

Issues: Group III Written Notice (failure to report, withholding information) and Termination; Hearing Date: 05/15/09; Decision Issued: 05/27/09; Agency: DJJ; AHO: John V. Robinson, Esq.; Case No. 9053; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9053

Hearing Officer Appointment: March 24, 2009

Hearing Date: May 15, 2009

Decision Issued: May 27, 2009

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of his employment effective December 17, 2008, pursuant to a Group III Written Notice issued on December 17, 2008 by Management of the Department of Juvenile Justice (the “Department” or “Agency”), as described in the Grievance Form A dated December 22, 2008.

The hearing officer was appointed on March 24, 2009. After scheduling the hearing for May 1, 2009, the hearing officer was informed by the Agency that the Agency’s key witness was to undergo surgery on April 29, 2009 and the Agency moved for a continuance of the hearing. The hearing officer found that under the facts and circumstances of this proceeding, a relatively short continuance would serve the interests of justice. Accordingly, the hearing officer found just cause for a short continuance and the parties agreed that the hearing was rescheduled to May 15, 2009.

The hearing officer scheduled a second pre-hearing telephone conference call at 4:00 p.m. on April 23, 2009. The Grievant’s Advocate, the Agency’s Advocate and the hearing officer participated in the pre-hearing conference call. The Grievant is challenging the issuance of the Group III Written Notice for the reasons provided in his Grievance Form A and is seeking the relief requested in his Grievance Form A, including expungement of the disciplinary action and reinstatement, with restoration of all salary and benefits. Following the pre-hearing conference, the hearing officer issued a Second Amended Scheduling Order entered on April 24, 2009, 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 Grievant was represented by his Advocate and the Agency was represented by its Advocate. 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 1-10 in the Agency's exhibit binder and exhibits A-E in the Grievant's exhibit binder.¹

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 was a juvenile corrections sergeant/unit manager, formerly employed by the Agency at a juvenile detention center (the "Facility").
2. The Grievant was so employed on August 20, 2008.
3. At approximately 8:50 p.m. on August 20, 2008, a juvenile correctional officer ("JCO") called for assistance to a particular unit at the Facility because two (2) residents ("Resident J" and "Resident W") were involved in an altercation.
4. Several officers responded to the scene, including the Grievant and Sergeant E.
5. The Grievant instructed both Resident J and Resident W to go to their respective rooms.
6. Resident W complied promptly without incident.
7. However, Resident J responded less promptly and while Resident J was walking to his room, Sergeant E placed his hands on Resident J's back and Resident J took exception to this action.
8. The Grievant followed Sergeant E into Resident J's room and the Grievant saw Sergeant E grab Resident J in the neck area, slam Resident J forcefully to the wall

¹ References to the grievant's exhibits will be designated GE followed by the exhibit letter. References to the agency's exhibits will be designated AE followed by the exhibit number.

and then to the floor. Sergeant E was choking Resident J who was expressing difficulty breathing.

9. At the hearing, the Grievant described Sergeant E as big like a football player while Resident J he described as a kid of about 140 pounds.
10. The Grievant continually told Sergeant E to release Resident J while physically trying to pull Sergeant E off Resident J, who was saying he could not breathe.
11. Finally, after some time, Sergeant E disengaged and left the room.
12. In his initial Institutional Incident Report, the Grievant did not suggest in the least that Sergeant E had behaved inappropriately concerning Resident J. AE 3.
13. After more details of the August 20, 2008 incident came to light, a dual investigation of Sergeant E's actions involving the Office of the Inspector General ("OIG"), state police and the Office of the Commonwealth's Attorney began. While Sergeant E was the main target of these investigations, the OIG was charged with investigating the entire incident and the Grievant's role also came under scrutiny.
14. When interviewed by OIG and Facility personnel on August 25, 2008, the Grievant admitted that he did not write significant details of what actually happened inside Resident J's room, as required by policy reinforced by his training. AE 8.
15. When asked by a special agent for the Grievant's rationale or reason for not including the information "considering that this was so significant," the Grievant responded, "Basically, basically, basically um who wants to implicate their fellow officer for any wrong doing, okay." AE 4, page 9.
16. The Superintendent of the Facility and others reasonably inferred from this response that the Grievant purposefully, willfully and deliberately omitted the information from his initial report in order to protect Sergeant E. AE 4, page 9.
17. Subsequently, as part of the investigation, the investigators gave the Grievant the opportunity to supplement his initial report, which the Grievant did, issuing two addenda (AE 10, pages 1 and 4 and AE 10, page 2).
18. At the hearing, the Grievant admitted that he did not tell the truth to investigators during the investigation, as policy requires reinforced by his training.
19. Naturally, the residents at the Facility were upset by the whole incident, particularly the attempted cover up of Sergeant E's violent restraint on Resident J. The Grievant admitted that he called a "community meeting" involving all of the

residents and staff during which the Grievant “apologized for what happened because I mean, what happened should have never happened.” AE 4, page 10. The Superintendent reasonably inferred from this apology further proof that the decision by the Grievant to withhold significant details from his initial report was conscious and deliberate.

20. The Grievant’s omission from the initial report posed a significant safety risk to public safety at the Facility, including both staff and residents.
21. The criminal component of the investigation concerning Sergeant E slowed the progress of the whole investigation, including the investigation into the Grievant’s actions. Because of the length of the investigation and before the investigative report was made available to the Superintendent of the Facility by the OIG, the Superintendent first referred the Grievant’s infraction to a Major at the Facility for disciplinary action. This Major, with the Superintendent’s approval, recommended a Group II for failure to follow written policy with a suspension and held a meeting with the Grievant.
22. In the meantime the Grievant met with a person at the Central Office of the Agency to complain about the proposed discipline and was referred back through the chain of command and told to let the grievance process take its course.
23. Subsequently, the Superintendent received the investigative report and materials from OIG and based on this new information and not for any retaliatory reasons, decided to withdraw the earlier Group II before presenting the Grievant with the new due process, first giving the Grievant another opportunity to review and respond before any action was taken.
24. The investigation by OIG was independent, thorough and professional and was reasonably relied upon by the Superintendent. The investigators did not coerce the Grievant as he asserts.
25. The Grievant received significant education and training concerning the need to follow the policies applicable in this proceeding. AE 8. The Grievant admitted that he knew the policies.
26. 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.
27. The Department’s actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
28. The Department’s actions concerning this grievance were reasonable and consistent with law and policy.

29. 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. By contrast, the Grievant was evasive on cross-examination and admitted during the hearing that he did not tell the truth to investigators.

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 "SOC"). 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 III offense, as asserted by the Department. Offenses in this category include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or

unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws. AE 9.

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. However, the Grievant bears the burden of persuasion concerning his claim of retaliation.

The Grievant has alleged retaliation but has failed to carry his burden of proof in this regard. An agency may not retaliate against its employees. To establish retaliation, a grievant must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)* (2) suffered a materially adverse action; *See EDR Ruling Nos. 2005-1064, 2006-1169 and 2006-1283* and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the grievant's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2, 2007) and *EDR Ruling No. 2007-1561 and 1587, page 5* (June 25, 2007).

The Grievant maintains that the Superintendent retaliated against him, increasing the level of discipline, because the Grievant met with Mr. C in central office concerning the first Group II Written Notice issued to the Grievant. However, the Superintendent credibly testified that he had no problem with the Grievant's meeting at central office and that the earlier disciplinary proceedings were withdrawn because of the Superintendent's intervening receipt of the investigatory report and materials from the OIG.

In the hearing, the Superintendent exhibited no ill-will or malice toward the Grievant but rather exhibited the demeanor of a calm, composed professional who felt he could no longer trust the Grievant because the Grievant had left significant information out of the initial report to protect a fellow officer thereby creating a public safety risk. The Superintendent had himself promoted the Grievant to Sergeant about a year earlier.

Additionally, concerning the Group III Written Notice, the Agency has articulated and proven by overwhelming evidence legitimate, non-retaliatory reasons for its actions necessary to maintain discipline and orderly operations.

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).

The Superintendent did consider mitigating factors, including the Grievant's attempts to restrain Sergeant E and his past good service to the Agency. However, the Superintendent reasonably concluded that what the Superintendent characterized as the Grievant's breach of

trust in consciously not fully describing Sergeant E's egregious behavior in the Grievant's initial report, with its attendant public safety risks, left him with little options but termination. It should also be noted that further precluding any chance of mitigation and further eroding the element of trust, are the Grievant's admissions, freely made, that he did not tell the truth to the investigators, a significant aggravating factor.

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.*

The action taken by Management was entirely appropriate under the circumstances and is in accordance with applicable policy and law.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the Group III 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 and/or facimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).