

Issue: Group II Written Notice (use of words with racial or ethnic connotations);
Hearing Date: January 2, 2002; Decision Date: January 4, 2002; Agency:
Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number:
5344



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5344

Hearing Date: January 2, 2002
Decision Issued: January 4, 2002

PROCEDURAL HISTORY

On August 6, 2001, Grievant was issued a Group II Written Notice of disciplinary action for:

VIOLATION OF POLICY NUMBER 5-22.6, SECTION F, USE OF WORDS WITH RACIAL OR ETHNIC CONNOTATIONS DIRECTED TOWARD AN INMATE: On July 08, 2001, [Inmate B] alleged that you said to him "kneel down [ni--er]" [Officer H] who was in the area at the time of the incident, stated he heard you state to [Inmate B], "kneel down [ni--er]."

On September 5, 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 December 6, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 2, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Three Correctional Officers
Two Sergeants

ISSUE

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

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 Corrections employs Grievant as a Corrections Officer Senior. He has worked for the agency for approximately ten years without receiving any prior disciplinary action.

On July 8, 2001, Grievant was working in housing unit 3 as a recreation officer. He was preparing inmates to receive haircuts. Grievant placed handcuffs on Inmate B and informed him he also had to wear leg shackles. Inmate B objected to this and called out to Officer H. Officer H was also preparing inmates in adjoining cells to receive haircuts. Officer H told Inmate B that leg restraints were required and then Officer H returned his attention to the inmate in adjoining cell. Grievant then instructed Inmate B to "kneel down ni--er." Inmate B became belligerent and thrashed about his cell. Officer H overheard Grievant's comment and observed Inmate B's reaction and perceived the incident as racial. Officer H felt he could better handle the conflict, so he informed Grievant he would take control of the situation and asked Grievant to step away.

On July 17, 2001, Inmate B drafted a letter¹ to the warden stating in relevant part:

On Sunday July 8, 2001 at approximately 2:30 p.m., I was approached by [Grievant] who asked me, was I getting a [haircut]? I responded yes and he proceeded to handcuff me from the back. As the door open[ed] he told me he had to put the shackles on also. I responded that I want to see a supervisor about that because we don't normally do it that way. I then called the [recreation] officer in charge [Officer H] over to confirm what the

¹ Agency Exhibit 3.

procedure is. That's when [Grievant] forcefully pushed me in the back and told me quote "Kneel down ni--as".

On July 23, 2001, Officer H drafted an internal incident report² stating:

On [July 8, 2001 at approximately 2:30 p.m.] I, [Officer H], was assisting [Grievant] on B-pod in HU 3 for haircuts. [Grievant] and I, [Officer H] were pulling out [Inmate B]. After being cuffed [Grievant] asked [Inmate B] to let him put the leg irons on. [Inmate B] say no we haven't been putting leg irons on for haircuts. [Inmate B] then called me [Officer H]. I [Officer H] said to [Inmate B] go ahead. That [is] when [Grievant] put his hand on [Inmate B's] shoulder and said "kneel down ni--a."

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." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. 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." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

"Failure to follow ... established written policy" is a Group II offense. DOCPM § 5-10.16(B)(1). Department of Corrections Policy 5-22 governs an employee's relationships with inmates, probationers, or parolees. DOCPM 5-22.6(F) states:

Humane Treatment. Inmates, probationers, or parolees shall be treated humanely. Abuse or any form of corporal punishment is prohibited. No profane, demeaning, indecent, or insulting language, or words with racial or ethnic connotations, shall be directed toward such persons.

Grievant's statement to Inmate B was intended to insult the inmate and it constituted words with racial connotations. Grievant's poor choice of words caused a violent response from Inmate B. Grievant's actions were contrary to Agency policy thereby justifying a Group II Written Notice.

The evidence is unclear regarding the precise word used by Grievant. During the hearing, Officer H testified that Grievant used the word, "ni—er" but his written statement refers to the word, "ni—a". Inmate B's statement refers to the word "ni—as". The Hearing Officer concludes that regardless of the precise word used, each version was intended to insult and contained racial connotations. Although there may be some

² Agency Exhibit 4.

uncertainty regarding which version of the word was used, the Hearing Officer concludes that at least one version of the word was used, thereby justifying disciplinary action.

Grievant denies using any racial slurs. It is not necessary for the Hearing Officer to conclude with absolute certainty that the slur was used. The Agency has established that it is more likely than not that Grievant uttered the offensive words. Thus, the Agency has proven its case by a preponderance of the evidence.

Grievant contends that Officer H is racially prejudiced and thus was motivated to support the inmate's untrue statement. No credible evidence was presented to support this claim.

The Agency did not suspend Grievant because of his length of service and favorable work record. The Hearing Officer concludes that the level of discipline chosen by the Agency is measured and appropriate under the facts of this case.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

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.

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