

Issue: Group III Written Notice (failure to follow instructions/policy); Hearing Date: 09/21/10; Decision Issued: 09/27/10; Agency: DOC; AHO: John R. Hooe, III, Esq.; Case No. 9403; Outcome: Partial Relief.

**COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of : Case No. 9403

Hearing Date: September 21, 2010
Decision Issued: September 27, 2010

APPEARANCES

Grievant
Representative for Agency
Agency Advocate
Three Witnesses for Agency

ISSUES

1. Did the Grievant violate the Virginia Department of Corrections Operating Procedure and Standards of Conduct Policy 135.1, XI.B.1. "Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy"? 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 1 - The written notice
- Tab 2 - Grievance documents
- Tab 3 - Photograph
- Tab 4 - Due process meeting memo
- Tab 5 - Internal incident report
- Tab 6 - Security post order for post no. 25
- Tab 7 - Post order review log page for post no. 25
- Tab 8 - Operating procedure 410.1 regarding Control Centers
- Tab 9 - Operating procedure 135.1 Standards of Conduct

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

- A. Incident report dated March 24, 2010 regarding C/O Z.

B. Incident report dated December 12, 2008 regarding C/O C.

FINDINGS OF FACT

The Grievant filed a timely appeal from a Group III Written Notice issued on March 16, 2010 for violation of Policy 135.1 Standards of Conduct for failing to comply with written established policy. The disciplinary action taken was the issuance of a Group III Written Notice without further discipline. The grievance, not having been resolved, was qualified for a hearing.

Agency exhibit 6, the Security Post Orders for post no. 25 states at page 10, no. 19 as follows:

The entry door to the control room remains secured at **all times** when not in use. Any offender workers in the area will be secured between the Sally Port Sliders anytime the control room doors open.

An agency witness testified that she observed the Grievant, a corrections officer at post no. 25, open the control room door at a time when an offender was not secured as required by the post orders. When the witness observed the Grievant open the control room door a second time without securing the offender, the witness testified that she mentioned to the Grievant that this was a breach of security.

Another witness for the Agency testified that upon observing the surveillance video of the area in question, the Grievant was seen to open the door a third time (after having the matter brought to his attention just minutes before) without securing the offender.

The Warden of the facility in question testified that the Grievant's failure to follow policy constituted a breach of security and could have resulted in the offender getting into the control room and opening all doors, an offender getting into the armory or an offender in certain locations having escaped from the facility.

The Agency's evidence established that the Grievant signed the post order review log indicating that he read and understood the post orders for post no. 25 (Tab 7). The Grievant testified that he does not deny violating the post orders when he opened the door without securing the offender. However, the Grievant said that he does not recall the witness pointing out the violation and that possibly he did not hear her because of the phones ringing in the area in question.

The Grievant also stated that the only issue before the Hearing Officer was the mitigating factor of inconsistent application of policy. In this regard, Grievant Exhibit A and Grievant Exhibit B were introduced to show that two other corrections officers opened doors in violation of post orders and neither received a Group Written Notice. In contrast, each of the other corrections officers received a "notice of improvement needed/substandard performance".

The Warden testified that prior to the subject incident which occurred on February 24, 2010, the Warden believed that the corrections officer was a good corrections officer. The Warden noted that no other infractions or written notices are in the corrections officer's personnel file.

The Warden testified that the Grievant's otherwise good record was considered as a mitigating factor which resulted in a Group III Written Notice without termination, suspension or demotion.

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. The written Notice issued on March 16, 2010 designates the type of offense as a Group III. However, the violation that is described on the Written Notice refers to Standards of Conduct 135.1XI.B.1. “Failure to comply with written established policy.” But when referring to Agency Exhibit 9, the Standards of Conduct at XI.B.1. describe the offense as a Group II offense, not a Group III offense.

The Agency’s advocate argued that the offense is a Group III offense under Standards of Conduct XII.B.7. and 16. The offense set out at B.7. is “violating safety rules where there is a threat of physical harm” and the offense set out at B.16. is “refusal to obey instructions that could result in a weakening of security”.

While the Agency did not produce evidence that the Grievant “refused” to obey instructions, the Agency’s evidence did establish that the Grievant’s actions violated safety rules where there is a threat of physical harm. However, the Agency did not charge the Grievant under XII.B.7.

The Agency has demonstrated, by a preponderance of the evidence, that the Grievant violated the security post orders for post no. 25 and thereby was guilty of a Group II offense.

The Grievant did not establish inconsistent application of policy. The incident involving the corrections officer as set in Grievant Exhibit A is very different factually. Grievant Exhibit A describes a corrections officer who opened the wrong gate by mistake and quickly shut the gate. Likewise, the incident described in Grievant Exhibit B involved a corrections officer who opened a control room door without securing an area who immediately corrected his mistake without incident.

DECISION

The disciplinary action of the Agency is modified. The Group III Written Notice issued to the Grievant on March 16, 2010 shall be reduced to a Group II Written Notice.

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

