

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 07/03/12;  
Decision Issued: 07/27/12; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No.  
9829; Outcome: Full Relief.

## DECISION OF HEARING OFFICER

In re:

**Case Number: 9829**

Hearing Date: July 03, 2012  
Decision Issued: July 27, 2012

### PROCEDURAL HISTORY

On December 21, 2011, Grievant was issued a Group II Written Notice of disciplinary action for violating DOC operating Procedure 135.1.

On January 13, 2012, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 16, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. A prehearing conference was held on May 23, 2012. The hearing was originally set for June 18, 2012. Due to the emergency medical condition of Grievant's counsel, the case was reset to July 3, 2012. On July 3, 2012, a hearing was held at Agency's location.

### APPEARANCES

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

### ISSUES

1. Did Grievant fail to follow a supervisor's instructions, perform assigned work or otherwise comply with established written policy<sup>1 2</sup>?
2. Was the Agency's discipline consistent with law and policy<sup>3</sup>?

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<sup>1</sup> Agency Exhibit C

<sup>2</sup> Agency Exhibit J. Operating Procedure 135.1 pg 8.C.2.a.

<sup>3</sup> Grievance Procedure Manual §4.1(b)1.

## **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.

## **FINDINGS OF FACTS**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of facts:

The Department of Corrections employs Grievant as a Corrections Officer at one of its Facilities. He has been employed by the Agency for approximately 7 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant is an Agricultural Staff Employee at a farm correctional facility. On or about November 30, 2011 Grievant transported an offender to the food loading dock to pick up beverages for offenders. When offender returned to the vehicle, he also had a package of fish. Grievant questioned offender about the fish and satisfied himself that the fish had been given to the offender. The fish was later stored in a greenhouse refrigerator. Uncontested testimony was that the fish was unusable for transportation to other facilities and was destined to be destroyed. It was also uncontested that it was common practice for offenders to pick up beverages that were unusable for transport to other facilities. On or about December 1, 2011 the facility inspector during normal rounds found the fish in the greenhouse refrigerator. The Agency contends that Grievant failed to properly supervise the offender. Grievant was questioned and given an opportunity to speak. Grievant did not deny that he was aware of the food item and maintained that offenders were permitted to receive food items such as the unmarketable fish.

## **OPINION**

There are apparently two classes of employees at Agency’s facility. One class has daily muster and updates. The other class of employees, who are also responsible for offenders, have what appears to be far more sporadic instruction. For instance, this group is invited to obtain information from an online virtual library.

Agency is charged with proving its case in disciplinary matters. Agency produced evidence of Grievant’s post duties<sup>4</sup> which in part state the job summary as “Supervise and direct inmate work crews assigned to the Institution’s greenhouse operations. Ensure the protection of the public-at-large and the Institutional staff and ensure the

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<sup>4</sup> Agency Exhibit A  
Case No. 9829

secure confinement and protection of inmates by providing and maintaining adequate security supervision and control of assigned inmates and all inmate activities and actions in and around the assignment areas.”

Agency produced operation procedure 802.1<sup>5</sup> which in part states “Contraband: An item forbidden for entry, possession, or removal from a Department of Corrections facility. An item in the possession of, or accessible to, an offender that has not been specifically issued to, or authorized for possession by the offender; or has not been obtained by the offender in accordance with operating procedures.”

Agency produced a virtual library memo<sup>6</sup> of 10-19-2011 directing employees to memo 130.1.

Agency produced a class roster and agenda of a training session held January 24 – 27, 2012<sup>7</sup>.

Agency produced Grievant’s Written Notice<sup>8</sup> which stated “Violation of Operating Procedure 135.1 (Standards of Conduct). Failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy. On December 1, 2011 you failed to properly supervise an inmate who transported contraband (fish) from the loading docks at Bland to the Green Houses (sic).”

Agency produced standard of conduct Operating Procedure 135.1<sup>9</sup> page 8 C.2.a in which Agency relies.

Agency produced Operating Procedure 130.1 regarding employee relationships with offenders<sup>10</sup>.

However, no exhibit except for Agency Exhibit F shows any demonstrative evidence that linked Grievant to knowledge of the contents of the exhibit. As far as testimony, Agency either did not question Grievant about his knowledge of the documents produced or, when questioned, Grievant denied awareness. Even Agency Exhibit F shows no positive link to Grievant having been given instruction specifically prohibiting the activity with which Grievant was charged.

Both Agency and Grievant became very caught up in how common possession by offenders of food other than beverages occurred. Both parties failed to convince the Hearing Officer their position was more believable than the other.

Operational Policy does prohibit offenders from obtaining any state property with out permission from the Warden. However, no memo was produced saying what food products were permitted and what food products would be classified as contraband.

What did occur was that offender openly brought the fish package into Grievant’s vehicle. Grievant asked how it was obtained satisfying himself it hadn’t been stolen.

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<sup>5</sup> Agency Exhibit B

<sup>6</sup> Agency Exhibit E

<sup>7</sup> Agency Exhibit F

<sup>8</sup> Agency Exhibit I

<sup>9</sup> Agency Exhibit J

<sup>10</sup> Agency Exhibit K

Grievant permitted it to openly be put in the greenhouse refrigerator. This would certainly indicate Grievant, a 7 year veteran, did not perceive the fish as contraband.

All parties agree that it was common practice to permit offenders to take some food stuff (“end line beverages”) from the food loading docks. No memo was ever produced stating that beverages were the only “not fit to transport” food that was permitted for offenders to obtain.

From the evidence produced it also appears Grievant was not required as a job duty to check the virtual library to be educated in up to date policies. In all, there appears to be a noticeable lack of communication between Agency and Grievant’s class of employees such that Agency has failed to prove Grievant was aware of a policy prohibiting offenders to obtain all but a limited group of items from the food loading dock.

Grievant’s attorney has requested Grievant be reinstated to his former work schedule. A Hearing Officer has no authority to order an Agency to assign certain jobs.<sup>11</sup> Grievant’s attorney has also requested attorney’s fees. Attorney’s fees are only applicable when the Grievant has been dismissed<sup>12</sup>, which is not the case in this matter.

## DECISION

For the reason stated above the Agency discipline is **rescinded**, the Group II disciplinary action shall be removed from Grievant’s file.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.<sup>13</sup> 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

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<sup>11</sup> Grievance Procedure Manual §5.9(b)3.

<sup>12</sup> Grievance Procedure Manual §5.9(b)2.

<sup>13</sup> 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 and EDR Consultant.

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

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

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.
- 3.

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

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<sup>14</sup> Please note, new address

arose.<sup>15</sup> 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.

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Sondra K. Alan, Esq.  
Hearing Officer

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<sup>15</sup> 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).