

Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 09/12/14;
Decision Issued: 09/17/14; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 10444;
Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10444

Hearing Officer Appointment: August 20, 2014

Hearing Date: September 12, 2014

Decision Issued: September 17, 2014

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge termination of his employment effective July 31, 2014, pursuant to a written notice, issued July 31, 2014 by Management of Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A filed August 5, 2014.

The parties participated in a first pre-hearing conference call scheduled by the hearing officer on August 27, 2014 at 10:00 a.m. The Grievant confirmed he is seeking reinstatement, back-pay and restoration of all benefits.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on August 27, 2014 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant represented himself 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 hearing¹. The hearing officer used his own recording equipment and tapes.

No open issues concerning production of documents or non-attendance of witnesses remained by the conclusion of the hearing.

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. The Grievant did not offer any exhibits.

The parties requested and the hearing officer entered a form of Protective Order concerning this proceeding. The Protective Order is attached hereto and incorporated herein by this reference.

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.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was formerly employed as a Corrections Officer Senior ("C/O") by the Agency at a correctional facility (the "Facility") which incarcerates approximately 488 offenders.
2. Security and safety at the Facility of staff, offenders and the public are paramount. Contraband is strictly prohibited at the Facility because it can compromise the integrity of the institution and staff.
3. The Grievant was employed by the Agency as the primary sallyport officer. The Grievant at the time of the termination of his employment had been employed by the Agency for about 8 years. The Grievant occupied a position of extreme trust as the sallyport officer because this is the only entry/exit point into the Facility for offenders and is entrusted only to experienced senior status C/Os.
4. On March 25, 2014, at approximately 3:15 p.m. C/O N was making his perimeter fence line check at the Facility and stopped at the sallyport to help the Grievant with strip searching offenders who had returned to the Facility from a regular community project in which the offenders help unload tractor trailers and stock a local food bank.²

² Individuals are referred to generically or by initials to preserve privacy.

5. C/O N observed certain offenders who went on the food bank run get off the van and run to the sallyport officer shack. These offenders carried grocery bags from which they took numerous snack items to hide in the officer's shack in a file cabinet drawer, under the Grievant's desk, etc. The Grievant assisted the offenders in hiding the food under his desk.
6. The offenders then entered the secure part of the Facility to be searched inside the strip search building. C/O N observed in the lining of offender H's coat, 40 candy bars, 2 popcorn and 3 gum packs.
7. The Grievant admitted that he allowed the offenders to take items from the food bank into the Facility and that he concealed the items for the offenders' future consumption and/or use.
8. On the evening of the incident, the Grievant called C/O N at home about 9 times. C/O N did not recognize the number on his caller id but, fearing an emergency, took the 9th call and the Grievant said some shit had gone down and asked C/O N not to say anything about finding the food inside the secure area of the Facility but to say they were found outside the compound. The Grievant in a meeting with the Warden on July 30, 2014 admitted to the calls and the statements.
9. The testimony of the Agency witnesses was credible and convincing. The demeanor of the Agency witnesses was open, frank and forthright. The Grievant admitted to almost all of the Agency's case, testifying at one point in the hearing to the effect, "I admit to my wrongdoing - my wrongdoing is wrong."

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 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 operative Agency Standards of Conduct (the "SOC") are contained in Agency Operating Procedure 135.1 ("Policy No. 135.1"). AE 7. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to Policy No. 135.1, the Grievant's conduct could clearly constitute a terminable offense, as asserted by the Agency.

Policy No. 135.1 provides in part:

V (D). THIRD GROUP OFFENSES (GROUP III):

1. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.
2. *Group III* offenses include, but are not limited to:
.....
(gg). Introducing or attempting to introduce contraband into a facility or to an offender

AE 7.

Department Operating Procedure Number 445.1 define "contraband" in part as follows:

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. Contraband items (for offenders) may include, but are not limited to, the following:...

AE 8.

By policy, the only items of food/snacks which the offenders can possess are those purchased in the Facility's commissary. Accordingly, the items from the food bank secreted by the offenders constituted contraband.

In this instance, the Agency appropriately determined that the Grievant's violations of Agency policies concerning contraband, attempting to impede an investigation into the event and also to coerce another C/O constituted a Group III Offense.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions justified the termination by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a terminable offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. *Rules* § VI(B).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

The Grievant has specifically raised mitigation in the hearing and in his Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the

mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Form A and all of those listed below in his analysis:

1. the Grievant's long, good service to the Agency of approximately 8 years;
2. the often difficult and stressful circumstances of the Grievant's work environment;
3. the candor of the Grievant in the hearing; and
4. the lack of prior formal discipline.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and in terminating the Grievant's employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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. 14th Street, 12th 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

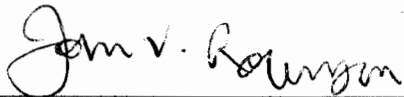
occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other 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: 9/17/14



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).

COMMONWEALTH OF VIRGINIA
Office of Employment Dispute Resolution

Re: Grievance of Anthony C. Bracey (Case No. 10444)

PROTECTIVE ORDER

Grievant:

Anthony C. Bracey

Administrative Hearing Officer:

John V. Robinson, Esquire
7102 Three Chopt Road
Richmond, Virginia 23226
(804) 282-2987
(804) 282-2989 (facsimile)
e-mail: jvr@jvrlawpc.com

Agency Representative:

Carl Hester, Warden

Advocate for Agency:

Ms. Simone Williams

Upon motion of the parties and agreement of counsel/advocates, and deeming it just and proper so to do, it is hereby ORDERED that:

1. This Order governs the handling of all documents, testimony and information produced, given or filed herein by the parties and designated as "CONFIDENTIAL".
2. A party may designate as "CONFIDENTIAL" any document produced or used in this proceeding, that contains any confidential, proprietary, copyrighted, personal, business or financial information by writing, typing or stamping on the face of such document, answer or transcript the word "CONFIDENTIAL" or by otherwise notifying counsel/advocates of the parties in writing, and, in the case of transcripts and exhibits, also the court reporter. Should a party object to the

designation of a document, or transcript as "CONFIDENTIAL", he may apply to the hearing officer for a ruling that the document, answer or transcript, or information contained therein, shall not be so treated after giving prior written notice of such application to counsel/advocates for all parties. Until the hearing officer enters an Order, if any, changing the designation of the documents, answers or transcripts, it shall be given the "CONFIDENTIAL" treatment initially assigned as provided for in this Order.

3. Except upon further Order of the hearing officer, documents, answers or transcripts, or portions thereof, designated as "CONFIDENTIAL" pursuant to this Order, and information contained in any such documents, answers or transcripts, shall be disclosed only to the hearing officer, counsel/advocates of record (including their staff) for the parties or independent experts retained by the parties. No person receiving such "CONFIDENTIAL" documents, answers, transcripts or information shall disclose them or their contents to any person other than the hearing officer or counsel/advocates of record.

4. All documents, answers or transcripts and information disclosed, given or produced by the parties herein shall be used solely for the preparation for and use at the hearing of this proceeding and shall not be used or disclosed by any receiving person for any other purposes, including any commercial or business purpose.

5. Counsel/advocates of record receiving such documents, answers, transcripts or portions thereof designated "CONFIDENTIAL" shall be allowed to disclose them or their contents to any other person only upon order of the hearing officer or upon receipt of written permission from opposing counsel/advocates granting such disclosure.

6. Counsel/advocates for any party may permit an expert or experts hired by any party in preparation for the hearing to review the documents subject to this Protective Order, but counsel/advocates for such party must first obtain from said experts a written statement confirming the expert's agreement to comply with every element of this Protective Order. Said experts shall agree in writing that the contents of the documents shall not be disclosed to any other person and said documents shall not be photocopied or reproduced by any other means.

7. Notwithstanding the foregoing provisions, this Order shall be without prejudice to the right of any party to challenge the propriety of discovery on any grounds including, but not limited to, relevance, privilege and materiality. To the extent that any party does not object to production of any confidential documents or to provision of confidential information, or is willing to provide such documents and/or information subject to and without waiving such objections, such party is hereby ordered to provide such documents and/or information to the other party as part of the discovery process in this proceeding and subject to the terms of this Protective Order.

8. Notwithstanding the foregoing provision, this Order shall not restrict in any manner the right of any party to offer or use as evidence at the hearing of this action any of the documents, answers, transcripts or portions thereof designated as "CONFIDENTIAL" subject to this Protective Order and nothing contained herein shall be construed as a waiver of any objection which might be raised as to the admissibility at the hearing of any evidentiary material.

9. Promptly upon the final termination of this action including any and all reviews, appeals and remands, counsel/advocates for each party shall either (i) return to opposing counsel/advocates all materials which opposing counsel/advocates has designated "CONFIDENTIAL", or (ii) destroy such materials. After taking such action, counsel/advocates for

each party shall certify to opposing counsel/advocates in writing that option (i) or (ii) was elected and has been duly satisfied. Notwithstanding the foregoing sentences of this paragraph, counsel/advocates may retain copies of briefs and other papers filed with the hearing officer which contain or constitute confidential information, but counsel/advocates must maintain such briefs and papers in accordance with the other terms of this Order.

10. This Order may be modified by further order of the hearing officer or by agreement of counsel/advocates for the parties, subject to the approval of the hearing officer, provided that any such agreement be memorialized in the form of a stipulation that shall be filed with the hearing officer and made a part of the record in the proceeding.

ENTER: 8 / 28 / 2014 *nunc pro tunc*

John V. Robinson