

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 12/09/08;
Decision Issued: 12/19/08; Agency: DOC; AHO: Thomas J. McCarthy, Jr.,
Esq.; Case No. 8981; Outcome: No Relief – Agency Upheld in Full.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 8981

Hearing Date: December 9, 2008
Decision Issued: December 19, 2008

APPEARANCES

Grievant
Agency Representative
2 Witnesses for Agency
0 Witnesses for Grievant

On December 9, 2008, a formal grievance hearing was held on this matter at the Agency facility where Grievant was employed.

ISSUES

1. "Did Grievant violate DOC Operating Procedure 135.1, Failure to follow instructions on August 13, 2008?"; and
2. "Was the Group II Notice properly issued?"

FINDINGS OF FACTS

1. On July 21, 2008, Grievant was in charge of the religious service at the agency facility. He accounted for the inmates attending by taking their identification cards. At the end of the service he checked the inmates out by returning their identification cards.
2. After receiving his identification card, one inmate did not exit the room, and went behind the Grievant to use a visitor's restroom without telling the Grievant.
3. Grievant did not see that the inmate did not exit the room and enter the visitor's restroom behind him which the inmate was not authorized to use.
4. When the other inmates and other participants left the room, not realizing an inmate was in the visitor's restroom, Grievant secured and locked the room.
5. When the inmate came out of the restroom, he found himself locked in the visitor's room.
6. Grievant was given a Group II written notice for not properly supervising inmates under his charge.

7. The testimony was the Group II written notice was issued because it was a sanction which would not affect Grievant's pay or leave status.

8. The inmate was not sanctioned for his conduct.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to the 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 the workplace." Murray v. Stokes, 237 Va. 653, 656 (1989).

Code Section 2.2-1201 sets out the duties of the Commonwealth Department of Human Resources Management and Section 53.1-10 sets out the Powers and Duties of the Director of the Commonwealth Department of Corrections. Department of Corrections Operating Procedure 135.1 contains the Standards of Conduct. Facility Operating Procedure 440.3 sets out the policies and procedures for the use of Inmate Identification Cards.

Facility Operating Procedure 440.3 sets forth the following:

Inside Security Perimeter - Officers/staff manning posts in the operational/activity areas will collect each inmate's identification card as he reports to the area: Visiting.

- The officer/staff will keep the inmate's ID card in his possession at all times while the inmate is in the area/building or securely stored in a pre-arranged storage facility;
- Use the ID to identify the inmate for count and other procedures; and,
- Return the ID card to the inmate upon the inmate's departure from the area/building.

DECISION

The Grievant failed to properly maintain control and supervise an inmate under his charge.

Failure to maintain secure control of an inmate in a correctional facility constitutes serious misconduct by the Grievant, and violated operating procedures, which could have led to a serious threat to the Grievant and others in the facility.

The disciplinary action was taken to acknowledge the seriousness of the lapse of security, while not causing the Grievant to lose pay or leave time. In so doing, the department considered mitigating factors. While the inmate was not disciplined, there was no evidence that similarly situated employees were treated more favorably. The disciplinary action of a Group II written notice provided discipline for a serious lapse of duty without affecting Grievant's pay or leave status.

The Group II written notice was proper for the offense and is sustained.

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 faxes 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.

Thomas J. McCarthy, Jr.
Hearing Officer