

Issue: Group II Written Notice with Termination (failure to follow policy); Hearing Date: 03/10/15;
Decision Issued: 03/26/15; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 10496;
Outcome: No Relief - Agency Upheld.

**VIRGINIA: DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: CASE NO.: 10496

DECISION OF HEARING OFFICER

HEARING DATE: MARCH 10, 2015

DECISION DATE: MARCH 26, 2015

I. PROCEDURAL BACKGROUND

The agency issued a Group II Written Notice to the grievant on September 26, 2014. He filed this grievance on September 29. I was appointed for hearing officer in this matter on November 6, 2014. I conducted a prehearing conference by telephone on November 24.

With the agreement of the parties, I scheduled the case for a hearing on January 27.

Because of weather issues, I canceled that hearing with the agreement of the parties. I rescheduled the hearing for March 10, 2015 and conducted the hearing on that date. Subsequent to the hearing I requested additional written argument on a single issue. The parties responded by March 18.

II. APPEARANCES

The agency presented 3 witnesses and 11 exhibits. Counsel represented the agency.

The grievant testified on his own behalf as his only witness. Legal counsel represented him.

III. ISSUE

Whether the agency acted appropriately in issuing to the grievant a Group II Written Notice on September 26, 2014 and terminating him from employment?

IV. FINDINGS OF FACT

The agency employed the grievant as a Corrections Officer. He began working for the agency in May, 2012. While he was in training shortly after his hiring, a training officer solicited him to bring smokeless tobacco into the secure portion of the facility where the training was taking place. The grievant did as he was requested.

In the summer of 2014, the agency commenced an investigation of allegations of heroin having been brought into the facility where the grievant was employed. On August 13, 2014, the grievant was interviewed as part of the investigation. During the course of the interview, he admitted to bringing the smokeless tobacco into the facility. This admission was the first time that anyone in an official capacity with the agency became aware of the incident.

On August 28 the grievant submitted to an interview with the Warden and Assistant Warden. He again admitted to the event from two years earlier. He stated that he was aware of numerous other employees who brought tobacco products into the facility. The grievant had not previously reported these events to anyone with the agency. The possession of any form of tobacco within the secure portion of the facility is a violation of Agency Operating Procedure 320.6. The Operating Procedure prohibits smoking and the use of other tobacco products on all agency properties. An exception exists in the policy for the keeping of tobacco in an employee's locked personal vehicle. The Warden issued the grievant a Group II Written Notice on September 26 for violating the Operating Procedure and failing to report violations of the procedure. The grievant had an active unrelated Group III Written Notice, issued on July 1, 2014. Based on the active prior discipline, the Warden terminated the grievant from employment on September 26.

V. DISCUSSION AND ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedural Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolutions, Rules for Conducting Grievances. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

I will discuss these considerations in the order presented.

The grievant has admitted to bringing a tobacco product into the facility. He did not contest that fact during the course of the hearing. He also does not dispute that he failed to report his own misconduct and the alleged violation of the policy by numerous other agency employees.

The agency couched the Written Notice in terms of two aspects-the violation of the operating procedure and the failure to report. It is clear that bringing any tobacco product into the facility is a violation of the Operating Procedure and misconduct for which discipline is warranted.

Upon my request for clarification as to the failure to report the violations, the agency has cited two provisions. First, it argues that Section IV (H) (2) of Operating Procedure 135.1 requires employees to “report to their supervisor any conditions or circumstances, as they become known, which will prevent employees from performing effectively or completing their assigned tasks.” Under some circumstances, that language would justify the issuance of written discipline against an employee. Here, the agency’s evidence falls short. No evidence or compelling argument has been made that the violation committed by the grievant, or those alleged to have been committed by other employees, prevented any employee from performing effectively or from completing an assigned task.

The agency has also argued that Section IV (B) (1) of Operating Procedure 038.1 requires an agency employee to report “any incident affecting the safe, orderly operation” of a unit of the agency. As above, it presented no evidence that the violations of the tobacco policy affected the operations of the facility. For these reasons, I find that the

only ground for which the grievant should have been disciplined was his own violation of the OP 038.1.

I find no basis for concluding that the disciplinary action is not consistent with law and policy. The grievant had the misfortune of being interviewed extensively as part of the investigation into the allegation of heroin being brought into the facility. Had he not admitted his wrongdoing during the investigative interview, he likely would have avoided discipline. He stated to the Warden: "I should have lied."

The Warden who disciplined the grievant testified that five other employees had been disciplined for violation of the tobacco policy. The grievant acknowledged that fact. No evidence has been presented that he was unfairly singled out for discipline.

He has attempted to argue that he should be viewed as a "whistle blower" and entitled to protection under Section 2.2-3009, *et seq* of the Code of Virginia. The grievant was, in fact, the polar opposite of a whistle blower. For two years or more he was aware of wrongdoing in the facility and remained silent. It was only when his own employment was in peril that he tried to implicate others. The fact that the Investigator and the Warden did not seem to be particularly interested in the names of other employees who the grievant knew of violating the policy does not excuse his own behavior. He had worked at a correctional facility in another state where a similar policy was in place. He has argued he did not want to tell on other officers in order to avoid becoming a pariah or outcast among his fellow employees. That reason alone does not justify his initial action.

No additional evidence was presented that could be considered by me in mitigation of the punishment. I find that the violation of the tobacco policy is appropriate

for punishment under the Standards of Conduct of the agency, Operating Procedure 135.1. A Group II offense under that policy includes the failure to comply with applicable established written policy. Reasonable minds may differ on whether the tobacco policy is a wise and perfectly-written one. My job is not to second guess how a policy is written. I do not find that it has been fairly or arbitrarily applied in this instance. The Warden had the discretion to issue a Group I offense for the act of the grievant. Pursuant to Section 5.8 of the GPM the decision of an agency manager is entitled to substantial deference. As above, I cannot find the Warden acted arbitrarily or capriciously in treating this as a Group II offense.

VI. DECISION

For the reasons stated above, I hereby uphold the issuance of the Group II Written Notice to the grievant on September 26, 2014 and his termination from employment.

VII. APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management, 101
North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail [to EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15- calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes this final.

RENDERED this March 26, 2015

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer