

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 06/06/13; Decision Issued: 06/25/13; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 10068; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10068

Hearing Officer Appointment: April 24, 2013

Hearing Date: June 6, 2013

Decision Issued: June 25, 2013

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the issuance of a Group II Written Notice issued January 9, 2013 by Management of Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A dated January 22, 2013.

The Grievant is seeking the relief requested in her Grievance Form A including restoration of any lost pay and benefits and rescission and removal from her record of the Group II Written Notice.

The hearing officer issued a Scheduling Order entered on May 1, 2013 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant represented herself and the Agency was represented by its advocate (the "Advocate"). Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing¹.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

In this proceeding, the Agency bears the primary burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the

¹ References to the agency's exhibits in a white binder will be designated AE followed by the exhibit number and references to the Grievant's exhibits in a purple binder will be designated GE followed by the exhibit number, if any.

circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses she has raised.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. At the time of the discipline which is the subject of this proceeding, the Grievant was employed as a Correction Officer ("C/O"), a security position, by the Agency at a correctional facility (the "Facility").
2. Security and safety at the Facility of staff, offenders and the public are paramount.
3. As a C/O, the Grievant is responsible, amongst other things, for providing security, custody, and control over inmates at the institution within and outside the Facility. AE 2 and 3.
4. The Grievant's partner recently retired and on January 3, 2013, the Grievant and another C/O were assigned to transport an inmate to a local hospital for treatment.
5. The Grievant picked up certain items, including the inmate restraints, from the Facility's armory.
6. The Grievant drove the trail vehicle and met the ambulance transporting the inmate and the other C/O at the Sallyport.
7. Even though the Grievant had the inmate restraints she had collected from the armory in her vehicle, she assumed, without checking, that the inmate had been placed in other restraints at the Sallyport.
8. In fact, the inmate was transported unrestrained to the hospital.
9. Under the applicable circumstances, Agency policy requires that inmates being transported be restrained in handcuffs, waist chain, cuff cover and leg irons at all times.
10. The Grievant has received significant training on such policy.

11. The Warden testified credibly and convincingly that the Grievant's failure to restrain the inmate on the way to the hospital constituted a threat to public safety.
12. The Assistant Warden testified credibly and convincingly that both the Grievant and the other C/O were in charge of the transportation of the offender and by policy both C/Os were responsible for ensuring that the offender was restrained.
13. The Grievant admits that a lot of things went wrong that day but doesn't feel that she is totally responsible. The Grievant admits that she had possession of the restraints in the trail vehicle on the way to the hospital. The Grievant admits that public safety was an issue.
14. The offender was restrained on the way back to the Facility pursuant to policy.
15. The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

ADDITIONAL FINDINGS, APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances 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

operative Agency Standards of Conduct (the “SOC”) are contained in Agency Operating Procedure 135.1 (“Policy No. 135.1”). AE 5. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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 and to provide appropriate corrective action.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth’s employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a “super-personnel officer” and must be careful not to succumb to the temptation to substitute his judgment for that of an agency’s management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

Pursuant to Policy No. 135.1, the Grievant’s conduct could clearly constitute a terminable offense, as asserted by the Agency. Here, the Agency elected not to terminate but instead mitigated the disciplinary sanction to a Group II offense with a 40 hour suspension. AE 1. Clearly, the punishment is not too harsh or unjust.

Policy No. 135.1 provides in part:

(V)(D)

THIRD GROUP OFFENSES (GROUP III):

1. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.
2. *Group III* offenses include, but are not limited to:
 -
 - g. Violating safety rules where there is a threat of physical harm.
 -

AE 5.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The Agency reasonably mitigated the discipline under the circumstances. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group II offense for failure to follow written policy.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

While the Grievant did not specifically raise mitigation in the hearing or in her Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Written Notice and all of those listed below in his analysis:

1. the Grievant's service to the Agency;
2. the fact that the Grievant's usual partner had recently retired; and
3. the often difficult and stressful circumstances of the Grievant's work environment.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to further reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and in disciplining the Grievant and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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 two types of administrative review, depending upon the nature of the alleged defect of the decision:

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. 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 or e-mailed.
2. **A challenge that the hearing decision does not comply with grievance procedure** 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 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 should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

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 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 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 EDR before filing a notice of appeal.

ENTER: 6/25/13

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

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