated 10/26/07 that addressed unacceptable behavior toward employees and outside customers, a complaint was filed against [Grievant] by a member of the Agency's Internal Audit staff for an unprofessional attitude and manner expressed toward her on two occasions, 10/21/07 and 12/9/07. Any further incidents involving inappropriate behavior or poor performance of duties will be addressed through further disciplinary action, which could result in termination of employment with the Department of Alcoholic Beverage Control.

5. Despite the Grievant asking Department management repeatedly throughout his grievance process for the specifics of his alleged "unprofessional attitude and manner" toward the Complainant on October 21, 2007 and December 9, 2007, the Grievant was only finally informed, either verbally or in writing, of such specifics on June 18, 2008, when he received the Complainant's signed statement pursuant to the parties' exchange of exhibits and witness lists ordered in the hearing officer's Scheduling Order of June 6, 2008. Not knowing such specifics until so late in the process obviously made it at least extremely difficult for the Grievant to take any corrective action and to defend himself in this proceeding.

6. The Complainant only prepared this signed written statement in June 2008. Tape 1, Side B.

7. The parties concede that this is your classic “he said, she said” case and turns on the credibility of either the Grievant or the Complainant.

8. The hearing officer finds that the testimony of the Grievant at the hearing was clearly more credible.

9. The Grievant’s demeanor at the hearing was open, frank and forthright. The Grievant answered questions and testified directly, consistently and confidently.

10. By contrast, the Complainant, who has since left the Department and the Commonwealth, testified by telephone and her testimony is inconsistent, conflicts with her recent signed written statement and defies common sense. For example, the security log for October 21, 2007 materially conflicts with the Grievant’s pertinent timeline of events for the relevant period even allowing for the Grievant’s use of the word “approximately.” The Agency concedes and in any event the hearing officer finds, the log is accurate. When questioned on cross-examination about this time discrepancy, the Grievant (notwithstanding the Agency’s admission) questioned the log’s accuracy rather than allowing any doubt for her version of events. Tape 1, Side B. The Complainant testified that on both October 21, 2007 and December 9, 2007, the Grievant threw the keys on the counter to her. The Grievant’s unrefuted credible testimony is that the countertop on or at which the keys were allegedly thrown is only inches away from where keys are held awaiting pick-up in an out-basket. When asked on cross-examination how far the out-basket is from the counter where the Grievant allegedly threw the keys, the Grievant replied “I don’t know.” Tape 1, Side B. The Grievant, continuing his cross-examination continued to ask the Complainant “6 inches, 8 inches, 2 feet?” After a very lengthy pause, the Complainant responded: “I don’t know. I know that the keys [were] thrown at me both instances.” Tape 1, Side B. Previously, in the hearing and in her written statement (AE 4), the Grievant had also stated that the keys were in an envelope with her name on it.

11. The Grievant’s version of events that he acted in a professional and appropriate manner in all his interactions with the Complainant is credible and the hearing officer so finds.

#### APPLICABLE LAW, ANALYSIS AND DECISION

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. The Agency has failed to sustain its burden of proving the alleged disciplinary infractions by the Grievant.

### DECISION

For the reasons stated herein, the disciplinary action is reversed. The Agency is directed to rescind and remove the Group I Written Notice issued to the Grievant on January 15, 2008. Contrary to certain loss of benefits/rewards/position claims made by the Grievant in the hearing, the hearing officer finds that the testimony of the Agency's Director of Security was credible and convincing that there has been no such loss. The hearing officer finds, based on the testimony of the Director of Security, that any recent realignment of the Grievant's duties was merely undertaken by Management as part of its lawful prerogative to effectively and efficiently utilize its employees within the permissible bounds of its professional discretion.

### 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 and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

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