

Issues: Group III Written Notice with Suspension (failure to follow policy), and Group III Written Notice with Termination (coercing State employees); Hearing Date: 11/19/12; Decision Issued: 01/08/13; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 9936; Outcome: Partial Relief, employee reinstated; **Attorney's Fee Addendum issued 02/08/13 – no fees awarded.**

DECISION OF HEARING OFFICER

IN RE: CASE NO.: 9936

HEARING DATE: November 8th and 19th, 2012

DECISION ISSUED: January 8, 2013

PROCEDURAL HISTORY:

An incident occurred on August 19, 2012. There was an investigation August 20-22, 2012. Grievant received a suspension letter on August 21, 2012. A preliminary report of the incident was made on August 24, 2012. There was an undated disciplinary review letter sent to Grievant. Grievant responded to the disciplinary review letter on September 5, 2012. On September 10, 2012 Grievant was issued two written notices. This matter was appointed to a Hearing Officer on October 10, 2012. There was a prehearing conference on October 18, 2012. The hearing occurred on two dates November 8th and 19th, 2012.

APPEARANCES

Grievant
Grievant's Attorney
Grievant's Witnesses
Agency Party Designee
Agency Advocate
Agency Witnesses

ISSUES

1. Did Grievant engage in the behavior described in the first written notice, that being, did Grievant fail to follow policy?
2. Did Grievant engage in the behavior described in the second written notice, that is, did Grievant attempt to coerce state employees?
3. Was Agency's discipline properly characterized by the appropriate Group offense?
4. Was Grievant's due process violated?
5. Were mitigating circumstances considered?

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. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. G.P.M. § 9.

FINDING OF FACTS

Grievant was a C building sergeant responsible for employees working under his command ¹. One of the offenders in C building had been under “5 points” restriction for which there were specific rules ². A supervisor was to do a shower and recreation list each morning ³. Grievant was one of the eighteen (18) categories of “supervisors” ⁴.

On August 19, 2012, a Sunday, an offender (OH), had been released from restriction but had not had a medical exam which would then have permitted him to have showers and recreation. On August 18, 2012 at morning muster, Grievant, plus several witnesses, stated Grievant did verbally make note that OH was out of 5 point restriction but the required exam could not take place until Monday. Grievant reported OH was not to go to showers or recreation. There is no evidence this information was repeated at muster on August 19th. A shower and recreation list was to be generated everyday by a “supervisor or acting supervisor” although the memo ⁵ does not specifically state which post position is responsible. The recreation list was not generated by anyone on August 19th. The recreation list would have further alerted employees to not release OH to the recreation cages.

Grievant did not immediately review all of building C the morning of August 19th. He instead assisted an employee in building D. In Grievant’s absence two officers permitted OH to go to recreation. Further, the C watch tower employee, with no authorization, told a C building floor employee he was not needed at his post. This employee then left the post which covered the area where the incident took place.

OH was released to a recreation cage by two of Grievant’s employees who claimed they had no information to not release OH to the recreation cage.

After OH was released to the recreation cage he apparently engaged in conversation with other inmates to use OH’s socks to choke OH. There is great discrepancy as to exactly what transpired according to testimony of several witnesses. The consensus, however, was that OH expressed a desire to be choked with his socks by another offender. The camera of the recreation area is extremely crude. While it does show movement and the coming and going of officers it

¹ Agency Exhibit O

² Agency Exhibit Q

³ Agency Exhibit P

⁴ Grievant Exhibit A

⁵ Agency Exhibit P

certainly never showed any person strangling any other person. The video did show what appeared to be OH's socks hanging from his waistband.

Grievant was called to the scene and arrived as OH was being returned to his cell. Grievant questioned his staff regarding the incident and believed from the narratives that no physical harm to anyone had occurred. However, Grievant became aware that during his absence one of his employees had discharged another employee, that an employee had made an entry in the log book, that OH had been strangled with a string ⁶ and which entry the employee later attempted to delete.

Grievant did promptly report to his supervisor that an incident involving a suggestion of attempted choking had occurred. Grievant did not, however, report that one of his staff had been erroneously discharged nor that an employee had attempted to alter a state record.

The incident was further investigated after OH's mother received notice from an unknown person that her son had been abused. The mother called the facility with the information she had received. After the investigation involving the statements of several witnesses the Agency concluded that Grievant had "failed to follow established policy" ⁷ and attempted to coerce employees regarding their reporting of the incident ⁸. The Agency issued two written notices the first offense was a Group III with demotion as discipline. The second (coercion), offense was a Group III with dismissal.

OPINION

The coercion charge is simply not provable by a preponderance of the evidence, that evidence being witness statements and a video of the event. No two witness statements were consistent and most witnesses had a stake in deflecting the blame from themselves. The video was of no probative value.

While it was clear from his own actions that Grievant wished to make the least of the incident as possible, there is no evidence that Grievant told anyone to practice deception. As a matter of fact, it was reported Grievant was annoyed that the log book had been smudged and no evidence pointed to Grievant being a part of that serious infraction.

The significance of the event in terms of Grievant's involvement is that:

1. Restrictions on OH were not repeated at August 19th muster to the employees responsible for OH.
2. There was no recreation list. Whether or not Grievant was responsible for its generation, he did not notice its absence.
3. Grievant was not aware in a timely fashion that one of his employees had been dismissed by a person with no authority to do so, thus leaving that post unattended by Grievant's employee.

⁶ Agency Exhibit H

⁷ Agency Exhibit V

⁸ Agency Exhibit W

4. Grievant did not report the destruction of a state record in a timely manner.
5. Grievant did not report the unattended post in a timely manner.

Security Post Ordered⁹ clearly put Grievant on notice of his duties. At minimum Grievant breached numbers 1, 2, 3, 8, 13, 16 and 28. The written notice stated Grievant:

- A. Failed to take up the recreation list
- B. Failed to report a serious incident to your supervisor (log book entry made by Control room Officer)
- C. You did not ensure the offender was examined by medical staff once you learned of an assault
- D. You failed to investigate the incident further

It was not clear that Grievant was responsible for generating the recreation list but he certainly should have been aware of its absence. Grievant did fail to report the log book entry in a timely manner. Grievant may have possibly believed there had been no actual physical harm during the incidence. However, since there was so much controversy in the verbal reporting, Grievant should have exercised caution in having OH examined. There were no rules presented on what was or was not a “full investigation” by Grievant. Grievant did call a meeting of his employees on August 19th, 2012 to better understand the situation.

Regarding Grievant’s complaint of lack of due process, this Hearing Officer is of the opinion Grievant was fully apprised of his charges for which he was being dismissed¹⁰ as well as given an opportunity to state his position to the Agency¹¹ after being aware of the outcome of Agency’s investigation. While one charge was finally characterized as “failure to follow policy” rather than “negligence on the job” it does not prejudice Grievant as the charge is essentially the same. Grievant has been permitted the opportunity to have a hearing before an impartial officer, to confront witnesses, to present witnesses and to present any other evidence on his behalf.

DECISION

Grievant was issued a Group III for his failure to follow policy which is suggested as a Group II offense in OP 135.1¹². However, it is this Hearing Officers opinion Grievant did fail to follow several policies each of which would be a Group II disciplinary action. Group II’s may aggregate to a Group III offense. Grievant’s good record was considered and a demotion without termination was issued. This discipline is therefore **UPHELD**.

Grievant was issued a Group III with dismissal for coercing persons associated with a State Agency. This Hearing Officer does not find sufficient evidence to uphold this discipline. This discipline is **RESCINDED**. Grievant is reinstated subject to the discipline issued above

⁹ Agency Exhibit O

¹⁰ Agency Exhibit R

¹¹ Agency Exhibit U

¹² Agency Exhibit S

(demotion and pay reduction). Grievant may receive back pay subject to the reduction of the upheld discipline and from which interim earnings must be deducted.

For the reasons stated above the disciplinary action is in part **UPHELD** and in part **RESCINDED**.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.¹³ Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) 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 policy 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, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the 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:

¹³ See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant.
Case No. 9936

Director, Department of Employment Dispute Resolution
600 East Main Street, 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 original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with 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 following the issuance of the decision). 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 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 grievance arose.¹⁴ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

Sondra K. Alan, Hearing Officer

¹⁴ An appeal to Circuit Court may be only on the basis that the decision was contradictory to law, and must identify the specific Constitutional provision, statute, regulation or judicial hearing that the Hearing Decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E. 2d 319 (2002).
Case No. 9936

DECISION OF HEARING OFFICER

IN RE: CASE NO.: 9936

HEARING DATE: November 8th and 19th, 2012

DECISION ISSUED: January 8, 2013

PROCEDURAL HISTORY:

On January 8, 2013 a decision was rendered in the above styled matter which in part **upheld** and in part **rescinded** the Agency discipline of Grievant. On January 23, 2013 counsel for Grievant timely filed a request for attorney's fees in the total amount of \$5000.

APPLICABLE LAW

Section 7.2(e) of the Grievance Procedure Manual states "Attorneys' fees are not available under the grievance procedure, **with one exception**: an employee who is represented by an attorney licensed by the Virginia State Bar, and who substantially prevails on the merits of a grievance challenging his/her discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. For such an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his/her former (or an equivalent) position".¹⁵

OPINION

In light of the definition of "substantially prevail", Grievant's attorney is not entitled to attorney's fees in this matter. It is required that Grievant be returned to a former position. Grievant was reinstated to employment with the Agency but the decision specifically reinstated Grievant to encompass the discipline of the first Written Notice. This discipline was that Grievant was to be demoted from his previous position, thus not satisfying the code requirement for attorney's fees to be awarded.

DECISION

Grievant attorney's request for attorney fees is **NOT** granted.

¹⁵ See Grievance Procedure Manual §7.2(e).
Case No. 9936

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.¹⁶ Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) types of administrative review, depending upon the nature of the alleged defect of the decision:

4. 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.
5. A challenge that the hearing decision is inconsistent with state policy 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, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, VA 23219

6. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the 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
600 East Main Street, Suite 301
Richmond, VA 23219

¹⁶ See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant.
Case No. 9936

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 original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with 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 following the issuance of the decision). 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 administrative review when:

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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 grievance arose.¹⁷ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

Sondra K. Alan, Hearing Officer

¹⁷ An appeal to Circuit Court may be only on the basis that the decision was contradictory to law, and must identify the specific Constitutional provision, statute, regulation or judicial hearing that the Hearing Decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).
Case No. 9936