

Issue: Group III Written Notice with 30-day suspension (physical altercation with a ward); Hearing Date: October 15, 2001; Decision Date: October 17, 2001; Agency: Department of Juvenile Justice; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5307



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5307**

Hearing Date: October 15, 2001  
Decision Issued: October 17, 2001

**PROCEDURAL HISTORY**

On May 14, 2001, Grievant was issued a Group III Written Notice of disciplinary action with 30 workdays suspension for:

That at approximately 0750 on 2/20/01, you [Grievant] were involved in a physical altercation with a ward. During this altercation you struck the ward with your hand causing a small abrasion on the bottom lip of the ward, the ward also complained of a loose tooth.

On May 14, 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 September 26, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 15, 2001, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative

Training Officer

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with suspension.

## **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 Juvenile Justice employs Grievant as a Juvenile Corrections Officer Senior. One of his responsibilities includes supervising juveniles convicted of various crimes who are sentenced by a Court into the juvenile correctional system. He has been employed by the Agency for over seven years. His work performance has been satisfactory. No evidence of any previous disciplinary action against Grievant was presented at the hearing.

The Ward is a 17 year old male convicted of armed robbery. He has a history of assaulting Agency staff and a proclivity towards physical violence. On June 11, 2000 and October 9, 2000, he assaulted Agency staff. On August 14, 2000, September 26, 2000, and November 29, 2000, he threatened Agency staff. There were numerous other assaults towards other wards with injuries requiring medical care.<sup>1</sup>

On February 20, 2001, Grievant was working in B-Cottage. He was in a room with approximately 15 wards and a nurse. His primary responsibility was to observe and remain close to the nurse while the nurse dispensed medication to the wards. The Ward was in the room talking to a few of his friends and was approximately two or three feet behind Grievant. Grievant had previously instructed the Ward to walk to another room. When Grievant heard the Ward's voice, Grievant knew the Ward had disregarded his instruction. While keeping his focus on the nurse, Grievant reached backwards and tapped the Ward and instructed the Ward to go into the other room. The Ward kept on talking to his friends. Grievant reached backwards again and tapped the Ward and repeated his instruction for the Ward to leave the area.

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<sup>1</sup> Grievant Exhibit 1.

The Ward reacted violently to Grievant's second attempt to have him leave. The Ward pushed Grievant from behind and quickly moved to within a few inches of Grievant.<sup>2</sup> The Ward yelled words to the effect of "give me my f—king space!" Grievant believed the Ward was in the process of assaulting him so the Grievant turned and punched the Ward in the mouth. Grievant believed hitting the Ward in the mouth was the only way to stop his advance. A fight ensued with Grievant suffering injuries and the Ward suffering a split lip and ultimately being restrained.

## CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." P&PM § 1.60(V)(B).<sup>3</sup> Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal."<sup>4</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."<sup>5</sup>

*Standard Operating Procedure 218* governs the use of physical force by a juvenile correctional officer. Section 218-4.0 of this procedure<sup>6</sup> provides:

Physical force is authorized for self defense, the defense of others, to prevent an escape, to prevent property damages, to protect a youth from harming himself, and to prevent the commission of a crime. Physical force should be used only when other alternatives have failed or appear unsuitable. When it is deemed necessary to use physical force to control a ward, only the minimal amount of physical force necessary is to be used.

Section 218-4.1 authorizes the use of Handle with Care and Handle with Care Plus physical restraint techniques. Handle with Care Plus is authorized "when other approved techniques do not appear reasonable or have failed, help is not eminent and the situation is perceived as life-threatening." Only certain techniques are approved under the Handle with Care Plus:

Whip kick

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<sup>2</sup> Grievant described the Ward as being "in his face."

<sup>3</sup> The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM") setting forth Standards of Conduct for State employees.

<sup>4</sup> P&PM § 1.60(V)(B)(2).

<sup>5</sup> P&PM § 1.60(V)(B)(3).

<sup>6</sup> Agency Exhibit 7.

- Forearm body blow
- Elbow strike (forward, backward and down)
- Stomping of instep
- Shin-raking
- Pressure point – for choke/bite release
- Double Gooseneck – for kneeling/walking
- Standing Wall Restraint
- Use of Shield

Failure to follow established written policy is a Group II offense.<sup>7</sup> Grievant was authorized to use physical force because help was not eminent and he was in a life-threatening situation. Grievant lacked sufficient time to apply another technique that did not require the use of force. Grievant did not use one of the techniques for which he had been trained under Handle with Care Plus. His behavior constitutes a failure to follow established written policy thereby justifying the Agency to issue him a Group II Written Notice. Only a five day suspension is appropriate under the circumstances of this case in light of Grievant's previous good work performance.

Grievant contends he should not be disciplined because his action was a natural reaction in self-defense. The Hearing Officer agrees that Grievant's reaction was logical and predictable; unfortunately, it was not in accordance with policy and Grievant's training. Grievant is a professional and is expected to rely on his training and Agency policy even when someone who is not a juvenile correctional officer may have acted differently in the same circumstances.

The Agency contends Grievant should receive a Group III Written Notice based upon the written statements of other staff and wards, none of whom testified at the hearing. When the Hearing Officer is faced with credible testimony from a juvenile corrections officer and written hearsay statements from wards or officers who are not before the Hearing Officer, the Hearing Officer must give greater weight to the testimony of the juvenile corrections officer who appeared at the hearing. Grievant's testimony clearly showed his use of physical force was necessary.<sup>8</sup>

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with 30 days suspension is **reduced** to a Group II Written Notice for failure to follow established written policy with five workdays suspension. The Agency is directed to provide the Grievant with **back pay** for the period of suspension exceeding five workdays less any interim earnings that the

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<sup>7</sup> P&PM § 1.60(V)(B)(2)(a).

<sup>8</sup> P&PM § 1.60(V)(B)(3) makes fighting or acts of physical violence a Group III offense. That provision does not apply when use of force is authorized by Agency policy.

employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue.<sup>9</sup>

## 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:

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.

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<sup>9</sup> GPM § 5.9(a)(3). P&PM § 1.60(IX)(B)(2).

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.

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Carl Wilson Schmidt, Esq.  
Hearing Officer