

Issues: Group II Written Notice (failure to follow policy) and Suspension; Hearing Date: 02/26/09; Decision Issued: 03/05/09; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9030; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 9030

Hearing Date: February 26, 2009  
Decision Issued: March 5, 2009

**PROCEDURAL HISTORY**

The Grievant received a Group II Written Notice on November 6, 2008 for:

Failure to comply with applicable established written policy.<sup>1</sup>

Pursuant to the Group II Written Notice, the Grievant was suspended from November 11, 2008 through November 14, 2008 with a loss of pay. Further, the Grievant was removed from the FTO Program until the Written Notice becomes inactive. On December 6, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. On January 29, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On February 26, 2009, a hearing was held at the Agency's location.

**APPEARANCES**

Agency Representative  
Agency Party  
Grievant  
Witnesses

**ISSUE**

1. Did the Grievant fail to comply with applicable established written policy?

**AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to

---

<sup>1</sup> Agency Exhibit 1, Tab 9, Page 4

independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. 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.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing eight (8) tabbed sections. In addition, prior to the commencement of the hearing, the Agency introduced without objection, an additional Tab 9. That notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a folder containing five (5) tabbed sections and that folder was accepted in its entirety as Grievant Exhibit 1.

Prior to the introduction of evidence by witnesses in this matter, the Grievant orally stipulated that he had touched the bottom of a female visitor's foot with the palm of his hand while performing a search for contraband on this visitor. The only place that this Grievant touched the female visitor was on the bottom of her foot. In addition to stipulating this touching, the Grievant stipulated that this touching violated Policy 445.1 of the Virginia Department of

Corrections Operating Procedure. More specifically, the Grievant stipulated that he violated Section VII(D) wherein Policy 445.1 states in part as follows:

Visitors shall be subject to the following search requirements:

1. Searches shall be conducted with consent of the visitor ...
2. All searches shall be conducted by a corrections official of the same gender as the visitor.<sup>2</sup>

Having stipulated the violation of this Policy, the Grievant stated that his position was that he was allowed to remain on duty for the remainder of that shift and was not punished for several days thereafter. The Grievant testified that he told his immediate supervisor, who brought this matter to his attention within minutes of the touching, that he was sorry and that it would never happen again. He further testified that he did not then think that touching the bottom of a female visitor's foot would be a violation of the Policy but that now he understands that it was a violation of the Policy.

The Agency's witnesses testified that the Commander of the Grievant's shift determined that the Grievant would be allowed to finish that shift. Further, the Agency witnesses testified that, when this matter was brought to management's attention on the Monday following the weekend event, management dealt with this in an expeditious fashion which then led to the Group Notice.

The Agency introduced Policy 135.1 which is the Virginia Department of Corrections Operating Procedure Standards of Conduct.<sup>3</sup> This admitted violation of Policy clearly falls within the definitions of a Group II Written Notice and a suspension is an acceptable punishment for a Group II Written Notice.

The Hearing Officer finds that there is no issue regarding the fact that the Grievant was allowed to finish his shift and that the Written Notice was not issued for several days after the actual event. Accordingly, the Hearing Officer finds that the Grievant did fail to follow applicable established written policy in this matter.

### **MITIGATION**

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..."<sup>4</sup> 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

---

<sup>2</sup> Agency Exhibit 1, Tab 4, Page 6

<sup>3</sup> Agency Exhibit 1, Tab 5

<sup>4</sup> Va. Code § 2.2-3005

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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. Having considered the above non-exclusive list as well as any other reasons for mitigation which were introduced at the hearing, the Hearing Officer finds that there are no grounds for mitigation of the Agency’s punishment.

### **DECISION**

For reasons stated herein, the Hearing Officer finds that the Grievant did fail to follow applicable established written policy.

### **APPEAL RIGHTS**

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the Hearing Officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main Street, Suite 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party and to the EDR Director. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>5</sup> You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>6</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

---

William S. Davidson  
Hearing Officer

---

<sup>5</sup>An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>6</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.