

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 10/23/09; Decision Issued: 10/27/09; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9204; 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: 9204

Hearing Date: October 23, 2009  
Decision Issued: October 27, 2009

**PROCEDURAL HISTORY**

The Grievant was issued a Group II Written Notice on July 28, 2009 for:

The security camera monitoring the drug closet and security monitors were inoperable for a minimum of six weeks. Inappropriate [sic] written request was made for the repairs and no follow up was made when repairs were not made on a timely basis. Also, the master security key was not protected. Records of access to restricted areas were not reviewed. These contributed to the alledged [sic] theft of drugs used for K9 training and made it difficult to pin point a time of the occurrence.<sup>1</sup>

Pursuant to the Group II Written Notice, the Grievant received a three (3) day suspension with loss of pay.<sup>2</sup> On July 28, 2009, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>3</sup> On September 25, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On October 23, 2009, a hearing was held at the Agency's location.

**APPEARANCES**

Agency Representative  
Agency Advocate  
Grievant  
Grievant Advocate  
Witnesses

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

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

<sup>3</sup> Agency Exhibit 1, Tab 2, Page 8

## **ISSUE**

1. Did the Grievant fail to follow appropriate procedure in requesting repairs for the security monitoring system and the security monitors at the Agency?
2. Did the Grievant fail to properly follow up to see to it that such repairs were made?
3. Did the Grievant fail to adequately protect the master security key that was in her possession?
4. Did any of the actions set forth above contribute to the alleged theft of drugs used for K9 training?

## **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.<sup>4</sup> Implicit in the Hearing Officer's statutory authority is the ability to 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.

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<sup>4</sup> 2005 VA. App. LEXIS 255 (July 5, 2005)

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 six (6) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1. The Hearing Officer’s copy of Agency Exhibit 1 was misnumbered in that there is no Page 4 to that exhibit. The pages were numbered 1, 2, 3, and then 5 through 42. Throughout this opinion, the Hearing Officer will refer to that notebook as it was numbered and not as it should have been numbered.

The Grievant provided the Hearing Officer with no documentary evidence and stated that she would rely on the documentary evidence that was contained within Agency Exhibit 1.

The Grievant in this matter was an Administrative and Programs Specialist III.<sup>5</sup> The Grievant’s Employee Work Profile in part states that the purpose of her position is as follows:

To provide ongoing planning and responsibility of the Security and Housekeeping units to include the developing and enforcing of preventative maintenance practices, the careful supervision of regular, hourly and contract staff... Incumbent is responsible for the development of applicable policies and procedures for the two units.<sup>6</sup>

The Employee Work Profile also provided, under the competencies required of the grievant to successfully perform this job, in part as follows:

...Working knowledge of security practices and procedures...<sup>7</sup>

On or about Thursday, June 4, 2009, the Grievant received an e-mail from one of her subordinates, (hereinafter "ST") stating in part as follows:

...In the storm the other night monitor # 1 and all cameras went out, has been out 2 days, monitor #2 and all cameras have been in freeze frame all week, we have no visual of anything going on in housing, CD [the Superintendent of Buildings and Grounds] was supposed to come check out monitor #2 the other day, it is still the same so I don’t know if he did or not, AB [the person who would actually

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<sup>5</sup> Agency Exhibit 1, Tab 4, Page 28

<sup>6</sup> Agency Exhibit 1, Tab 4, Page 28

<sup>7</sup> Agency Exhibit 1, Tab 4, Page 29

make the repairs] is supposed to be at the new location assisting in training.  
(HELP)<sup>8</sup>

On June 5, 2009, the Grievant forwarded this exact e-mail to the employee referred to in the e-mail of June 4, 2009 as the one who was supposed to be at a new location assisting in training.<sup>9</sup>

The Hearing Officer heard testimony from the Agency witnesses that AB was the electrician who would normally be tasked with fixing cameras and monitors. The Hearing Officer further heard testimony that this employee was at another state location at the time of these e-mails and did not return for at least two (2) weeks and that he was under no obligation to check his e-mails during this time frame.

On June 21, 2009, the Grievant received another e-mail from ST. This e-mail stated in part as follows:

...I left a voicemail on CD's voicemail concerning the same. We still need our camera monitors back on line. I know you know this but this is just a reinterization [sic], somebody should have a need to know when AB is not present.<sup>10</sup>

On June 22, 2009, the Grievant forwarded the e-mail of June 21, 2009, which she received from ST to AB asking if he could help with these items. At no time did the Grievant directly notify CD, who was the Superintendent of the Buildings and Grounds Department. The Hearing Officer heard testimony from the Agency witnesses that whenever there was a repair issue of this type, that either the Buildings and Grounds e-mail mailbox should receive a copy of a request for the item to be fixed or the original should be sent to that e-mail address. The reason for this is that e-mail address was monitored on a daily basis by a number of people and, an e-mail would be addressed immediately.

The Superintendent of the Buildings and Grounds Department, CD, testified that he did in fact receive a voice mail from ST prior to June 21, 2009 and that, to the best of his recollection, he responded to that voice mail and checked the monitoring and camera system on or about June 21, June 22, or June 23, 2009. Agency witnesses testified that as of the time frame of June 21 through June 23, 2009, the Buildings and Grounds Department was on notice of the problem regarding the monitoring system and the cameras. CD testified that he performed a cursory check of the system and discovered what he deemed to be one (1) monitor that was not working properly. He felt that the system was in fact recording data. Without notifying anyone else, he put in place the necessary steps to repair that monitor. In point of fact, the repairs did not take place until July 10, 2009, after it was discovered that drugs were missing from a secure room where drugs were maintained for K9 training. As it turned out, at least the camera that

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<sup>8</sup> Agency Exhibit 1, Tab 3, Page 14

<sup>9</sup> Agency Exhibit 1, Tab 3, Page 15

<sup>10</sup> Agency Exhibit 1, Tab 3, Page 16

focused on that room was not functioning and may not have been functioning since June 1<sup>st</sup> or 2<sup>nd</sup>, 2009.

The Agency presented through its witnesses credible evidence that the Grievant should have at least copied the generic Building and Grounds e-mail box with her request to AB when she copied to him the message that she had received from ST indicating that there was a problem with the cameras. This request would have gone to the Buildings and Grounds generic e-mail box on or about June 5, 2009. Further, the Agency presented credible evidence that the Grievant's follow up e-mail to AB of June 22, 2009 should have been sent to the Buildings and Grounds generic e-mail box. Virginia Department of Corrections Procedure II-M-Part II(C)(1)(a) states as follows:

Department staff that discover items needing repair shall report the problems noted to the Department Head, or designee. Each Department Head is then responsible for ensuring that a web request is submitted including a brief explanation of the problem, a notation of whether the work requested is routine or emergency, and the name of the person submitting the request. <sup>11</sup>

Further, Virginia Department of Corrections Procedure II-M-Part II(C)(1)(b) states in part as follows:

Department heads are responsible for monitoring the progress of the request that are filed from their assigned areas. <sup>12</sup>

There is no evidence before the Hearing Officer that the Grievant ever notified the head of Buildings and Grounds that there was a problem with the cameras. There is no evidence that the Grievant followed up with anyone to see if the cameras were in fact working. Inasmuch as this Agency had a secure room with drugs in it and a secure room with weapons in it, this is clearly a violation of the Grievant's Employee Work Profile wherein it states that that she is responsible for security.

The Grievant was issued a Master Security Key. This key would allow her, or anyone who had possession of it, to enter doors that had a magnetic key lock on them. On occasion, the batteries in the magnetic key lock could fail and this key, a metal key, was a means to open the doors in the event that the magnetic key cards failed. The Agency presented evidence that there were three (3) people who had this type of master key. The Agency presented evidence that it had investigated the other two (2) and came to the belief that they were not involved in this matter. The Agency's witnesses testified that the Grievant stated to them that she had left her master key in her drawer in an unsecured manner. There was no evidence that the drawer was locked nor was there evidence that the drawer was in a locked room.

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<sup>11</sup> Agency Exhibit 1, Tab 5, Page 34

<sup>12</sup> Agency Exhibit 1, Tab 5, Page 34

The Agency has the ability to create a Lock Access Report which will show when a door was entered and whose access card was used to enter the door. This Report is limited to the last 100 entries of that particular door. When the drugs were discovered as missing, the Grievant was ordered to produce such a report and it indicated that an inappropriate card was used to attempt to enter the drug room and that one (1) of the master keys was used to enter it. The Grievant did not testify and did not deny that her key was the one used to enter the drug room. The burden on the Agency is to prove by a preponderance of the evidence, not beyond a reasonable doubt, that the Grievant's key was used. In the face of the Agency's affirmative testimony and the lack of the Grievant's denial, the Hearing Officer finds that the Agency has proved by a preponderance of the evidence that it was the Grievant's master key that was used to enter the secure drug room. Accordingly, her failure to properly secure this key and to periodically produce Lock Access Reports to determine if someone was using her key facilitated the theft of the drugs.

In this matter the Grievant chose not to testify. The Grievant called only one (1) witness on her behalf. That witness was ST, the person who sent the first e-mail in this matter notifying the Grievant of the problems with the cameras and monitors. His testimony was exceedingly brief and simply confirmed that he left a voice mail with CD regarding the problem with the cameras and monitors. The Grievant offered no other evidence, either oral or written. The Grievant relied on the written evidence that the Agency offered. None of this written evidence helped the Grievant. It generally will not be difficult for the Agency to carry its burden of proof when a Grievant does not offer any evidence that is contradictory to the evidence presented by the Agency. The Grievant in this matter seemed more concerned with the failure of others to properly perform their duties in this matter than with her own failure to properly follow procedure.

### **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>13</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 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. The Agency, in consideration of the Grievant's prior work record, mitigated this matter from a potential termination to a Group II Written Notice with a three (3) day suspension. The Hearing Officer has considered all of the delineated items in mitigation as set forth in this paragraph and, the Hearing Officer also considered any and all other possible sources of mitigation which were raised by the Grievant at the hearing and the Hearing Officer finds that there are no additional grounds for mitigation in

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<sup>13</sup>Va. Code § 2.2-3005

this matter and that the Agency has properly mitigated the Grievant's punishment from a potential termination to a Group II Written Notice with a three (3) day suspension without pay.

### **DECISION**

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof and that the Group II Written Notice was validly and properly issued and that the three (3) day suspension without pay was proper.

### **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  
600 East Main Street, Suite 301  
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>14</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>15</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]

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William S. Davidson  
Hearing Officer

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<sup>14</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>15</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.