

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 11/08/13;
Decision Issued: 11/28/13; Agency: ODU: AHO: Ternon Galloway Lee, Esq.; Case
No. 10193; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10193

Hearing Date: November 8, 2013

Decision Issued: November 28, 2013

SUMMARY OF DECISION

The Agency had found Grievant engaged in unsatisfactory performance. The Agency then issued Grievant a Group I Written Notice. The Hearing Officer found Grievant engaged in the behavior, it was misconduct, and the Agency's discipline was consistent with policy and law. Thus, the Hearing Officer upheld the Agency's discipline.

HISTORY

On May 20, 2013, the Agency issued Grievant a Group I Written Notice for unsatisfactory performance on April 25, 2013. On June 20, 2013, Grievant timely filed his grievance to challenge the Agency's action. On October 10, 2013, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A prehearing conference ("PHC") was held on October 16, 2013.¹ Subsequently, the Hearing Officer issued a scheduling order setting the hearing for November 8, 2013, as agreed to by the parties during the PHC.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. Grievant objected to the Agency's audio CD submitted as an exhibit. The Hearing Officer overruled the objection. Then the Hearing Officer admitted Agency Exhibits 1 through 5, including an audio CD; Grievant's Exhibits 1 through 5, to include an audio CD; and the Hearing Officer's Exhibits 1 through 4.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate and the Grievant represented himself.

APPEARANCES

Advocate for Agency

Witnesses for the Agency (2 witnesses)

Grievant

Witnesses for Grievant (6 witnesses including Grievant)

ISSUE

¹ This was the first date available for both parties for the PHC.

Was the written notice warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing all the evidence presented and observing the demeanor of each witness who testified the Hearing Officer makes the following findings of fact:

1. The Agency is a university and Grievant has been employed with its police department for several years. The Agency recognizes Grievant as a long-term good employee. His rank is Sergeant. (Stipulation by the Agency).
2. On April 25, 2013, about 9:17 a.m. an attempted burglary occurred in The Apartment Building. The resident came out of the shower and discovered the suspect in his apartment looking at CDs. The suspect was startled and ran off empty handed. Once reported to the Agency’s police, Grievant was dispatched to the area. (A Exh. 2). Grievant was the sergeant on duty that day and supervisor of the shift at the time of the incident. The incident occurred on campus/next to the campus. (Testimony of Lieutenant; A Exh. 1, p. 7).
3. Grievant did not immediately report by telephone the incident to the Patrol Lieutenant or the Assistant Chief of Police (“ACOP”). (A Exh. 1, p. 7; A Exh. 4, p. 9; Testimony of Lieutenant).
4. On the date of the above referenced event, however, at 5:28 p.m., Grievant submitted by e-mail a briefing of police incidents he was involved in on April 25, 2013. This briefing was sent to, among others, the acting chief of police, and it included a summary of the burglary matter occurring earlier that day at 9:17 a.m. (G Exh. 3, p. 3).
5. Management issued Grievant a Group I Written Notice for failure to timely report the incident. Management’s specific description of the alleged misconduct is as follows:

On April 25, 2013, officers were dispatched to the [apartments] on a burglary in progress. The victim reported that as he stepped out of the shower he became aware of the presence of another person in the apartment. He confronted a suspect who was in the process of taking property belonging to the occupant. The suspect ran from the apartment in an unknown direction. Officers responded and began a preliminary investigation. On your daily platoon report, you reported the following: *At 0917 hrs. [Officer #34] responded to [area district, House] in reference to a burglary in progress. The victim came out of the shower and saw the suspect in his living room near the coffee table. The victim surprised the suspect and the suspect fled from the residence empty handed. See*

report for more detail.

As the duty Sergeant, you are responsible for notifying your Patrol Lieutenant or a senior member of management about the Clery Act reportable criminal incident. Notification is necessary so that management can determine the necessity of issuing an emergency notification/timely warning to the campus community. This incident warranted the emergency notification which was issued many hours after the incident as a result of your failure to report it timely. When you were asked about the incident you replied that burglaries have not been reported in the past.

(A Exh. 1, p. 7).

CLEARY ACT

6. The Clery Act (“the Act”) is a federal law mandating colleges and universities maintain a reporting system for certain incidents. Among other requirements, the Act, requires the institutions to provide two types of alerts under certain circumstances. They are Emergency Notification and Timely Warning.² (A Exh. 4, p. 15 Testimony of Lieutenant).

7. The Clery Act requires “Emergency Notification” under circumstances noted below:

(i) Institutions are required to immediately notify the campus community upon confirmation of a significant threat to the health or safety of students or employees occurring on the campus;

(a) Immediate is defined as “imminent or impending threat;”

(b) Confirmation is defined as verified that a legitimate emergency or dangerous situation exists;

(c) Examples cited include:

Outbreak of meningitis, norovirus or other serious illness;
Approaching tornado, hurricane, or other extreme weather;
Earthquake;
Gas Leak;
Terrorist incident;
Armed intruder;
Bomb Threat;
Civil Unrest or Rioting;
Explosion;
Nearby chemical or hazardous waste spill.

(A Exh. 4, p. 15).

8. The Agency usually sends out electronic emergency notification to the university’s

² See 20 U.S.C. § 1902(f).

community by text message when there is an ongoing threat to the campus community. (Testimony of Lieutenant).

9. The Clery Act also requires “Timely Warning” under circumstances noted below:

- (i) Institutions are required to issue a timely warning for any Clery Act Crime that occurs on the institution’s Clery geography that is;
 - (a) reported to campus security authorities or local police agencies; and
 - (b) is considered by the institution to represent a serious or continuing threat to students or employees.

(ii) Clery act crimes are:

Criminal homicide/manslaughter;
Sex offenses (forcible and non-forcible);
Robbery;
Aggravated assaults;
Burglary;
Motor vehicle theft;
Arson.

(A Exh. 4, p. 15).

10. Timely Warnings are also sent out electronically and address incidents that have already occurred. (Testimony of Lieutenant).

11. Some earlier timely warnings sent to the campus community by the Agency include ones sent electronically by the Chief of Police on December 10, 2012, about burglaries that occurred on December 9 and 10, 2012, on campus or in neighborhoods surrounding campus. Also, a timely warning was provided to the campus on March 8, 2013, at 2:01 p.m. for a sexual assault and burglary that occurred in an off-campus residence on March 7, 2013, at about 1:00 a.m. (A Exh. 3, pp. 3-4; Testimony of Lieutenant).

12. Whether a timely warning is sent out is at the discretion of senior management and depends on the facts of the case. Incidents involving a residence are usually considered more dangerous than those not involving a residence. Thus, such warnings maybe more likely when an incident concerns a residence. (Testimony of Lieutenant; G Exh. 5, p. 2).

13. The Agency’s police officers, were trained regarding the Clery Act. By March 28, 2011, Grievant had received his training. (A Exh. 4, p. 13; Testimony of Grievant).

14. An institution’s violation of the Clery Act requirements could result in the university being assessed a \$35,000 fine. (Testimony of Lieutenant).

POLICIES

April 29, 2010 Directive

8. On April 29, 2010, the Agency issued a “New Notification Procedure” (“April 29, 2010 Policy”). The policy required immediate notification by telephone of the following crimes or incidents when they involved a student and/or occurred in the area of concurrent jurisdiction with the university:

- Homicide;
- Serious injury, Attempted Suicide or death of a student;
- Aggravated assault;
- Rape/Sexual Assault; and
- Robbery to individual/business.

(G Exh. 1, p. 1).

9. Also, the April 29, 2010 Policy, required the telephone notification to be made in the following order:

1. Street Sergeant, or officer in charge, to
2. On-call field command Lieutenant, to;
3. Acting Chief of Police, to;
4. Chief of Police.

10. Burglary was not listed as a crime for which immediate notification was to be made. (G Exh. 1, p. 1).

The policy also noted that when in doubt, the notification by telephone should be made regardless of the hour. Further the policy indicated that notifications are required when any of the above referenced incidents involve a student and/or occurred in the area of concurrent jurisdiction. (A Exh. 3, p.2; G Exh. 1, p.1).

October 11, 2011 Policy

11. As of October 11, 2011, the Assistant Chief of Police could determine if a timely warning or emergency alert would be sent to the Campus community. (Testimony of Lieutenant).

November 29, 2011 Directive

12. On November 29, 2011 the Agency issued Directive 2000. To the extent there were any conflicts with any prior issued policies, Directive 2000 controlled. (A Exh. 4).

13. Directive 2000 required the field commander to, among other things, notify the assistant chief of police on call of all critical and/or significant events. (A Exh. 4, pp. 9-10).

14. On April 25, 2013, Grievant was the field commander under Directive 2000. Sections II and IV of Directive 2000 read together require the Field Commander to notify the Assistant Chief of Police on-call as soon as practical of all unusual occurrences and critical and/or

significant events. (A Exh. 4, pp. 9-10).

15. Directive 2000 notes that, “Unusual Occurrences” include but are not limited to the following:

1. Active shooter, barricaded or hostage situations involving violent behavior or threat of violence;
2. Disasters or significant emergency situations as referenced in the emergency action plan (EAP);
3. Serious, disabling or life-threatening injuries or medical issues to university staff, faculty or police personnel;
4. Homicide;
5. Shooting incidents involving police personnel;
6. Any other serious situation that may threaten or cause alarm to the University community;
7. Events which may adversely affect the university's relationship with outside organizations or the University's revenue or expenditures;
8. Any incident in which the news media may show an unusual interest.

(A Exh. 4, pp. 10-11).

16. Further, Directive 2000 defines “unusual Occurrences” as “those incidents or situations which are out of the ordinary and may require the notification of the assistant chief of police on call or the chief of police.” The directive further states that if any questions exist as to whether to notify the assistant chief of police on call or the chief of police, the field commander is to err on the side of caution and make the notification. (A Exh. 4, p. 11).

17. Directive 2000 contents included the following topics:

- Purpose;
- Duties and Responsibilities;
- Staffing and Relief;
- Unusual Occurrences and Critical Incident Duties and Responsibilities;
- Administrative Contacts;
- Responsibilities of Assistant Chief of Police/Chief of Police On-Call.

18. The Agency contends Grievant failed to comply with Directive 2000, Section II (A)(8);

in that he failed to make a telephone call to senior management, or the ACOP, about the April 25, 2013 burglary. (Testimony of Lieutenant; A Exh. 1, p. 7).

May 8, 2013 email

19. On May 8, 2013, the Agency's Acting Chief of Police sent an email to its law enforcement personnel, including Grievant, reminding them of the Clery Act requirements mandating emergency notifications and/or timely warnings when conditions or unusual occurrences threatened the safety of the community. The e-mail also referenced a Sergeants' meeting held on May 7, 2013 where the above referenced Clery Act requirements were discussed. Further it noted that for emergency notifications, attempts to commit any Clery Act crimes are treated as if the crimes were completed and the required notification must be made. (G Exh. 1, p. 2; A Exh. 1, p.14).

20. The May 8, 2013 email also instructed the appropriate personnel to make emergency notifications to the Acting Chief of Police from 5:00 a.m. to 5:00 p.m. This email also listed the Clery Act crimes requiring emergency notification. Burglary was listed as one of them. (G Exh. 1, p. 2; A Exh. 1, p.14)).

Policy Number 11:1

21. The Agency established Policy Number 11:1 ("Policy 11.1") on May 15, 2013. It superseded Directive 2000 which the Agency previously issued on November 29, 2011. Among other matters, Policy 11.1 instructed field officers of whom to notify for a Clery reportable crime. Particularly, it noted the following reporting order:

1. If the senior officer's immediate supervisor is not on duty, contact any command rank officer on duty.
2. If no command rank officers are on duty, contact the command rank officer designated by the chief of police, or designee, as on call.
3. If the command rank officer identified as on call is not available, telephone in the following order until contact is made:
 - a. Assistant chief of police, administration (contact first for any possible Clery crime);
 - b. Assistant chief of police, operations;
 - c. Chief of police.

(G Exh. 1, pp. 5-6).

OTHER

22. The October 11, 2011 Progress Report was provided to the University's President. In paragraph # 16, the first sentence states, "[t]he Acting Chief of Police has assumed the responsibility of making notifications in the event of an emergency or serious situation." Also, paragraph # 24 references Clery Act reporting requirements as an area more suitable for non-sworn police staff. (A Exh. 4, pp. 3, 5).
23. Grievant received a Clery "short cut" sheet on September 19, 2012. (A Exh. 1, p. 11; A Exh. 4, p. 15). The "Short Cut" sheet list burglary as a Clery Act crime and notes the requirement to issue a timely warning regarding such an incident if reported to campus police and considered by the university to represent a serious or continuing threat to students or employees. (A Exh. 1, p. 11; A Exh. 4, p. 15; G Exh. 2, p. 9).
24. The Agency held a staff meeting on April 16, 2013 wherein Grievant and other campus police officers attended. The written agenda for the meeting does not indicate the Clery Act was discussed, nor does the notes taken by one of the officers who attended the April 16, 2013 meeting. (G Exh. 4, p. 2).
25. Several burglaries, attempted burglaries, and/theft have occurred on campus or at off campus residents during the time period April 2012 to June 2013. (A Exh. 3).
26. As early as October 2011, the Agency planned to deter crime on and around campus and make the area more secure. (A Exh. 4, pp. 1-7).
27. Prior to being issued the Group I Written Notice, Grievant had received four counseling memorandums on May 25, 2012, May 27, 2012, November 2, 2012, and November 8, 2012. (A Exh. 1, p. 11).
28. Sergeants are not issued telephones while working in the field; however, telephones are available throughout the campus and at the police station. (Testimony of Lieutenant).
29. As of April 25, 2013, Grievant, several of his co-workers who were field sergeants, and some of Grievant's subordinates never telephoned senior management and notified them about a burglary. They were under the assumption that burglaries did not need to be telephoned in to senior management. (Testimonies of Grievant, Grievant Witnesses 5, 1).
30. During the April 25, 2013 attempted burglary, the suspect did not have a weapon, and the victim reported that he did not fear for his life. (Testimony of Grievant). After the incident, Grievant was summons to the hospital regarding a student who had been assaulted. Grievant was then summons to respond to a fellow officer who had experienced a fall. At the end of his work shift, Grievant provided a briefing which included the burglary incident occurring earlier during the day. The next day, the Assistant Chief of Police asked Grievant why he failed to telephone the Assistant Chief of Police about the burglary incident that occurred the day before. (G Exh. 1, p. 5; Testimony of Grievant).

DETERMINATIONS 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/her 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 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.³

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 Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further an offense is appropriately identified as a Group II offense when it significantly impacts business operations/constitute neglect of duty or violation of a policy/procedure. Group III offenses are the most severe and normally warrant termination. *See* Standards of Conduct Policy 1.60.

On May 20, 2013, management issued Grievant a Group I Written Notice for unsatisfactory performance on April 25, 2013. The, Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted

³ Grievance Procedural Manual §5.8

and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group I Written Notice and did that behavior constitute misconduct?

The Agency contends that Grievant's performance was not satisfactory on April 25, 2013, because Grievant failed to contact the ACOP by telephone as soon as practical to inform his superior of a burglary incident. Considering the uncontradicted evidence, the Hearing Officer finds Grievant engaged in the behavior alleged.

Next the Hearing Officer considers whether this behavior was misconduct. The Agency contends its policy, Directive 2000, required telephone notice to the ACOP. It further notes that this policy allows senior management to meet the mandates of the Clery Act. That is, obtain notification of the burglary incident from the sergeant as soon as practical and issue a timely warning of the incident if (in senior management's determination) it constituted a serious or continuing threat to students or employees of the campus.

Grievant argues that the email dated April 29, 2010 was the order of the day. Relying on the content of that email, he notes that it does not list burglary as a crime for which the field sergeant is required to immediately report by telephone so that senior management can, if deemed appropriate, provide a timely warning to the university's community. In support of his position, Grievant also presented testimony of several witnesses, sergeants and officers, who testified that the practice was not to give telephone notification of a burglary, to include attempted burglary, as soon as practical to senior management.

The Hearing Officer finds Grievant's contentions are negated by evidence of record. This evidence shows timely warnings regarding burglaries had been issued by the Agency prior to the April 25, 2013 incident. These warnings reflect that at least some field sergeants had provided telephonic notices to senior management regarding burglary incidents. What is more, the evidence shows that Grievant and other officers had received Clery Act training after the April 29, 2010 email, but before the April 25, 2013 burglary incident. In addition, the evidence demonstrates that in September 2012, Grievant had been provided a document sheet identified as a "short cut" to the Clery Act. The "Short Cut" sheet list burglary as a Clery Act crime and notes the requirement to issue a timely warning regarding such an incident if reported to campus police and considered by the university to represent a serious or continuing threat to students or employees. Considering the evidence in its entirety, the Hearing Officer finds the following:

- (i) Agency policy required Grievant to notify senior management by telephone of the Clery Act incident, burglary;⁴
- (ii) Grievant failed to do so; and
- (iii) His failure was misconduct.

⁴ Even though some sergeants and officers contend they were of the belief that telephone notification of a burglary did not need to be provided to senior management, the evidence indicates that they should have known that such notification was required by policy.

B. Was the discipline consistent with policy and law?

The evidence shows that Grievant engaged in misconduct. Thus, the Agency's issuance of the least punitive disciplinary notice, a Group I Written Notice is consistent with policy and law.

II. Mitigation.

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”⁵ EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”⁶ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁷

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice and it was misconduct. Further, the Hearing Officer has found, the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable. The Hearing Officer has carefully deliberated. This has included considering all the evidence, to include (but not limited) testimony of all witnesses, Grievant's work history, Grievant's receipt of prior counseling, other incidents that demanded Grievant's time during his shift on April 25, 2013, and Grievant's contention that telephones were not provided to field sergeants. Having taken all evidence into account, the Hearing Officer cannot find the Agency acted unreasonable. Thus, the Hearing Officer upholds the discipline.

⁵ Va. Code § 2.2-3005 and (c)(6)

⁶ *Rules for Conducting Grievance Hearings* VI(A)

⁷ *Rules for Conducting Grievance Hearings* VI(B)

DECISION

Hence for the reasons stated here, the Hearing Officer upholds the Agency's discipline.

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
Departmental of Human Resource Management
101 N. 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 N. 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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 final.⁸

Entered this 28th day of November, 2013.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate
Agency Representative
Grievant
EDR's Director of Hearings Program

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.