

Issue: Notice of Improvement Needed (failure to get permission from supervisor);
Hearing Date: 06/25/19; Decision Issued: 07/15/19; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11338; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11338

Hearing Date: June 25, 2019

Decision Issued: July 15, 2019

PROCEDURAL HISTORY

On February 22, 2019, Grievant received a Notice of Improvement Needed/Substandard Performance for failing to get permission from his supervisor to move a canine from his residence to Facility G and commuting in a State vehicle to and from work without his canine and without permission from his supervisor.

On October 11, 2018, 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 April 16, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 25, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

1. Whether the Agency complied with policy by issuing a Notice of Needs Improvement/Substandard Performance?

2. Whether Grievant engaged in the behavior described in the Notice of Needs Improvement/Substandard Performance?

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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. GPM § 9.¹

FINDINGS OF FACT

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

The Department of Corrections employs Grievant as a Corrections Sergeant. He has been employed by the Agency for approximately 20 years.

Grievant was a Canine Sergeant at Facility S for three years. He reported to the Captain, Statewide K-9 Coordinator. The Purpose of his Position included:

Under supervision of the Statewide K-9 Assistant Coordinator/Captain, provides direct and daily supervision and guidance to the [Region] K-9 Narcotic/Contraband Interdiction and Bloodhound Man trailing Unit in order to prevent narcotics, cell phones, tobacco, and other illegal or unauthorized substances from entering correctional facilities.²

Following issuance of the Notice of Improvement Needed/Substandard Performance, Grievant was assigned to work in personal property as a Corrections Sergeant.

The Agency assigned canines to Handlers. Once a canine was assigned to a Handler, the Agency built a Kastle at the Handler’s residence where the dog would live. A Kastle was an out building with the chain fence and deck.

¹ The Hearing Officer initially determined that the Burden of Proof was on Grievant because the Agency did not issue a Written Notice. Upon further consideration, the Hearing Officer has concluded that the Burden of Proof is on the Agency because the action taken by the Agency is in the nature of disciplinary action and qualified as Informal Discipline.

² Agency Exhibit 9.

A Handler was permitted to have an Agency-owned vehicle at his or her residence to transport the canine to Agency facilities. The Agency's own vehicles were modified to have kennels in the rear seats of the vehicles.

Grievant was a Handler to Canine H. He kept Canine H at his residence in a Kastle. Grievant was changing his residence. Although Grievant worked at Facility S, he decided to move Canine H from his residence to Facility G. He called the Warden at Facility G and asked if he could move Canine H and the Kastle to Facility G. The Warden approved the request.³ Grievant called the Regional Manager and asked for her assistance with moving the Kastle to Facility G. The Regional Manager contacted buildings and grounds employees and asked them to move the Kastle to Facility G. In July 2018, the Kastle was moved to Facility G and Canine H began residing there. Grievant kept his Agency-owned vehicle at his residence and drove that vehicle to Facility G to perform work related assignments with Canine H as well as feeding Canine H on a daily basis.

Grievant did not seek the permission of Mr. B or the Captain to move the Kastle and Canine H to Facility G. Grievant's Employee Work Profile showed the Captain as his supervisor but Mr. B considered himself to be Grievant's supervisor because they worked more closely than did Grievant and the Captain.

On August 21, 2018, the Captain went to Facility G to observe the kennels there. He noticed Canine H was in a Kastle at Facility G. The Captain was not aware the Grievant had moved Canine H to Facility G. The Captain was concerned because he observed an inmate interacting with Canine H.⁴ The Captain called Mr. B to see if Grievant had asked permission from Mr. B to move Canine H from Grievant's residence to Facility G. Mr. B was not aware that Grievant had moved Canine H to Facility G.

The Captain kept an inventory of the location of all DOC canines.

On August 21, 2018, the Captain advised Grievant to relocate Canine H to the main kennels at Facility P.

On October 5, 2018, Grievant received a memorandum from the Chief of Security at Facility S providing:

The Facility administration has reviewed the current security assignment to the housing units and supports functions of the institution. The administration is committed to ensuring that correctional staff is well-rounded in their knowledge, skills and abilities. To meet this goal, staff assignments, are reviewed and decisions to assign/re-assigned are made

³ The Warden testified that Facility G was closer to Grievant's home than Facility S and, thus, Grievant's request made sense.

⁴ The Inmate was a "dog lover" who worked the yard crew at Facility G. He used a hose to spray the dog kennels at Facility G and made sure the dogs had water in their bowls to drink.

to ensure that appropriate rotation which allows staff to gain skills and experience and other important components of our overall security operations.

Based on Institutional needs, you will be assigned to a 5 & 2 Shift in Property as the supervisor of Property. The effective date of this assignment is October 1, 2018.

Your supervisor for the shift is [Lieutenant].⁵

Grievant's salary was reduced by \$1200 as a result of his removal from the canine program. Grievant's removal from the canine program was not a "permanent ban". Grievant could reapply to become part of the program.

On February 22, 2019, Grievant received a Notice of Improvement Needed/Substandard Performance for failing to get permission from a direct supervisor to move his canine to Facility G and for violating Operating Procedure 323.2, Commuting in a State vehicle.

On March 8, 2019, the Agency Head issued a Determination of Qualification for a Hearing:

I am qualifying your grievance for a hearing based on the foregoing facts that substantially raise a sufficient question as to whether an adverse employment action occurred as a result of informal discipline and/or unfair application or misapplication of State and agency personnel policies, procedures, rules, and regulations.⁶

CONCLUSIONS OF POLICY

The Agency has not presented sufficient evidence to show the Grievant violated the policy, supervisor's instruction, or post order. The Notice of Improvement Needed/Substandard Performance must be rescinded.

The Agency alleged that Grievant should have obtained the Captain's permission to move Canine H from his residence to Facility G.

Operating Procedure 435.3 governs Canines. Section (VI) (E) provides:

1. Facility kennels can be used as special housing for Man-trailing, Contraband Detection, and Narcotic Detection canines upon

⁵ Agency Exhibit 2.

⁶ Agency Exhibit 2.

approval. Narcotic Contraband Detection canines shall only be housed at the facility kennels for short-term emergencies.

The kennels at Facility G were under the control of the Warden at Facility G. Grievant obtained approval from the Warden to move Canine H from his residence to Facility G. Grievant's actions were consistent with Section (VI) (E).

Operating Procedure for 435.3 Section (IV) D provides:

The Statewide Canine Coordinator will coordinate the development of uniform procedures and standards and shall be the point-of-contact for the DOC on matters pertaining to the operations of canines and handlers. This position will act in conjunction with the Regional Operations Chiefs, Regional Administrators, Regional managers, and Unit Heads to ensure the program is managed and supervised according to policy and procedure. This position will determine number and types of canines assigned to each facility in conjunction with the Regional Operations Chiefs, the Security Operations Manager, and the Chief of Corrections Operations.

The Agency argued that Section (IV) (D) required Grievant to obtain permission from the Captain before moving Canine H. This section makes the Captain a "point of contact" but it does not create an obligation of Grievant to obtain the Captain's permission to move Canine H.

Grievant's Employee Work Profile did not require Grievant to obtain permission from the Captain prior to moving Canine H. The Agency did not present any emails or evidence of discussion with supervisors regarding Grievant's obligation to obtain permission from the Captain prior to moving Canine H. Most security positions with the Agency have Post Orders. The Agency did not present a Post Order for Grievant's post requiring him to notify the Captain prior to moving Canine H. In short, the Agency did not adequately inform Grievant of his obligation to obtain permission from the Captain prior to moving Canine H.

The Agency removed Grievant from the canine program. Section (V)(D)(1) provides:

Handlers can be removed from the canine post at the discretion of the Facility Unit Head, Regional Operations Chief or Regional Administrator, Statewide Canine Assistant Coordinator, Statewide Canine Coordinator, or Security Operations Manager.

Grievant's participation in the canine program was at the Agency's discretion. The Agency was authorized to remove him from that program. The Hearing Officer will not reverse the Agency's decision to remove Grievant from the canine program.

The Agency alleged Grievant violated its commuting policy. Operating Procedure 435.3 (H)(4) provides:

Due to their daily assignments, Narcotic, Contraband, and Bloodhound Mantrailing Handlers are the only canine handlers approved for “commuting” in accordance with Operating Procedure 323.2, Commuting in a State Vehicle.

Grievant held the position of a Handler and Section (H)(4) authorized him for commuting in accordance with Operating Procedure 323.2. Section (H)(4) focuses on the position held by an employee and not on that employee’s daily activities which may change over time.

Operating Procedure 323.2 defines Base Point as:

Designated place, office, or building where the employee performs his/her duties on a routine basis ...; Multiple base points are not allowed.

Once Canine H was moved to Facility G, Grievant’s base point became Facility G.

Operating Procedure 323.2 defines Commuting as:

Use of a state-owned or leased passenger-type vehicle by an employee for travel between home and parking location and base point, while not in travel status.

Operating Procedure 323.2 (IV) (C) provides:

Authorize Use of State Vehicle While Commuting

1. Personal use of a state vehicle shall be strictly limited to transportation between base point and home in either direction.
2. Despite reimbursement to the Commonwealth for this limited and specific personal use, no other personal use is authorized.

Operating Procedure 323.2 authorize Grievant to travel from his residence to his base point, Facility G. Grievant’s did not act contrary to Agency policy.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Notice of Improvement Needed/Substandard Performance is **rescinded**.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.