

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 05/13/11; Decision Issued: 05/23/11; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 9578; Outcome: No Relief – Agency Upheld.

Commonwealth of Virginia
DEPARTMENT OF CORRECTIONS

DECISION OF HEARING OFFICER
In the matter of: Case No: 9578

Hearing Date: May 13, 2011
Decision Issued: May 23, 2011

PROCEDURAL HISTORY

On January 25, 2011, Grievant was issued a Group II Written Notice (Offense Date: 9/30/10) with a one day suspension for "Failure to follow instructions and/or policy", (Written Notice Offense Code/Category 13). The *Nature of Offense and Evidence* indicated:

"Violation of Standards of Conduct Op 135.1 XI. B.1. Failure to comply with established policy: On 09/30/10, [*Grievant*] was working conducting bar and window checks on N2 pod. Instead of conducting the cell checks as partners, which is the policy, [*Grievant*] performed the checks individually by himself. ..." ¹

On February 21, 2011, Grievant timely filed a grievance to challenge the Group II Written Notice. The Employee Grievance Procedure - Grievance Form A was dated 02-21-10 (*emphasis added*) by Grievant in what appears to be a clerical error in the year. Grievant's "Grievance Form A" was stamped as received by Agency on 2/22/11. The grievance proceeded through the resolution steps. On March 31, 2011, when the parties failed to resolve the grievance, the agency head qualified the grievance for a hearing.² The Department of Employment Dispute Resolution assigned this matter to the Hearing Officer effective April 28, 2011.

A pre-hearing conference, via telephone, was held on 5/6/11 with Grievant, Agency Representative, and Hearing Officer. At this pre-hearing conference the grievance hearing was set, by agreement, for 5/13/11 beginning at 9:00 A.M. at the agency's facility.

Hearing Officer and the individuals indicated below appeared at the time, date, and location set for grievance hearing. Grievant did not appear. At the direction of the Hearing Officer on 5/13/11 attempts were made to contact Grievant via telephone after the agreed upon 9:00 A.M. start time for the hearing. It was determined that Grievant had sent an e-mail to Hearing Officer and to Agency Representative on 5/12/11 at 10:11 P.M. stating that he would not be attending the grievance hearing on May 13, 2011. A copy of Grievant's e-mail of 5/13/11 will be included as a part of the record in this cause.

¹ Agency Tab 1.

² Agency Tab12: Grievance Form A.

The grievance hearing began at approximately 9:50 A.M. on 5/13/11 at the agreed location with Grievant not present. Agency Exhibits (Tabs 1 through 12) were admitted *en masse* at hearing.

APPEARANCES

Agency Representative
Agency Party Designee (who was also a witness)
Lieutenant

ISSUES

Whether the issuance of a Group II Written Notice with one day suspension was warranted and appropriate under the circumstances?

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.³ A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.⁴

FINDINGS OF FACT

After reviewing the evidence admitted at hearing and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant was issued a Group II Written Notice with a one day suspension on January 25, 2011 (Offense Date: 9/30/10) for "Failure to follow instructions and/or policy". The "Nature of Offense and Evidence" indicate: "*Violation of Standards of Conduct Op 135.1 XI. B.1. Failure to comply with established policy...*"⁵

Grievant is employed by Agency as a Corrections Officer at Agency Facility.⁶ Grievant was so employed on 9/30/10. On 9/30/10 Grievant conducted "bar and window checks" on N2 pod, which was segregation unit at Agency Correctional Facility. Grievant conducted the "bar and window checks" alone. Grievant stated in a written document attached to his "Grievance Form A" that he does not contest that he worked alone on 9/30/10 conducting "bar and cell

³ Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8.

⁴ Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 9.

⁵ Agency Tab 1.

⁶ Agency Tab. 12.

checks" in N2 pod at Agency's Correctional Facility.⁷

"Bar and cell checks" are security inspections conducted at Correctional Facility and involves restraining any present offender, entering the cell, and tapping on the window frames, vents, grills, doors, making sure nothing is loose and listening for different sounds.⁸

Agency policy requires more than one officer be present during "bar and window checks" when entering the cell with an offender present in the cell.⁹

Offender reported an incident occurring on 9/30/11 involving Grievant. An allegation was filed by Offender at Agency Correctional Facility that on 9/30/10, during a "bar and cell check" conducted by Grievant in Offender's cell, that Grievant struck Offender. This allegation led to interviews, incident reports, investigations, and polygraph examinations being conducted. At the conclusion of the investigations Agency determined that Offender's allegation was false.¹⁰

Agency has promulgated written policy on Facility Searches and Inspections. Virginia Department of Corrections Operating Procedure 445.2 ("OP 445.2) (Effective Date: August 1, 2009) addresses Facility Searches and Inspections. Corrections Officers receive training on OP 445.2 at the academy and OP 445.2 is available at Facility for Corrections Officers to review. This policy provides, "Searches shall be conducted by two correctional officers or a corrections officer and another DOC employee. ...".

Security Post Orders, POST NUMBER: 64, POST TITLE: N-2 floor/Segregation, also provides, in pertinent part, that, "Searches must be completed by **at least (2) two** Officers".¹¹ Additionally, it provides, "If it becomes necessary to enter an offender's cell, **at least (2) two** certified Officers will be present."¹²

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This legislation includes provisions for a grievance procedure and 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 pursue legitimate grievances.

Code Section 2.2-3000(A.) sets forth the Virginia grievance procedure and provides, in 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

⁷ Agency Tab 12, written statement of Grievant.

⁸ Testimony of Lieutenant.

⁹ Testimony.

¹⁰ Testimony, Agency Tabs 5,6,7,8,9,10, and 11.

¹¹ Tab 4, Security Post Orders, Specific Duties: # 11.

¹² Tab 4, Security Post Orders, Specific Duties: # 14.

of employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

Standards of Conduct:

The Department of Corrections ("DOC"), pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department.

The *Standards of Conduct* (Policy Number 135.1 Effective Date: April 15, 2008) divide unacceptable behavior into three groups, according to the severity of the behavior, with Group I being the least severe. Group I offenses include types of behavior less severe in nature, but which require correction in the interest of maintaining a productive and well-managed work force. Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal. Group III offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal.¹³

Section IV. of the *Standards of Conduct, Operating Procedure 135.1* states:

- A. The standards of conduct outlined in this procedure are designed to protect the well-being and rights of all employees, to assure safe, efficient government operations, and to assure compliance with public law.
- B. The Standards of Conduct
 - 1. establish a fair and objective process for correcting or treating unacceptable conduct or work performance;
 - 2. distinguish between less serious and more serious actions of misconduct, and provide corrective action accordingly;
- C. The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.

Section XI. SECOND GROUP OFFENSES (GROUP II) of the *Standards of Conduct, Operating Procedure 135.1* states (in pertinent part):

- A. These include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.
- B. Group II offenses include, but are not limited to:
 - 1. failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy;
- C. Procedure for Issuing a Group II Notice.
 - 1. When issuing an employee a *Written Notice* Form for a *Group II* offense,

¹³ Agency Tab 2. DOC Operating Procedure, "Standards of Conduct".

management should issue such notice as soon as practical. Discipline shall normally take the form of the notice and up to 10 workdays maximum suspension without pay (maximum of 80 hours for non-exempt employees).¹⁴

Agency's *Standards of Conduct*, Operating Procedure 135.1, Attachment 2, provides that "failure to follow supervisor's instructions or comply with written policy" is an example of a Group II offense.¹⁵

OP 455.2

Virginia Department of Corrections Operating Procedure 445.2 (Effective Date: August 1, 2009) establishes written policy concerning Facility Searches and Inspections. This operating procedure applies to facilities operated by the Department of Corrections and provides:

During cell searches, offenders shall be removed from the cell, searched thoroughly, placed in hand restraints if appropriate, and maintained under supervision while their cell is being searched. Searches shall be conducted by two correctional officers or a corrections officer and another DOC employee. ...¹⁶

Security Post Orders:

Security Post Orders, POST NUMBER: 64, POST TITLE: N-2 Floor/Segregation, provides, in pertinent part, as follows:

SPECIFIC DUTIES:

11. Cell searches will be conducted on Mondays each week. Cell searches will be conducted every time an offender is out of his cell for any reason. If a cell has not been searched, the offender must be removed and a search conducted. Offenders who are on mental health, strip-cell status will be searched by the night shift staff. **All** cell searches shall be documented in the control room logbook. Searches must be completed by **at least (2) two** Officers. ...

14. Stay within view of the Control Room Officer, at all times. If it becomes necessary to enter an offender's cell, **at least (2) two** certified Officers will be present. A supervisor will be present, if possible.

29. Each Monday, the day shift officer(s) will be responsible for conducting a window/bar check of **every** cell within the assigned area of control focusing on lighting, windows, bars, and grills....

SPECIFIC DUTIES (SPECIAL HOUSING UNIT)

7. **Each** time an offender is removed from their cell, ensure the following procedure is being followed.

- At least two (2) certified Officers will be present at the cell door. (1) One officer will maintain constant-sight supervision of the offender while at the

¹⁴ Agency Tab 2. DOC Operating Procedure, "Standards of Conduct".

¹⁵ Agency Tab 2.

¹⁶ Agency Tab 3, OP 445.2 Section V.A.1.c.

cell door.¹⁷

Allegations:

"Bar and window checks" of a cell are regularly conducted by Corrections Officers at Correctional Facility. This involves a Corrections Officer striking bars/vents/other structural items of a cell with a rubber mallet to determine if there is a sounding difference which may indicate a problem or tampering.

This grievance arose due to allegations an offender made of being struck by Grievant during a "bar and window check" and concerns by management that Grievant failed to comply with established policy when he conducted "bar and window checks" without a partner as policy required.

Grievant entered a "segregation cell" where an offender was held for behavioral issues. Grievant entered the offender's cell alone. Offender was not removed from the cell and was in the cell while "bar and window checks" were being conducted by Grievant.

An allegation was made by an offender that, during the September 30, 2010 "bar and window checks" of his cell, Grievant struck him. This matter was reported by the offender to Agency staff and was the subject of two investigations. Ultimately, the Agency determined that the allegation was false.

Agency raised strong safety and security concerns in there not being another Officer present when Grievant entered Offender's cell. Also, Agency expressed concern that if policy was followed and two Officers were present for the "bar and window check" the false allegation and the subsequent investigations (including polygraphs) may have been "eased". Agency opined that with a 2nd Officer present the matter may not have risen in the first place or, if it arose, it could have been investigated and resolved more expeditiously.

The evidence indicates that there was written policy in place that required more than one officer be present during the "bar and window check" on 9/30/10 when Grievant entered the cell with an offender present in the cell. Furthermore, Grievant was aware or should have been aware of this policy when he entered the cell alone. Testimony of Lieutenant indicated that two officers need to be at a cell when cell door is open and when making a "bar and window checks". One officer stays at the door with Offender while the other makes the checks. Lieutenant testified that he did not know of any exception when one officer alone would be allowed to go into a "segregation" cell.

Grievant does not contest that he conducted the "bar and window checks" on N2 pod on 9/30/10 without a second officer present. Grievant does contend in his document filed with his *Form A* that he does not feel the discipline was fairly and consistently administered.

Testimony of Warden indicated that other staff received disciplinary actions as a result of the matters occurring on 9/30/10. Furthermore, Warden was not aware of any prior incident of

¹⁷ Agency Tab 4.

the same nature in which disciplinary action was not taken.

There was no evidence presented at hearing of inconsistent or unfair application of policy.

Due Process:

Warden met with Grievant November 10, 2010 and discussed matters. Warden notified Grievant of the offense, provided an explanation of the agency's evidence in support of the charge, and gave him an opportunity to respond. A subsequent meeting was set and held on December 8, 2010. At this meeting Grievant responded to the allegations.

Due to allegations by Offender of being struck by Grievant both an institution investigator and the IG Office conducted investigations of matters in this cause. The investigations were brought to a conclusion prior to issuance of the Written Notice. These investigations took time to conclude. Ultimately, both investigations exonerated Grievant of assault and battery of the offender.

The evidence indicates that Grievant was given oral written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

Mitigation:

Under the *Rules for Conducting Grievance Hearings*, Section VI, B, 1, 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.

Section XI. B.1. of the *Standards of Conduct, Operating Procedure 135.1* provides that, "failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy" is an example of a Group II Offense.

Section XI C.1. of the *Standards of Conduct, Operating Procedure 135.1* provides that, "Discipline shall normally take the form of the notice and up to 10 workdays maximum suspension without pay..." In this cause Agency imposed a one day suspension.

The evidence indicates that mitigating and aggravating circumstances were considered by Agency. Agency raised strong concern with safety and security and was concerned that Grievant placed himself in jeopardy. Agency expressed concern that if policy was followed by Grievant and two Officers were present the false allegation may not have arisen in the first place. Additionally, Agency expressed concern that with two officers present matters may have been investigated and resolved more expeditiously.

The Agency's discipline is not found to exceed the limits of reasonableness.

CONCLUSION

Based upon the evidence presented at hearing and for the reasons presented above, the Agency has proven by a preponderance of the evidence that (i) Grievant engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the Agency's discipline was consistent with law and policy. Furthermore, the disciplinary action of issuing a Group II Written Notice with one day suspension was warranted and appropriate under the circumstances.

DECISION

For the reasons stated above, the Agency's issuance to Grievant of a Group II Written Notice with one day suspension is hereby **UPHELD**.

APPEAL RIGHTS

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

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 are 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: Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219.

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: Director, Department of Employment Dispute

Resolution, Main Street Centre, 600 East Main, Suite 301, Richmond, VA 23219.

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 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. You must give a copy of your notice of appeal the Director of the Department of Employment Dispute Resolution.

Lorin A. Costanzo, Hearing Officer

Copies:
Agency
Grievant
EDR

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