

Issues: Group I Written Notice (unsatisfactory performance) and Termination (due to accumulation); Hearing Date: 07/08/08; Decision Issued: 07/11/08; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 8890; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8890

Hearing Officer Appointment: June 16, 2008

Hearing Date: July 8, 2008

Decision Issued: July 11, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of his employment on February 25, 2008 by Management of the Department of Corrections (the “Department” or “Agency”), as described in the Grievance Form A of March 24, 2008. The hearing officer was appointed on June 16, 2008. The hearing officer scheduled a pre-hearing telephone conference call at 3:00 p.m. on June 23, 2008. The Grievant, the Agency’s advocate and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant confirmed that he is challenging the termination for the reasons provided in his Grievance Form A and is seeking the relief requested in his Grievance Form A, including reinstatement. Following the pre-hearing conference the hearing officer issued a Scheduling Order which is incorporated herein by this reference.

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

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 Agency Exhibits 1 through 6. The Grievant did not seek to introduce any exhibits.¹ The parties did not request from the hearing officer any orders for witnesses or documents.

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

APPEARANCES

Representative for Agency
Additional Witness for Agency
Grievant

FINDINGS OF FACT

1. The grievant was a postal assistant, previously employed by the agency at a level 3 correctional facility. AE 3.
2. On February 5, 2008, another postal assistant (the "Substitute") whose job it was to fill in for any absent postal assistant at the facility in all three (3) support unit mailrooms, substituted for the Grievant during his absence that day.
3. The Substitute discovered in the Grievant's work area inmate mail which the Grievant had not properly processed in accordance with his responsibilities and duties.
4. The Substitute promptly called her superior, the Mailroom Supervisor, who instructed the Substitute not to touch anything so that the Mailroom Supervisor could perform her own investigation and evaluation of the worksite and the infractions.
5. The Mailroom Supervisor and the Substitute inspected the Grievant's work area and discovered mail items, some from October 2007 to January 2008, which the Grievant had not processed in accordance with well-established Agency policy and procedure, including 57 first class letters, approximately fifty cash receipts, approximately 300 request forms and publications.
6. The unprocessed items were found in various places including inside an envelope within a desk drawer and in a filing cabinet. AE 2.
7. Previously, the Grievant had shown certain traits of poor work performance in processing the mail as reflected in his most recent Employee Work Profile ("EWP"). AE 3. Additionally, the Grievant has an active Group I Written Notice issued on August 24, 2007 relating to a mail processing infraction. AE 5.
8. More seriously, but unrelated to any mailroom infraction, the Grievant also has an active Group III Written Notice issued on March 28, 2006. AE 5.
9. The Grievant was responsible for processing inmate mail for 1 of 3 support units (designated S1, S2 and S3) with each support unit being broken down into 3

building/housing units. In turn each building/housing unit is broken down into 4 “pods” or sub-units.

10. Each of the 3 support unit mailrooms receives its mail for that day at approximately 9:00 a.m. The mailroom responsibilities and duties of the Grievant included daily (a) processing of the first class mail sorting it by pod and placing it in the appropriate mail tub for ultimate distribution by a Corrections Officer (“C/O”) to the appropriate inmates, (b) sorting and processing of inmate requests directed to facility management and personnel and the responses, (c) sorting and processing of cash receipts which generate from the facility’s business office and which basically inform the inmate that cash has been credited to his account because a family member or other person has sent him a money order or similar item, and (d) sorting and processing magazines and other similar publications.
11. During the period relevant to this grievance (the “Period”), the other 2 support unit mailrooms received substantially the same volume and mix of items of mail as the Grievant’s mailroom. Neither experienced any material problems concerning the processing of mail.
12. Since the Grievant left, his former mailroom’s mail processing operations have run smoothly.
13. On February 8, 2008, the Grievant met with the Mailroom Supervisor and her superior officer (the “Superior”) and could offer no reasonable explanation which could excuse the Grievant’s failure to process the mail.
14. Indeed, at the hearing, the Grievant similarly offered no reasonable explanation for his failure, seeking instead at one time to minimize the infraction by, for example, stating that cumulatively the unprocessed items only represented a day’s worth of mail.
15. The Agency continually reminded and trained the Grievant concerning his mailroom responsibilities and duties. *See, e.g.*, AE 3 and 4.
16. The Department’s actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
17. The Department’s actions concerning this grievance were reasonable and consistent with law and policy.
18. The testimony of the Agency witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of the Agency witnesses at the hearing was candid and forthright. The Grievant had no questions for either Agency witness and, unsolicited, expressly agreed that the Substitute’s testimony was accurate.

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. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.

Pursuant to Departmental Operating Procedure Number 135.1 (AE 6) and consistent with the Standards of Conduct, Grievant's mailroom infractions can clearly constitute a Group I offense. Group I offenses include inadequate or unsatisfactory job performance.

Of course, the Grievant's employment was terminated effective February 25, 2008 due to accumulation of the active disciplinary actions specified in this decision. As the Department stressed in the hearing, Department Operating Procedure No. 135.1 (XII)(C)(2) provides concerning active Group III Written Notices that "[i]f the employee is not removed, due to

mitigating circumstances, the employee is to be notified that any subsequent written notice issued during the “active” life period, regardless of level, may result in removal.” AE 6. The Agency argues that mitigation is inappropriate under the circumstances.

As previously stated, the agency’s burden is to show upon a preponderance of evidence that the termination of the grievant’s employment 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.*

As the agency argued in this proceeding, the policy requires dismissal. The Grievant still fails to grasp the severity of his disciplinary infractions. The Department, exercising its professional judgment through the appropriate personnel, and applying the Commonwealth’s policy of progressive discipline, decided that termination of the grievant’s employment was warranted and appropriate under the circumstances. Such a decision was entirely appropriate and justified. 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 gravity of the violation in the context of a correctional facility precludes a lesser sanction. The hearing officer agrees.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in removing the grievant from his employment 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 Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).