

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 9600

Hearing Date: June 14, 2011

Decision Issued: January 13, 2012

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
4 Witnesses for Agency
1 Witness for Grievant

ISSUE

"Was the Group II Written Notice with termination issued to Grievant for failure to follow post orders to complete security checks appropriate?"

FINDINGS OF FACTS

1. Grievant was issued his second Group II Written Notice which occasioned his termination for failure to perform security checks as outlined in post orders and properly log security checks when done.
2. On February 16, 2011, Grievant was assigned area (C-1 Pod). Grievant did not perform hourly security checks from 6:11 a.m. to 8:22 a.m. Grievant was 8 minutes late performing security checks from 12:45 p.m. until 1:53 p.m. No security check was made on February 17 until 9:50 a.m. even though checks were logged as being done.
3. Testimony was heard that log entries were not timely made.
4. Grievant asserted that his position was short staffed and he had to man the gate, supervise feeding, escort a nurse on her rounds and provide a count. By Agency policy, security checks are the top priority duty for corrections officers.

5. Agency witnesses testified that security checks required the Corrections Officer making the checks to enter the cell, make sure the inmate was alive and look for unauthorized activities, all as a first priority over other assigned duties.

6. Testimony was heard that agency staff checked the rapid-eye television camera for evidence of Grievant's activity. The recordings of this camera system were testified to but not produced, therefore testimony about such recordings was not considered.

7. Sufficient evidence was presented to sustain the Agency's case without the "Rapid Eye" recordings.

8. Testimony about Grievant's activities not from "Rapid Eye" were credible.

9. Numerous attempts, causing delay, for cause in this decision, have been made to have the recording from "Rapid Eye" available, all to no avail.

10. The Hearings Officer has disregarded as inadmissible any testimony based on the "Rapid Eye" footage.

11. The Agency has allowed the video clips that the Hearing Officer requested the Agency provide the Grievant's counsel with or means to view the scene, to be recorded over and thus destroyed.

APPLICABLE LAW OR POLICY AND OPINION

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

The Director of the Department of Employment Dispute Resolution has ruled that the Grievant has the burden of proof in this matter under Operating Procedure 101.5, dated October 1, 2007.

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)], and Department of Corrections Procedure 101.5, dated October 1, 2010, as amended.

Virginia Department of Corrections Operating Procedure, No. 135.1, effective date April 15, 2009.

DECISION

In spite of valiant attempts by the Advocate for the Agency, the video material testified to has not been made available to Grievant's counsel and has not been considered relevant. It has been recorded over and thus destroyed.

Based on the testimony of the Grievant that he had other matters, i.e. feeding, escorting a nurse, it is obvious that he did not prioritize and conduct security checks on a priority basis. Therefore, he did not follow policy and instructions by not doing and logging security checks.

I find the Group II Written Notice valid and since it was a second active Group II, termination was valid.

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 DEDR. 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 DEDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, Virginia, 23219 or faxes 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 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 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 DEDR 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.

Thomas J. McCarthy, Jr.
Hearing Officer

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
RECONSIDERATION OF DECISION OF HEARING OFFICER

In re: Case Number 9600

Hearing Date: June 14, 2011
Decision Issued: January 13, 2012
Reconsideration Date: April 9, 2012

I have reviewed the evidence and reconsidered the decision in the above matter. There was evidence in the hearing that another security officer was terminated for not making security checks he had logged as required by post orders. Given the seriousness of the circumstances as presented, I cannot find the termination inconsistent or unreasonable. Another security guard was terminated for not doing security checks he had logged. In this matter, a second Group II Written Notice for the same conduct was grieved. The termination was not unreasonable or inconsistent with similar matters. Grievant did not make at least one security check and logged that he did, and this was misconduct.

Due to the circumstances of this being a prison security check matter, the discipline (termination) did not exceed the limit of reasonableness requiring mitigation by this hearing officer.

Thomas J. McCarthy, Jr., Esquire
Hearing Officer