

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 11/18/08;
Decision Issued: 11/25/08; Agency: DOC; AHO: John V. Robinson, Esq.; Case
No. 8972; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8972

Hearing Officer Appointment: October 31, 2008

Hearing Date: November 18, 2008

Decision Issued: November 25, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group II Written Notice: failure to follow instructions and/or policy, issued on July 24, 2008 by Management of the Department of Corrections (the “Department” or “Agency”), as described in the Grievance Form A of July 28, 2008.

The hearing officer was appointed on October 31, 2008. The hearing officer scheduled a pre-hearing telephone conference call at 4:00 p.m. on November 6, 2008. The Grievant, the Human Resource Officer for the Facility (as defined below) and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant confirmed that he is challenging the issuance of the above referenced Group II Written Notice for the reasons provided in his Grievance Form A and is seeking certain relief requested in his Grievance Form A, namely a reduction in the disciplinary action. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on November 6, 2008, 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 discipline was warranted and appropriate under the circumstances.

At the hearing, the Agency was represented by the Assistant Warden. 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 21 pages faxed by the Agency to the hearing officer on November 12, 2008 and

two (2) additional exhibits, a Security Post Order #58 (consisting of 10 pages) and a single page Post Order Review Log.¹

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant is a correctional officer, employed by the Agency for just over two (2) years at a maximum security level 4 facility (the "Facility").
2. The Grievant was so employed on July 17, 2008.
3. On July 17, 2008, the Watch Commander, a captain who has since retired from the Agency after about 25 years of service, was conducting security rounds.
4. After conducting a perimeter check, the Watch Commander went to Housing Unit 5 where he saw the Grievant asleep at approximately 02:22 hours, leaning back in a chair with his eyes closed.
5. The Watch Commander watched the Grievant sleeping. The Watch Commander tried to call the Grievant on the radio but got no response.
6. Someone called the Grievant on the telephone and the Grievant woke up and answered. After the call, the Grievant leaned back, closed his eyes and went back to sleep for about 45 seconds.
7. Finally the Grievant saw the Watch Commander standing at the door. When the Watch Commander asked the Grievant why he was sleeping the Grievant responded that he was tired.
8. The Watch Commander relieved the Grievant from duty in Housing Unit 5, told the Grievant to get something to drink and sent him to Housing Unit 3.

¹ 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.

9. The Grievant received significant education and training concerning the dire need to “[r]emain alert, attentive and observant at all times. Acknowledge the presence of any supervisor, either verbally or by signal, [who] enters your area of control. . . .” Post Order #58, General Duty #18. The Grievant signed a Post Order Review Log on July 7, 2008, certifying that the Grievant had “read, discussed with [his] supervisor and [understood] the post orders indicated above prior to signing below and prior to assuming the duties so described in the post orders.”
10. The post orders clearly constitute applicable established written policy.
11. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.
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 witnesses called by the Agency 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, 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.

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 Department's Standards of Conduct (the "SOC") are contained in the Operating Procedure Number 135.1. 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 the SOC, the Grievant's infraction could clearly constitute either a Group II or Group III offense, as asserted by the Department.

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; . . .

THIRD GROUP OFFENSES (GROUP III).

- A. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.
- B. *Group III* offenses include, but are not limited to:
 - 8. sleeping during working hours;

Department Operating Procedure Number 135.1.

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 Grievant argued that he should have received a form of counseling for his infraction pursuant to Section VI(B) of the SOC. However, the Agency argues that it fully accounted for any mitigating factors by not issuing a Group III Written Notice, by not suspending the Grievant's employment with any accompanying loss of pay, etc.

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 described above, 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 severity of the Grievant's infraction putting at risk the Grievant, inmates, Facility staff and the general public in the context of a maximum security 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 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 and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).