

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 05/09/14; Decision Issued: 06/04/14; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 10328; Outcome: No Relief - Agency Upheld.

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 10328

Hearing Officer Appointment: April 9, 2014

Hearing Date: May 9, 2014

Decision Issued: June 4, 2014

PROCEDURAL HISTORY, ISSUES  
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the issuance of a Group I Written Notice issued October 10, 2013 by the Department of Corrections (the "Department" or the "Agency"), as described in the Grievance Form A dated November 7, 2013.

The Grievant, the Agency's advocate, and the hearing officer participated in a first pre-hearing conference call on April 17, 2014.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on April 18, 2014, which is incorporated herein by this reference.

At the hearing, the Grievant was represented by his advocate and the Agency was represented by its 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 hearing<sup>1</sup>.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

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<sup>1</sup> References to the agency's exhibits will be designated AE followed by the exhibit number. The Grievant did not submit any exhibits.

## APPEARANCES

Representative for Agency  
Grievant  
Witnesses

## FINDINGS OF FACT

1. On October 10, 2013, the Agency issued to the Grievant a Group I Written Notice for unsatisfactory performance: "[Grievant] was aware of staff being off of their assigned post as Floor Officer and made no effort to correct this security breach. He was aware that Sergeant D instructed Officer B the HU 3 Lower Floor Officer to move an offender from HU 3 to HU 1. Grievant failed to ensure that someone was properly relieving Officer B." AE 1.
2. On September 12, 2013, the Grievant was in charge of supervising Housing Unit 3 from 8:00 a.m. to 10:00 a.m. at a security level 3 facility (the "Facility"), securing many dangerous offenders, including those serving life terms without the possibility of parole, for very serious crimes. AE 5.
3. A homicide occurred on HU 3 between 9:51 a.m. and 9:58 a.m. on September 12, 2013. To identify the perpetrator(s) and to assess security lapses, management conducted a second by second review of the Facility's Rapid Eye Camera system between 8:00 a.m. and 10:00 a.m.
4. While the Grievant was not initially under investigation, such review established unequivocally that the Grievant was aware that staff under his supervision were off their assigned posts as Floor Officers and the Grievant made no effort to correct this security breach.
5. The Grievant admitted that he knew for periods of time staff were not on post, especially on the first floor.
6. For example, staff responsible for the 100-200 pods went to the third floor, where the Grievant maintains his office, and the Grievant did not challenge them concerning the mandated post coverage at all times, when he became aware of their presence on the third floor.
7. Additionally, concerning the specific example cited in the Written Notice, the Warden convincingly testified utilizing the Rapid Eye log (AE 6), that the Grievant failed to ensure that someone was properly relieving Officer B when he moved an offender from HU 3 to HU 1 as instructed by Sergeant D.

8. Security at the Facility is paramount and the consequences of security lapses can be serious. In particular, if inmates observe that posts are not manned by security at all times, as required by policy, inmates can seize the opportunity for malfeasance.
9. The presence of security officers on their posts at all times is important to fulfill their dual role of both supervising and protecting offenders.
10. The Facility has a carefully conceived system of back-up supports for security officers. For example, if an officer needs to take a break or go to the bathroom, notification for provision of support is made in turn, first to the Sergeant or Lieutenant, then to the cluster and, finally, to the Watch Commander, who is responsible for staffing for the whole Facility.
11. The testimony of the Agency's 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 make this assessment, the hearing officer must review the evidence *de novo* "to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or Group III offense.)

In this proceeding, the Agency has shown upon a preponderance of the evidence that the Grievant engaged in a violation of the Agency's policy regarding the manning of security posts at all times. The Grievant's argument at the hearing, that only the specific instance of the relief of Officer B is covered by the Written Notice is not borne out by the terms of the Written Notice because the preceding sentence casts a broader net of "staff being off their assigned post" (Emphasis Supplied). AE 1.

Similarly, Grievant's contention that he was not aware of the policy is belied by the August 15, 2013 e-mail to him from the Chief of Security (AE 8) and the Muster Minutes of August 21, 2013, for which the Grievant signed. (AE 9).

The Agency has met its burden of proving upon a preponderance of the evidence that concerning the failure of the Grievant to correct staff being off their assigned posts, the Grievant engaged in the behavior contrary to policy, such behavior constitutes misconduct and is properly characterized as at least a Group I offense.

### DECISION

For the reasons stated herein, the discipline is upheld. The hearing officer hereby upholds the Agency's Group I Written Notice as warranted and appropriate under the circumstances.

### 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. 14<sup>th</sup> Street, 12<sup>th</sup> 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.

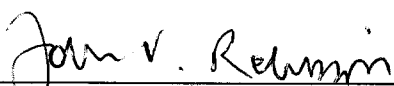
A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the 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 / 4 / 14

  
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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).

**Distribution List  
for  
Due Process Hearing  
regarding  
Duane Taylor (Case No. 10328)**

**Grievant**

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**Grievant's Advocate**

**Advocate for Department**

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**Manager's Representative**

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**OEDR Representative**

Ms. Brooke S. Henderson  
Office of Employment Dispute Resolution  
Dept. of Human Resource Management  
101 N. 14th Street, 12th Floor  
Richmond, VA 23219  
(804) 225-2995 (telephone)  
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**Hearing Officer**

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