

Issues: Group II Written Notice (failure to follow policy) and Suspension; Hearing Date: 01/23/09; Decision Issued: 01/30/09; Agency: DJJ; AHO: John V. Robinson, Esq.; Case No. 9009; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9009

Hearing Officer Appointment: December 16, 2008
Hearing Date: January 23, 2009
Decision Issued: January 30, 2009

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group II Written Notice issued by Management of the Department of Juvenile Justice (the "Department" or "Agency"), as described in the Grievance Form A dated August 15, 2008.

The hearing officer was appointed on December 16, 2008. The hearing officer scheduled a pre-hearing telephone conference call at 2:00 p.m. on December 23, 2008. The Grievant, the Department's advocate (the "Advocate") and the hearing officer participated in the pre-hearing conference call. The Grievant 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Grievance Form A and is seeking certain relief requested in his Grievance Form A, namely the Group II Written Notice rescinded, the three (3) days suspension reinstated with restoration of any lost pay and benefits. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on December 23, 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 Advocate. 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 exhibits 1-8 in the Agency's exhibit binder and 18 pages faxed by the Grievant to the hearing officer on January 16, 2008.¹

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.

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 juvenile correctional officer-senior, employed by the Agency at a juvenile detention center (the "Facility").
2. The Grievant was so employed on June 3, 2008.
3. At approximately 1728 hours on June 3, 2008, the Grievant who was the responsible floor officer, took four residents (D, S, P & M) to the unit showers.
4. After being in the showers for about twelve (12) minutes, the four (4) residents returned to their rooms.
5. The night shift Facility staff came on duty at approximately 7:00 p.m. While such staff did not notice anything untoward during their first check of the residents, during the second check, at about 1930 hours, a Senior Juvenile Correctional Officer (the "JCO-Sr.") discovered P lying on the floor of his rom.
6. After calling and receiving no response from P, the JCO-Sr. entered the room and found P lying face down, unconscious, with a bloodied face and bleeding from the mouth.
7. Medical staff were summoned and P was taken to the hospital where he was admitted for two (2) days.
8. Upon returning from hospital on June 5, 2008, P was assigned to the Facility infirmary for further observation.
9. When on June 8, 2008, the Facility tried to return P to his unit, P refused to go back to his same unit, saying for the first time that he had been physically assaulted while in the shower on June 3, 2008 by D and S.

10. P stated that the real reason for his hospitalization was the assault and not a seizure, as the Facility had at first thought.
11. The Facility commissioned its institutional investigator (the "Investigator") to conduct a review of the matter.
12. Amongst other things, the Investigator reviewed surveillance video tape relating to the incident and interviewed the Grievant and the other shift juvenile correctional officer (the "Other JCO") who was occupied on the control board and was oblivious to what was going on with the four (4) residents who were out for showers.
13. Like the Grievant, the Other JCO stated that soon after the residents went to the showers, she was contacted by a superior officer and told to have all units in the building secure all the residents and to check their safety equipment for inclement weather.
14. The Grievant admitted that he did not watch the residents while he checked the emergency equipment during the showers and the video surveillance confirms this fact (Exhibit 2).
15. The Grievant's excuse is that he was checking the safety equipment as instructed. However, at the hearing, the Grievant also admitted that if the same situation occurred again, he would first secure the residents before checking any equipment.
16. The Grievant also did not properly conduct the visual room checks in accordance with written policy, as required.
17. Grievant's failure to properly supervise the residents while they were in the shower, an undisputed dangerous locale for resident mischief and violence, afforded the opportunity to the miscreant or miscreants to assault the victim without being seen.
18. The Grievant received significant education and training concerning the need to follow the policies applicable in this proceeding.
19. The post orders clearly constitute applicable established written policy.
20. 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.
21. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

22. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
23. 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 a Group II offense, as asserted by the Department. Amongst other things, *Group II* offenses include: failure to follow a supervisor's instructions or comply with written policy. AE 8.

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 Facility's Institutional Operating Procedure Number 2.2 concerning Management and Supervision of Residents provides, in part, as follows:

[Facility] staff shall supervise residents on campus as follows:

1. All staff are responsible for maintaining sight and sound supervision of assigned (and physically present) residents, inside and outside the building at all times. . .
3. Staff shall always position themselves where they will have maximum sight supervision and no "blind spots" in the coverage/supervision of residents. . .
7. During showers at least one staff shall be positioned to supervise the shower area, while the other staff supervises the remainder of the residents.

AE 5.

The Facility's Security Post Order Number 16 provides, in part, as follows:

Maintain professional decorum and keep security and safety of the wards as the most important element of supervision. . .

Maintain continual observation of area of control. Be alert for any unusual activities, behavior, conditions, or violations of institutional or program rules, and reports to Unit Sergeant.

Maintain a complete and accurate log of all activities/incidents. . .

Treat all wards in a fair, firm, and consistent manner. . .

A complete security check of your area of control will be made at least every hour. The Pod Officer will make a complete security check to include all floors, vestibule area, and a visual check of each cell. The Control Center Officer will be notified of these rounds and will be responsible for logging such. . .

Informal counts shall be made every 15 minutes by the Pod Officer during all shifts and shall be documented every 30 minutes in log books.

AE 4.

The Grievant argued that he had conflicting instructions and the punishment was inappropriate. However, the Agency counters that the instructions were not conflicting because the Grievant was not told to check his emergency equipment “immediately” and the so-called conflicting instruction incorporated as the first step, the primary directive to secure the residents (reinforced by the written policy and significant trainings received by the Grievant). The Grievant admitted during the hearing that he would act differently if faced with the same shower situation in future and the Agency asserts that it fully accounted for any mitigating factors by only suspending the Grievant’s employment for three (3) out of a possible ten (10) days. The Agency also argues that despite the Grievant’s admitted good past service to the Agency and his clean record to this point, the seriousness of the infraction and the assault preclude a lesser sanction. The hearing officer agrees.

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 assault and the seriousness of the Grievant’s infraction, preclude 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, Main Street Centre, 600 East Main Street, Suite 301, 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).