

Issue: Group I Written Notice (disruptive behavior); Hearing Date: October 9, 2001; Decision Date: October 10, 2001; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5299



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5299

Hearing Date: October 9, 2001
Decision Issued: October 10, 2001

APPEARANCES

Grievant
Two witnesses for Grievant
Warden
Attorney for Agency
Three witnesses for Agency

ISSUES

Was the grievant's conduct on April 28, 2001 subject to disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group I Written Notice issued on May 9, 2001 because he had engaged in disruptive behavior on April 28, 2001. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing. The Department of Corrections (Hereinafter referred to as "agency") has employed the grievant as a correctional officer for eight years.

Prior to April 28, 2001, grievant and one particular sergeant had not been on good terms. There had been one incident on April 4, 2001 at the shooting range in which the sergeant (Caucasian) had told the grievant that he should stand in front of the target because he was black. Grievant had reported that incident but did not report any other incidents that he alleges occurred in the months prior to April 28, 2001.

At about 3:50 p.m. on April 28, 2001, grievant entered the foyer outside the control room. Grievant had already heard the announcement on the loudspeaker reminding staff that it was time to do an inmate count. The sergeant, who was inside the control room, yelled two times at the grievant to do the count. The control room door was closed and the sergeant yelled loudly to make himself heard by grievant. Grievant felt that the sergeant yelled unnecessarily loudly, was unprofessional in his manner and that his order to count was unnecessary because grievant already knew that it was count time. Two correctional officers, one in the control room, and one outside the room, heard the sergeant and also felt he had been unprofessional. Grievant then left the area to conduct the inmate count.

When he returned about five minutes later, grievant was still upset about how the sergeant had treated him. Another correctional officer was just behind grievant as they entered the control room; the sergeant was standing at the top of the steps. Grievant waited a few seconds to allow the sergeant to exit down the steps.¹ When the sergeant didn't move, grievant walked up the five steps to the main floor of the control room. As he reached the top step, the sergeant (who is substantially taller and larger than grievant) said, "You just can't be nice to some people," leaned in the direction of grievant, and bumped his shoulder into grievant's shoulder. Grievant walked over to sign his count report and then turned to the sergeant asking why the sergeant had pushed him. The sergeant denied bumping him and grievant repeated his question. As the sergeant again denied the bump, another correctional officer became concerned that the words between the two might escalate into something more serious. She stood up and told the grievant, "No, [name of grievant] ... No."

¹ Exhibit 1. Written statement of female correctional officer, April 28, 2001.

Another sergeant, who was in the control room at the time, also witnessed the sergeant bump into grievant.² Both he and the other correctional officer spoke with grievant to calm him down. The correctional officer who was entering the control room behind grievant also saw the sergeant bump into grievant. After this, the sergeant left the control room to go home because it was the end of his shift. Grievant was still upset and several minutes later, as he was talking with the other sergeant in the foyer, said words to the effect of, "I'm tired of him f___ing with me." The grievant was given a Group I Written Notice for this incident. The sergeant was counseled but not disciplined.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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).

Code § 2.1-116.05(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 § 2.1-116.09.

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 Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training⁴ promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The

² Exhibit 1. Sergeant's written statement to Captain, April 30, 2001.

³ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

⁴ Now known as the Department of Human Resource Management (DHRM).

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.

Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual Standards of Conduct Policy No. 1.60* provides that Group I offenses include acts and behavior that are the least severe in nature.⁵ One example of a Group I offense is disruptive behavior. The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.15 of the DOC Standards of Conduct addresses those offenses that include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force. One example of a Group I offense is disruptive behavior.⁶

A preponderance of the evidence in this case establishes that there had been friction between the sergeant and grievant for some time. The sergeant had previously made an unprofessional and racially biased statement to grievant. On April 28, 2001, the sergeant deliberately attempted to aggravate grievant when he unnecessarily twice ordered grievant to conduct the regular count. Then, when grievant returned from the count, the sergeant waited at the top of the stairs until grievant came up and deliberately bumped into grievant. Grievant confronted the sergeant by asking him why he had bumped him. The sergeant further attempted to goad grievant by denying bumping him.

The sergeant's denial of his action is not credible. First, it is very unlikely that grievant would ask why the sergeant bumped him if it hadn't happened. Second, and most importantly, four people including three disinterested witnesses – the other sergeant, the female correctional officer and the officer behind grievant – all saw the sergeant bump shoulders with grievant. While some of these witnesses are unable (or unwilling) to say whether the bump was deliberate, they all agree that the bump did occur.⁷ The sergeant's blatant lie under oath in the face of overwhelming evidence significantly taints his credibility. Therefore, where there is any difference between the grievant's testimony and the sergeant's testimony, the grievant's version is deemed more believable. The grievant did not tell the sergeant that he would whip him.

⁵ Exhibit 4. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

⁶ Exhibit 5. Department of Corrections Procedure Number 5-10.15, *Standards of Conduct*, June 1, 1999.

⁷ After his written statement to the captain, the other sergeant later told the assistant warden he wasn't sure whether it was a bump or merely a brushing of sleeves. The hearing officer finds the written statement more accurate because it was written closer to the actual event and is more likely to be truthful than a later version.

As a supervisor, the sergeant is expected to set an appropriate example for subordinates. In this case, the sergeant first baited the grievant, then deliberately bumped into him, and finally lied about his own culpability. The grievant knew full well that he was the subordinate and that bucking authority would be difficult. Nevertheless, after being deliberately bumped by the sergeant, it was a reasonable response to ask the sergeant why he had bumped him. The mere asking of this question was not disruptive. However, the female correctional officer could tell that grievant was upset and felt it necessary to intervene. Thus, to the extent that this officer and others were momentarily distracted from the performance of their duties, the incident did cause a disruption in the normal work pattern.

Grievant could have asked to speak with the sergeant in private, or he could have immediately reported the incident to a superior officer. However, given the totality of the circumstances, it is entirely understandable that he was upset and that he asked the sergeant to explain why he bumped into grievant. Therefore, to the extent that this incident was disruptive, the primary responsibility lies with the sergeant because he initiated the disruption when he deliberately bumped grievant and, because he prolonged the incident when he denied doing it. The sergeant's actions were all the more egregious because he acted totally inappropriately for one in a supervisory position, and because he lied while under oath during the grievance hearing.

The Standards of Conduct policy provides for the consideration of mitigating circumstances in the implementation of disciplinary actions and states, in pertinent part:

While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:

- a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
- b. an employee's long service or otherwise satisfactory work performance.⁸

Grievant certainly should be counseled about the appropriate steps to take when a superior officer acts unprofessionally and attempts to provoke an incident. In this case, grievant was given a Group I Written Notice but the sergeant was not disciplined. Given the fact that the sergeant precipitated this incident and denied his role in doing so, it is patently unfair that grievant alone should receive disciplinary action. Therefore, in the interest of equal and objective treatment, the disciplinary action must be reversed.

⁸ Exhibit 4. Section VII.C.1, DHRM *Standards of Conduct Policy No: 1.60*, effective September 16, 1993.

DECISION

The decision of the agency is hereby reversed.

The Group I Written Notice issued on May 9, 2001 is **RESCINDED**. The Written Notice shall be removed from the grievant's file. The Written Notice shall be removed from the grievant's personnel file and retained by the agency pursuant to Section 5-10.19.B of the DOC Standards of Conduct.

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 three 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 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.

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.

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.

David J. Latham, Esq.
Hearing Officer