

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 08/15/08; Decision Issued: 08/19/08; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 8914; Outcome: No Relief – Agency Upheld in Full.

**COMMONWEALTH OF VIRGINIA, DEPARTMENT OF EMPLOYMENT  
DISPUTE RESOLUTION**

**RE: DEDR CASE NO.: 8914 (DEPARTMENT OF CORRECTIONS)**

**DECISION OF HEARING OFFICER**

**HEARING DATE: AUGUST 15, 2008**

**DECISION ISSUED: AUGUST 19, 2008**

**PROCEDURAL HISTORY**

On April 9, 2008 the Department of Corrections issued to the grievant a Group II Written Notice. The Regional Director as part of his Third Resolution Step Response reduced the discipline to a Group I Written Notice. He directed the warden to reissue the notice at that level. The warden reissued the notice. This grievance is proceeding under the Form A dated April 24, 2008. I was appointed as hearing officer on July 25 and received the Notice of Appointment on August 1. A prehearing conference was conducted by telephone on August 4. The hearing was conducted at the facility where the grievant was employed on August 15.

**APPEARANCES**

Agency Representative

Agency Advocate

Grievant

Three Witnesses for the Agency

Three Additional Witnesses for Grievant

**ISSUE**

1. Whether the grievant committed a Group I offense on September 27, 2007 by aiding in the transfer of personal property from one inmate to another?

### **FINDINGS OF FACT**

The grievant has been employed by the agency as a Corrections Officer for approximately four years. He was working in that capacity on September 27, 2007. At approximately 6:30 p.m. an inmate (hereinafter "Inmate C") asked the grievant when he would be upgraded from isolation status to that of segregation. This change in status would allow the inmate to be in possession of additional personal property in his cell. Inmate C then asked the grievant to retrieve a set of headphones from another inmate (hereinafter "Inmate B"). The grievant indicated to Inmate C that he would do so. He then proceeded to the part of the building where Inmate B was housed and retrieved the headphones.

Under Departmental Policy No. 445.2 these headphones were contraband in the possession of Inmate B, not being his property. The grievant carried the headphones to the jail portion of the dormitory and placed them on a chest to be inventoried along with the other items to be returned to Inmate C upon his change in status. While using the restroom in the building at approximately 9:15 p.m. the grievant overheard another inmate ("Inmate F") speaking with Inmate C about the headphones. This third inmate told Inmate C to take the headphones apart when he received them back. The grievant proceeded to open the headphones. He found a suspicious cigarette containing a green leafy substance. He burned one end to attempt to determine the contents. He determined that the smell did not appear to be that of tobacco. At that point the grievant called in the watch commander who verified that the smell was not tobacco. The watch commander returned the cigarette to the grievant. He delivered it to the institutional investigator approximately two hours later.

The grievant and watch commander spoke with the institutional investigator about the placement of charges. The grievant placed no charges against any of the inmates as a result of this incident.

### **APPLICABLE LAW AND OPINION**

The Virginia Personnel Act, Chapter 29 of Title 2.2 of the Code of Virginia, sets forth the procedures and policies pertaining to employment with the Commonwealth of Virginia. It includes, among other things, a grievance procedure for employees to challenge disciplinary and other actions taken against them. In disciplinary actions, the agency must establish the appropriateness of its charge and discipline by a preponderance of the evidence.

Operating Procedure 135.1 of the agency sets forth three groups of unacceptable behavior, ranked according to the severity of the behavior. A different range of punishment applies to each level of offense. Group I offenses are those which are less severe in nature but which require some correction “in the interest of maintaining a productive and well-managed workforce.” This level of offense does not carry with it any possibility of termination or suspension for a single offense. A Group I Written Notice has an active life of two years from the date of issuance.

The grievant was given a Group I Written Notice for his actions. He argues that the agency failed to present sufficient evidence to sustain the charge for two reasons. First, he says that the evidence does not show any intent on his part to effect the transfer of property from Inmate B to Inmate C in violation of agency policy. He also argues that the Standards of Conduct do not apply to instances where only intent to commit an act is involved. I reject each of these arguments.

The evidence as to the intent of the grievant is largely circumstantial. It is well established under Virginia law that “intent is the purpose formed in a person’s mind which may be shown by circumstantial evidence including the person’s conduct.” Nobles v. Comm., 218 Va. 548, 551, 238 S.E.2d 808, 810 (1977). The conduct of the grievant here is undisputed. He intentionally took possession of the headphones from Inmate B upon the request of Inmate C. At that time the headphones were contraband. The warden testified that once an item is contraband, it remains contraband forever. This is consistent with the provisions of Agency Operating Procedure 802.1, which provides for the confiscation of contraband. From the evidence, the grievant knew, or should have known, that he should have placed administrative charges against Inmate C for transferring the headphones to Inmate B and against Inmate B for possession of headphones that did not belong to him. The evidence shows that the grievant merely placed the headphones in a semi-secure area near the cell of Inmate C in anticipation of a later inventory.

This chain of events is entirely consistent with the statement made by the grievant to Inmate C that he would retrieve the headphones from Inmate B. The chain of events likely would have resulted in the headphones being returned to Inmate C. It was broken only by the entirely fortuitous event of Inmate F making the comment to Inmate C to take apart the headphones at a time when, unbeknownst to Inmate F, the grievant was within earshot. But for the grievant being in the right place at the right time by accident the headphones would have been restored to Inmate C.

The agency has argued that additional evidence of the intent of the grievant can be found in his failing to place any charges against Inmate B. I do not find that omission to be of great consequence. The evidence is conflicting on whether the grievant understood that the institutional investigator would be placing the charges and relied on him to do so. I find that the

greater weight of evidence supports the conclusion that the failure of the grievant to place the charges was the result of a failure of communication between him and the investigator.

The grievant is correct in asserting that the Standards of Conduct for a Group I offense do not reference intent. He is not correct, however, in his belief that this provides him with a defense. Certain of the listed offenses, such as inadequate job performance or conviction of a moving traffic violation, can be the result of less than intentional acts. The actions of the grievant were intentional, even if he did not intend to violate any specific policy. In fact, he admitted that he was not aware of the provisions of Policy 445.2.

I believe that the present situation is analogous, for analytical purposes, to an attempt to commit a criminal offense. An attempt to commit a crime is composed of “the intent to commit it and a direct but ineffectual act done towards its commission.” Meritt v. Comm., 164 Va. 653, 657, 180 S.E. 395, 397 (1935). As stated above, the grievant foiled intended transfer of the headphones to Inmate B to Inmate C by his discovery of the marijuana found in the headphones. At that point, the grievant had committed a sufficient act toward the conclusion of the offense for this to be viewed as a “completed attempt” to commit the offense.

This interpretation of the Standards of Conduct is proper under the due process rights to which the grievant is entitled. The charging document, the Written Notice, sufficiently apprises the grievant of the behavior for which he is being called to answer. My authority allows me to “independently determine” whether the alleged conduct justifies the level of discipline. I am required to consider the realities of the case in determining whether the notice conveyed to the grievant the necessary information of his challenged behavior. Va. Dept. of Corrections v. Compton, 47 Va. App. 202, 623 S.E. 2d (2005). I find that the Written Notice provided the grievant with a legally sufficient notice of the evidence to be presented by the agency. The

hearing and the earlier steps in the grievance procedure provided him with a meaningful opportunity to respond. As early as the Second Resolution step, the agency raised the question of “the intent to facilitate” the transfer of contraband between the inmates. I cannot find that the Due Process Rights of the defendant are violated by this construction of the Standards of Conduct and I find it to be appropriate.

### **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. 14<sup>th</sup> St., 12<sup>th</sup> 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.

### **DECISION**

For the reasons stated herein, I uphold the issuance of the Group I Written Notice dated April 9, 2008.

ENTERED this August 19, 2008.



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