

Issues: Group III Written Notice (bringing contraband into facility) and Suspension;
Hearing Date: 02/27/09; Decision Issued: 03/02/09; Agency: DOC; AHO: Cecil H.
Creasey, Jr., Esq.; Case No. 9029; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9020

Hearing Date: February 27, 2009
Decision Issued: March 2, 2009

PROCEDURAL HISTORY

On October 7, 2008, Grievant was issued a Group III Written Notice of disciplinary action with five days suspension. The offense was knowingly attempting to introduce contraband in the form of two bottles of cologne into a corrections facility, in violation of Agency policy. Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 28, 2009, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on February 6, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, February 27, 2009, on which date the grievance hearing was held at the Agency's regional office.

The Agency submitted an exhibit notebook with numbered exhibits that were, without objection from the Grievant, admitted into the grievance record and will be referred to as Agency's Exhibits, numbered respectively. The Grievant did not submit any documents beyond the Agency's submission. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Advocate for Agency
Representative for Agency
Two witness for Agency (including Representative)

ISSUES

Did Grievant's conduct warrant disciplinary action under the Standards of Conduct and Agency policy? If so, what was the appropriate level of disciplinary action for the conduct at issue?

The Grievant requests rescission or reduction of the Group III Written Notice.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

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).

Code § 2.2-3000 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.

The Agency's Policy 135.1, Standards of Conduct, defines Group III offenses to include acts and behavior of such a sever nature that a first occurrence normally should warrant termination. Examples of Group III offenses include refusal to obey instructions that could result in a weakening of security. Agency Exh. 6.

The Offense

The searching corrections officer and the assistant warden testified for the Agency. The Grievant elected not to testify. After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant as a corrections officer for seventeen years. Her duties include maintaining security, custody and control over inmates at the institution, and she was required to carry out her responsibilities in accordance with supervisor's instruction, written post orders, divisional and institutional operational procedures. Agency Exh. 3.

The Grievant attempted to bring into the security area at least two bottles of cologne she stated she was bringing to the nurses. When searched at the sally port, the searching officer found the bottles in her coat. The searching officer barred the items and directed the Grievant to store the bottles in her car, which the Grievant apparently did. Under the applicable procedure, the incident was reported to the watch commander, resulting ultimately in the Group III Written Notice.

The Agency's Local Operating Procedure (LOP) 440.2, Perimeter Security, provides a list of items that are authorized to be carried into the security compound by employees, and bottles of cologne are not specifically permitted. There is also a list of prohibited items, that is not all-inclusive, that does not specifically address cologne. The policy requires that for any item that is questionable and not listed, approval on a manifest is required to be signed by the Chief of Security, Warden Senior, or the Assistant Warden for Public Safety and Internal Control. Agency Exh. 7. The Grievant did not testify at the grievance hearing, but she acknowledged in the investigation and in her written responses that she was aware of the applicable policies.

The assistant warden testified that the Group III written notice was issued because the Grievant deliberately attempted to violate known policy against contraband. The severity was deemed to be a Group III because the prior active group notice was for a contraband violation (accepting food from visitors and inmates). The assistant warden testified that the discipline for this current offense was mitigated to suspension for five days in lieu of the normal termination for a Group III offense or a second Group II.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant 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 the 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.*

I find that the Grievant’s admitted conduct satisfies the Agency’s burden of proving the offense. The Agency demonstrated a reasonable, measured response to the Grievant’s prior Written Notice, mitigating down to a less severe discipline. For the current offense, although there was no evidence of a corrupt motive for bringing the contraband into the secure facility, the violation was, nevertheless, knowing and intentional. Violation of the applicable contraband policies is appropriately considered a Group III offense under the Standards of Conduct. For this reason, I find the Agency has met its burden of proof.

The Grievant’s record contains an active Group II Written Notice issued October 6, 2006, for improper associations between employees, visitors and inmates. On the face of the prior, active written notice the discipline is noted as being mitigated down to no suspension without termination because of the length of the Grievant’s service and past performance. For this present offense, the assistant warden testified that the discipline was similarly mitigated from termination to five days’ suspension because of the Grievant’s tenure with the agency.

Mitigation

The agency has proved (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* (“Hearing Rules”) § VI.B.1.

Removal is the normal disciplinary action for Group III Written Notices unless mitigation weighs in favor of a reduction of discipline. Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution.” Va. Code § 2.2-3005(C)(6). Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Since the Agency has already mitigated the discipline from termination to five days suspension, when combined with the prior active written notice, the Agency has demonstrated a record of measured disciplinary response. With the agency already having mitigated its

cumulative discipline, it would take extenuating circumstances to show mitigation sufficient to reduce the level of discipline further. Under the *Rules for Conducting Grievance Hearings*, an employee's length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. While any discipline carries a serious consequence and should be imposed charily, in this case, the Agency's action of imposing a Group III Written Notice with suspension is within the limits of reasonableness. While the hearing officer finds that this Grievant did not act with corrupt motive, in light of the applicable standards, the Hearing Officer finds no evidence that warrants any further mitigation to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, I uphold the Agency's Group III Written Notice with five days suspension.

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, 600 East Main Street, Suite 301, 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**. (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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer