

Issues: Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 02/17/09; Decision Issued: 03/18/09; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 9031; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 03/23/09; Reconsideration Decision issued 03/31/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 03/23/09; EDR Ruling #2009-2263 issued 04/10/09; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 03/23/09; DHRM Ruling issued 04/15/09; Outcome: AHO's decision affirmed.**

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 9031

Hearing Date: February 17, 2009

Decision Issued: March 18, 2009

APPEARANCES

Grievant
Agency Representative
4 Witnesses for Agency
0 Witnesses for Grievant

On February 17, 2009, a formal grievance hearing was held on this matter in the large conference room in the office of the Hearings Officer due to the fact that the Agency facility where Grievant was employed had been closed. The decision was delayed for the Agency to submit copies of regulations and policy in effect at the time of the offense.

ISSUES

“Was Group II written notice resulting in termination proper for Grievant’s actions regarding failure to follow applicable established written policy, including watching a football game when security policy required the Grievant’s attention to be elsewhere?”; and

“Was Grievant’s termination additionally proper due to the fact that an inmate was burned by Grievant’s cigarette, whether on purpose or due to horseplay?”

FINDINGS OF FACTS

1. On November 21, 2008, Grievant was issued a Group II Written Notice for “... failure to comply with applicable established written policy, to wit, on the above offense date you acknowledge you were watching a football game when security policy required your attention to be elsewhere. Additionally it appears evident that you either purposely burned an inmate with your cigarette or, due to your horseplaying, created a situation where an inmate was burned by your cigarette.” The written notice specified termination as of November 21, 2008.

2. Grievant had an active Group III Written Notice in her file, when the Group II Written Notice was issued. The Group III Written Notice would have expired on February 14, 2009.

3. Grievant was seated watching the Virginia-Virginia Tech football game with inmates and one other corrections officer in a dorm of the correction facility. She left the area briefly, when she returned, the TV channel had been changed. She told Inmate A to turn the F_____ TV back. He ignored her. Grievant then told Inmate if he didn't change the TV back (to the Virginia-Virginia Tech Game) she was going to burn him. Grievant took Inmate A's cigarette and asked him if he had ever been burned by a cigarette. He showed her his right arm. Grievant burned Inmate with her cigarette. The Grievant testified the burn occurred accidentally.

4. Grievant admitted to an investigator from the Department Inspector General's Office that she was watching the televised football game and that the cigarette in her hand accidentally burned the inmate. She maintained she was watching the TV because of noise from inmates about the channel being changed.

5. While a surveillance camera was in position to record the incident, the recording equipment did not record and retain the incident. Forensic experts' attempts to retrieve the record of the incident were unsuccessful.

6. Attempts to retrieve the record of the incident delayed the investigations of the incident for five (5) months.

7. There was no testimony of an eyewitness to the Grievant burning the Inmate's arm.

APPLICABLE LAW AND OPINION

For state employees subject to the Virginia Personnel act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the polices and procedures promulgated by DHRM.

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

Department of Corrections Standards of Conduct shall be and are consistent with Department of Human Resources Managements (DHRM) policy which sets the standards for professional conduct and behavior, and corrective actions for unacceptable behavior.

Virginia Department of Corrections Operating Procedure, 130.1 Rules of Conduct Governing Employee Relations With Offenders effective December 15, 2006, was in effect at the time of the incident in question.

Grievant was given adequate notice of the offenses, admitted she was watching the TV in the inmate's dorm in writing, and was given an opportunity to respond at which time she maintained the cigarette burn was an accident.

Department of Human Resources Management Policy and Procedure Manual effective September 16, 1993, was in effect when the Group II was issued. Policy No. 1.6, Section V.B.3.b.(2), states that an employee not terminated with the first Group III Written Notice "... should be advised that any subsequent written notices during the active life of the written notice may result in discharge."

Mitigation was considered. From the evidence all required procedures were followed.

DECISION

While no eyewitness testified to seeing the Grievant burn the Inmate, she admitted violating policy by watching the televised football game while on duty. This violated Security Post Order #6. The use of abusive language directed toward an inmate violated the Virginia Department of Corrections Operating Procedure 130.1, Section VI, B.

Under the Standards of Conduct in effect at the time of the incident, such actions were misconduct.

Even if the cigarette burning incident was an accident, which was not proved, the surrounding circumstances qualified the issuance of a Group II Written Notice. With a Group III active at the time the Group II was issued, termination was proper.

The issuance of the Group II Written Notice is sustained as is the termination.

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

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
RECONSIDERATION OF DECISION OF HEARING OFFICER

In re: Case Number 9031

Hearing Date: February 17, 2009
Decision Issued: March 18, 2009
Reconsideration Date: March 31, 2009

Grievant, requested this Hearing Officer to reconsider and change the decision in the above matter.

I have reviewed the evidence and reconsidered the decision in this grievance. Grievant's justification for changing the decision is based on the testimony cited from another Corrections Officer who was disciplined for willfully filing an incomplete report on the incident.

A full investigation of the matter was accomplished by a Department Inspector General investigator. A copy of the investigator's report was sent to Grievant before the hearing. The investigator's testimony, as well as Grievant's own statements during the investigation and the hearing, bear out the charge. While there was not an eye witness to Grievant burning the inmate, the Grievant admitted doing so. Grievant asked Inmate if he had been burned and from the evidence, Grievant told him he would be burned and told of brushing ashes from his arm.

From the credible evidence presented, the Group II Written Notice was proper. I decline to change my decision.

Thomas J. McCarthy, Jr., Esquire
Hearing Officer

April 15, 2009

RE: **Grievance of v. Department of Corrections**
Case No. 9031

Dear :

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, your request does not identify any such policy, so we must respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley