

Issue: Group II Written Notice (failure to comply with established written policy); Hearing Date: August 29, 2001; Decision Date: September 26, 2001; Agency: Department of Military Affairs; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5258

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS**

DECISION OF HEARING OFFICER

In the matter of Department of Military Affairs Case Number 5258

Hearing Date: August 29, 2001
Decision Issued: September 26, 2001

PROCEDURAL HISTORY

On May 17, 2001, Grievant was issued a Group II Written Notice of disciplinary action for:

Failure to comply with established written policy specifically ChalleNGe Policy/Procedure 2-8. "A Cadre member shall not physically, verbally or emotionally haze or harass cadets." On 5 May [Grievant] physically bumped a cadet with his chest and used obscene/abusive language towards him.

The Agency considered this Group II Written Notice along with a prior active Group III Written Notice and decided to terminate Grievant.

On May 21, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 6, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 29, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Counselor
Three Cadets
Petty Officer
Squad Leader
Assistant Squad Leader
Instructor
Store Worker

Sergeant

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal.

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. GPM § 9.

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 Military Affairs employed Grievant as a Security Officer III in its ChalleNGe program. His working title was Cadre. As a Cadre, Grievant’s mission was to “[m]aintain cadet accountability, control, and safety” and “[u]se military training and military structure to provide cadet instruction in leadership, followership, and teamwork.”¹ Grievant is a dedicated and loyal employee who enjoys his job and regularly volunteers to provide extra hours of work. He had been recommended for promotion on the day prior to the incident giving rise to discipline.

ChalleNGe is a remarkable program designed to transform the lives of teenagers and young adults. Individuals who have “lost their way” in life by performing poorly in or dropping out of school or by associating with the “wrong type of people” can rebuild their character and develop skills through the program. One woman testified that she “got her daughter back” after her daughter completed the program.

ChalleNGe is similar to a military-style boot camp. Instructors wear uniforms and are called Cadres. Students wear uniforms and are called Cadets.² For five months, Cadets live at the Facility, learn military discipline, and attend High School level classes. Cadets who do not follow the rules may find an instructor “in their face” yelling at them about their misbehavior. Cadets are expected to comply with directions given by instructors.

¹ Agency Exhibit 4.

² Cadets must volunteer to join the program. They are not referred through the Court system.

On May 5, 2001, the Cadet was in the Agency's dining area referred to as the Chow Hall. Another cadre observed the Cadet mix first and second helping beverages which the cadre believed was contrary to Chow Hall procedures. The cadre began reprimanding the Cadet. Grievant observed the confrontation and walked up to the Cadet. Grievant instructed the Cadet to leave the Chow Hall and re-enter through the front entrance and, then refill his cup with water. As the Cadet began walking away he laughed at Grievant. Grievant overheard the Cadet's laughter. Grievant quickly walked to the backyard outside the Chow Hall and began verbally reprimanding the Cadet. Grievant "got in his face" and began yelling at him to correct his poor behavior and attitude. Grievant did not push or hit the Cadet at any time although he repeatedly used the word "f—k" as part of his discourse with the Cadet. The Cadet did not complain of any injuries following the altercation.

The Cadet had a history of misbehavior and lackluster performance in the program. When the 19 year old Cadet entered the program, his academic test scores reflected the scores of a student in the first grade. He was terminated from the program because he began concealing a razor or knife-type weapon within is uniform. His objective was to injure, if necessary, another Cadet with whom he had a dispute. Only after he and his mother met with the program Head, was the Cadet reinstated.

CONCLUSIONS OF LAW

Agency Policy and Procedure 1-5 governs the use of obscene and abusive language by employees. The policy states, "staff must not use obscene and abusive language at any time while in the performance of their official duties." Use of obscene and abusive language is a Group I offense under the policy.

When Grievant used the word "f—k" while speaking to a cadet, he used obscene and abusive language in the performance of his official duties. In accordance with the Agency's policy, his behavior constitutes a Group I offense.

Grievant argues that curse words are sometimes used by employees dealing with cadets in heated exchanges for the purpose of emphasizing the significance of the situation. Although several witnesses testified that they used curse words on occasions, no evidence was presented suggesting the Agency knowingly sanctioned the practice. Issuance of a Group I is supported.

The Agency contends Grievant pushed the Cadet in the chest and then in the back thereby justifying his discipline under Policy 2-8. Policy 2-8 provides that "Cadre members shall not physically, verbally, or emotionally haze or harass cadets."³ Policy 1-4 prohibits cadres abusing or assaulting cadets.⁴

³ Agency Exhibit 4.

⁴ Agency Exhibit 5.

Based on the credibility of the witnesses and the sequence of events, the Agency has not established by a preponderance of the evidence that Grievant pushed the Cadet in the chest.⁵ Another cadre had a clear view of Grievant's interaction with the Cadet. This cadre did not hear all of the conversation between Grievant and the Cadet but could hear Grievant say "f—k" as he spoke to the Cadet. The cadre did not see Grievant touch the Cadet at any time.

The Cadet testified that he was pushed in the back while walking in line and that Grievant must have pushed him because Grievant was the only one behind the Cadet. The other cadre may not have seen Grievant and the Cadet as they were in line. Nevertheless, the Agency has not proven this allegation. No one observed Grievant push the Cadet. Even if someone pushed the Cadet, it is not clear Grievant pushed him. There were other cadets behind the Cadet who could have pushed the Cadet.

An employee receiving a Group I Written Notice who has a prior active Group III Written Notice may be terminated. The Hearing Officer will not terminate Grievant for several reasons. First, Grievant's use of abusive language was not characteristic of his typical behavior. His coworkers described Grievant as one who follows regulations very closely. Second, Grievant is a very dedicated employee who the Agency described as "one of the most reliable cadre employees." Grievant "typically volunteers to assist with cadet functions on his off time."⁶ Because Grievant has an accumulation of disciplinary action that would otherwise justify termination, the Hearing Officer will award back pay only from September 1, 2001 forward.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice. The Agency is directed to **reinstate** Grievant to his former position or, if occupied, to an objectively similar position. The Agency is further directed to provide Grievant with **partial back pay** from September 1, 2001 less any interim earnings that the employee received and credit for annual and sick leave that the employee did not otherwise accrue from September 1, 2001. GPM § 5.9(a).

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set 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 four types of administrative review, depending upon the nature of the alleged defect of the decision:

⁵ The Agency also argued that Grievant accidentally head-butted the Cadet but admits that because the contact was accidental there is no basis to discipline Grievant. Thus, the Hearing Officer will not address this allegation.

⁶ Agency Exhibit 3.

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 is the basis for such a request.
2. **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 cite 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.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of 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.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

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 **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-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 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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 HRM, 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 the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq., Hearing Officer