

Issue: Group III Written Notice with Termination (failure to follow policy/procedures);
Hearing Date: 05/02/16; Decision Issued: 05/09/16; Agency: DOC; AHO: John
R. Hooe, III, Esq.; Case No. 10798; Outcome: Partial Relief.

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

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of: Case No. 10798

Hearing Date: May 2, 2016
Decision Issued: May 9, 2016

PRELIMINARY MATTERS

Upon being appointed as the Hearing Officer in this matter, effective April 5, 2016, the Hearing Officer arranged a pre-hearing telephone conference which was conducted on April 13, 2016 at 9:00 a.m. The telephone pre-hearing conference was conducted with the Grievant and Agency representative. During the telephone pre-hearing conference, was agreed that the grievance hearing was scheduled to be conducted on Monday, May 2, 2016 beginning at 9:00 a.m. at the Agency's preferred location. It was also agreed that a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called would be provided to the Hearing Officer and the other party no later than Monday, April 25, 2016 at 5:00 p.m.

APPEARANCES

Grievant
Representative for Agency
Advocate for Agency
Five witnesses for Agency

ISSUES

1. Did the Grievant commit multiple violations of Operating Procedure 601.4 resulting in missing TABE test booklets?
2. If so, did Grievant=s conduct constitute a Group III violation?
4. If the Grievant=s conduct constituted a Group III violation, was termination of employment justified?

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents:

- 1 - Written Notice
- 2 - Employee Grievance
- 3 - Operating Procedure 601.4
- 4 - Standards of Conduct 135.1
- 5 - TABE and OPT Regional Training Book
- 6 - Virginia Department of Correctional Education DCE (Test Security Agreement)
- 7 - Statement from Grievant
- 8 - Test material verification form
- 9 - Due process meeting notes
- 10 - First step meeting details
- 11 - Statement from Principal
- 12 - Email regarding TABB cost
- 13 - Superior Invoice Example

The Grievant Exhibit admitted into evidence is Exhibit A which is a transcript of the statement read to the Hearing Officer by the Grievant after the Grievant was placed under oath by the Hearing Officer.

FINDINGS OF FACT

The Grievant filed a timely grievance regarding her termination of employment.

The undisputed evidence is that on February 19, 2016 the Grievant was administering the Test of Adult Basic Education. All materials are required to be kept in a locked box except during the actual testing. The Grievant testified that at about 4:30 in the afternoon, the inmates from Class 5 were “finishing up.” She stated that as they were handing in their test

booklets and answer sheets before leaving, she got all the booklets and sheets out of the lock box and put them in sequential order. She further testified that when the last person from Class 5 was done she put his booklet in the appropriate sequential stack and placed everything in the lock box. She testified that at approximately 5:15 she took the cart to the principal's office and Employee 1 unlocked the office so that the lock box could be placed in the secured office. The Grievant did not mention to Employee 1 or to anyone else at that time that two booklets were missing. The Grievant testified that it had been the past practice that the booklets would be counted on the next return to work day which was February 23, 2016.

On February 23, 2016 at approximately 7:15 a.m. the Grievant met with Employee 1 in the principal's office and counted the test booklets. At that time Employee 1 confirmed that two booklets were missing. The principal's notified of the missing test booklets, the Grievant's class was closed for the day and the Grievant and several co-workers searched for the missing booklets. The two booklets were not found.

The Grievant's un rebutted testimony indicated that she has been an employee for twenty years and has conducted the test in question over seventy times, following the same procedures and practices she followed on February 19, 2016. The Agency acknowledges that the Grievant has no prior written notices and that the Group III and termination resulted because of the impact on the Agency resulting from the two missing test booklets.

The Agency's first witness, Witness 1, Superintendent, testified regarding the regional training the Grievant received as to TABE testing as more fully set out at Agency Exhibit 5. She specifically referred to page 7 of Exhibit 5 which is titled "Administrator's Job Description. Test Security: The School Administrator has the ultimate responsibility!" The items listed on page 7 do not appear to apply to instructors such as the Grievant. The witness also referred to page 8 of Exhibit 5 titled "Instructor's Job Description." In the job description it states "Promptly takes action, documents the irregularity and reports any irregularities to the administrator." The witness then referred to Agency Exhibit 8 indicating that the "Testing Materials Checkout Form" was not properly filled out by either the Grievant or by Employee 2, the Regional Office Manager.

Witness 1 further testified that the Grievant on January 25, 2011 signed the "Test Security Agreement" shown as Agency Exhibit 6. Specifically, she referred to number 9 of the agreement which states "I understand that at least two trained people must be present during distribution and return of the testing materials to secure area." However, it appears that in addition to the Grievant there was a second trained person involved in the distribution and return of the testing materials to the secure area.

Agency Exhibit 7 was next referred to by Witness 1, being a typed statement dated February 24, 2016 signed by the Grievant. In the signed statement the Grievant stated that at the beginning of the testing week, February 16, 2016 she got her TABE materials from the principal's office from Employee 1 who had counted them out prior to the Grievant receiving them from Employee 1. The Grievant admitted that she did not check the count or the ID numbers. In addition, the Grievant stated in the signed statement that it was on February 19,

2016 at the completion of testing that she noticed that two of the books were not there and that she did not say anything to the principal because “I thought they had been pulled for administrative reasons.”

Witness 1 referred to Agency Exhibits 12 and 13 to demonstrate the financial impact on the Agency resulting from the two missing test booklets.

Following the brief testimony of Witness 2, the Agency called Witness 3, the Director of Testing. He pointed out that when he met with the Grievant on March 1, 2016 she signed the statement at Exhibit 9 which includes the statements “Takes Responsibility. Not counting books when received. Not counting books when returned at the end of the week.”

Witness 4, Principal, testified that he issued the written notice (Agency Exhibit 1) and emphasized that the Grievant was responsible for the count of the textbooks and that her failure to do so and the missing textbooks undermined the entire mission of the school.

Witness 5, Supervisor of Principals, testified that he has been with the Agency for 17 years. He indicated that approximately one and a half years ago a similar incident occurred and although he was not involved in discipline of the employee involved if the person had not resigned the employee would have been given a group III written notice and terminated.

Following the testimony of Witness 5, the Agency rested their case.

The Grievant testified that she did not report the missing test booklets when she discovered them on Friday the 19th because she believed they had been pulled for some administrative reason since she had the appropriate number of booklets for the number of people testing. She testified that it had happened in the past and had not been a problem. She further testified that it has been the normal practice not to count at the end of the day when the lock box is returned to the principal’s office but at the beginning of the next work day which in this case would have been February 23rd. She also testified that during her many years as an employee and having conducted the test seventy or more times she has always followed the same practices as on the occasion in question. The Grievant further testified that inmates were to be checked by the J4 officer leaving the classroom and the entry way officer when entering the cell block. If this was done, the Grievant questioned why the booklets which are 8 inches by 11.5 inches would not have been discovered.

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.

Operating Procedure No. 135.1 Standards of Conduct apply to the Agency and the Grievant as an employee of the Agency the Operating Procedure No. 135.1 V Groups of Offenses and Mitigating Circumstances provides the following definition:

D. Third Group Offenses (Group III)

1. These offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant termination.

DECISION

The evidence indicates that the Grievant's failure to properly inventory the test booklets and her failure to immediately report the two missing test booklets was not willful misconduct. The Grievant's un rebutted testimony was that even if the test booklets were taken by an inmate while they were in Grievant's possession they should have been discovered by the J4 officer when the inmates were leaving the classroom and the entry way officer when entering the cell block. No other employees were disciplined with respect to the missing test booklets.

The Hearing Officer is not convinced by a preponderance of the evidence that the Grievant's failure to properly inventory the test booklets and her failure to immediately report that the two test booklets were missing represent either singularly or in combination a Group III offense. However, the Hearing Officer does conclude that a preponderance of the evidence supports the Grievant's misconduct justifying a Group II written notice. Group

II include actions and behaviors that are more severe in nature than those listed at Group I. Specifically, Group II offenses include, but are not limited to: “a. Failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy.”

Accordingly, it is the decision of the Hearing Officer that the Grievant should be reinstated to her employment with the Group III written notice being replaced with a Group II written notice with ten work days suspension without pay. With the exception of the unpaid suspension, the Grievant is reinstated with full benefits and back pay.

APPEAL RIGHTS

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A 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 administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. AReceived by@ means delivered to, not merely post-marked or placed in the hands of a delivery service.

Requesting Administrative Review:

1. **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 refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. The director=s authority is limited to ordering the Hearing Officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-786-1606 or emailed.
2. **A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings)**, as well as a request to present newly discovered evidence, is made to EDR. This request must refer to a specific requirement of the

grievance procedure with which the hearing decision is not in compliance. EDR=s authority is limited to ordering the Hearing Officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-786-0111 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

Final Hearing Decision. A Hearing Officer=s original decision becomes a final hearing decision, with no further possibility of 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:** Once an original hearing decision becomes final, either party may seek review by the Circuit Court on the ground that the final hearing decision is contradictory to law. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR=s approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency=s request.

A notice of appeal must be filed with the Clerk of the Circuit Court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

John R. Hooe, III
Hearing Officer