

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 04/06/09;
Decision Issued: 04/06/09; Agency: DOC; AHO: John R. Hooe, III, Esq.; Case
No. 9037; 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. 9037

Hearing Date: April 2, 2009
Decision Issued: April 6, 2009

PRELIMINARY MATTERS

A telephone pre-hearing conference was conducted on March 3, 2009 at 9:00 a.m. during which the parties agreed to conduct the due process hearing on Thursday, April 2, 2009 commencing at 9:30 a.m. on the grounds of the facility. The delay in conducting the hearing was at the request of the Grievant.

It was further agreed during the pre-hearing conference that a copy of all exhibits a party intended to introduce at the hearing and a list of witnesses to be called would be provided to the Hearing Officer and to the other party no later than March 26, 2009.

APPEARANCES

Grievant
Representative for Agency
Agency Advocate
Four Witnesses for Agency
Two Witnesses for Grievant

ISSUES

1. Did the Grievant disobey instructions given by a superior? If so, was the Grievant's behavior a violation of the Agency Operating Procedures and Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?
2. Should mitigating factors result in less severe discipline?

EXHIBITS

The Agency Exhibits admitted into evidence were contained in a single notebook with the following contents:

- Tab A - The Group II Written Notice issued August 5, 2008
- Tab B - Operating Procedure 135.1 Standards of Conduct
- Tab C - Grievant's Form A with attachments

The Grievant's Exhibits admitted into evidence were the following:

- Exhibit 1 - Property Inventory, 3 Pages
- Exhibit 2 - Controlroom log book, 2 Pages

FINDINGS OF FACT

The Grievant filed a timely appeal from a Group II Written Notice issued on August 5, 2008 for violation of Operating Procedure 135.1 XI.B.1. "Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy". Following the failure to resolve the matter at the third resolution step, the Grievant was qualified for a hearing.

The Grievant's immediate supervisor testified that she gave the Grievant a direct order to pack and inventory two sets of inmate property. The supervisor further stated that she discovered that the Grievant and a co-worker had not completed the assigned work before beginning work on a third set of property. The supervisor further testified that due to the actions of the Grievant it was necessary to complete the packing and inventory of all three sets of property at the end of Grievant's shift, resulting in some overtime which otherwise would not have been necessary.

Although the Grievant maintained that she believed that her supervisor had ordered her and her co-worker to also deal with the third set of property, none of the testimony from the other witnesses, including the two witnesses called by the Grievant, support the Grievant's position.

The Warden testified that a Group II Written Notice, rather than a Group I Written Notice, was issued due to the Grievant's past conduct, even though her past conduct did not result in any written notices. The Grievant testified that she had received a number of commendations at other facilities where she was employed prior to her current employment location and also received favorable reviews when she was considered for a promotion.

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 (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.

To establish procedures on Standards of Conduct and Performance 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 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 to provide appropriate corrective action.

The Virginia Department of Corrections Operating Procedure No. 135.1 sets out its Standards Of Conduct under the authority of the Code of Virginia § 2.2-1201. Operating Procedure 135.1 sets out at XI. Second Group Offenses (Group II) B.1. that failure to follow a supervisor's instructions or perform assigned work is a Group II Offense, with a first Group II Notice resulting in up to ten work days suspension without pay.

It is further noted that the Standards of Conduct at X First Group Offenses (Group I) includes at B.4. "Inadequate or unsatisfactory job performance."

Grievant contends that she believed that her supervisor had ordered the work in

question and that she did not violate any operating procedure. She further suggests that her otherwise good work record and commendations should mitigate this offense.

Upon considering all the evidence, it is clear that the discipline did not exceed the limits of reasonableness even in light of the Grievant's evidence of mitigating circumstances. While the Warden issued the Group II Written Notice so that he could potentially discharge the Grievant upon a second Written II Notice, he did not impose any suspension.

The Agency has demonstrated, by a preponderance of the evidence, that the Grievant failed to follow a supervisor's instructions, a Group II Offense.

DECISION

The disciplinary action of the Agency is affirmed. The Group II Written Notice issued to the Grievant on August 5, 2008 is **AFFIRMED**.

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 Capital Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (8-4) 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 5 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes **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.

John R. Hooe, III
Hearing Officer