Issue: Group III Written Notice with termination (violation of safety rules); Hearing Date: January 11, 2002; Decision Date: January 15, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5346

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5346

Hearing Date: January 11, 2002
Decision Issued: January 15, 2002

PROCEDURAL ISSUE

Due to availability of the participants, the hearing could not be docketed until the 31st day following appointment of the hearing officer.[1]

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Institution Operations Officer
Attorney for Agency

[1] § 5.1 of the *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

Six witnesses for Agency

ISSUES

Was the grievant's behavior on October 17, 2001 such as to warrant 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 III Written Notice issued on November 7, 2001 because he sent an anonymous letter containing a white, powdery substance to a coworker on October 17, 2001.[2] Grievant was discharged from employment effective November 7, 2001. The parties did not resolve the grievance at the third resolution step and the agency head subsequently qualified the grievance for a hearing.

The Department of Corrections (hereinafter referred to as agency) has employed the grievant as the Dental Clinic Director (Dentist Supervisor) for 10 years. His most recent performance evaluation rated him as a "contributor." During the past several years he has exceeded expectations in his annual evaluations. As the Clinic Director, he is responsible for ensuring that the dental staff adheres to institutional security and safety policies and procedures.[3] He currently has an active Group I Written Notice for using obscene or abusive language in the workplace.[4]

The spectre of possible biological attacks by terrorists began soon after the September 11, 2001 attacks on the World Trade Center and the Pentagon. By early October 2001, many false alarms and hoaxes involving alleged anthrax attacks had occurred. On October 5, 2001 a man in Florida died from exposure to anthrax. Over the next week, an employee of a television network became ill from exposure to anthrax and a congressional leader received a letter containing anthrax spores. News coverage during this period became pervasive, with round-the-clock coverage on television. By October 15, 2001, many people were scared and authorities were threatening to prosecute those who perpetrated anthrax hoaxes.

During the afternoon of October 17, 2001, grievant placed a quantity of white, dental cement powder in a folded piece of paper with the word "BOO!" written on it.[5] He put the paper and powder in an envelope that he sealed, addressed to surgical technician R, and placed on the desk used by surgical

[2] Exhibit 14. Written Notice, issued November 7, 2001.
[3] Exhibit 11. Grievant's Employee Work Profile, May 1, 2001.
[4] Exhibit 8. Written Notice, issued April 7, 2000.
[5] Exhibit 1. Photographs of envelope, insert, and white powder.

technicians. Between 2:30 and 2:40 p.m., surgical technician D noticed the envelope on the desk but did nothing with it at that time. He made a telephone call, left the office to attend to a patient and returned at about 3:00 p.m. Noting that the envelope was still on the desk, he picked it up, walked into the autoclave room and handed it to surgical technician R. As he turned to leave the room, he heard surgical technician R say, "This isn't funny."[6] Technician D turned around and noticed that technician R had a fine, white, powdery substance on his hands and pants. Technician D then noticed the same powdery substance on his own hands. The powder had leaked from the envelope even though the envelope had not yet been opened. Neither technician knew what the powder was. Neither technician knew who had left the envelope.

Both technicians became concerned about the powder. Over the next ten minutes, both technicians asked several other employees in the medical unit if they knew anything about the envelope. They then went to the lieutenant in charge of security for the medical unit. Technician R was holding the envelope by one corner, and in a serious, unsmiling manner said, "If this is a joke, it's not funny."[7] The lieutenant observed that technician D appeared to be "very concerned." The lieutenant became scared and concerned for his own safety, put on rubber gloves and placed the envelope in a plastic, Ziploc-type specimen bag. He then washed his hands, as did technician D. Grievant then walked into the area and asked what was going on. When told about the envelope, grievant acknowledged that he had prepared the envelope and that it was just a joke. Within a few minutes, the agency safety officer arrived to interview the grievant. Grievant stated, "I don't know what the big deal is, it was only a joke. I don't know why you people are making such a big fucking deal out of this."[8]

One employee in the medical unit became sufficiently concerned about the incident that he called the FBI to report the incident. Several days later, the FBI contacted institution management to ascertain what had occurred. Once the agency assured the FBI that it had been just a hoax, the FBI closed its inquiry.

APPLICABLE LAW AND OPINION

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

[6] Exhibit 2. Memorandum from special agent to chief of investigative unit, October 30, 2001.
[7] Exhibit 2. *Ibid*.
[8] Exhibit 2. Internal Incident Report filed by Safety Officer, October 17, 2001.

and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 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.[9]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[10] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards provide a set of rules governing 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. The policy states:

> The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section.[11]

The Department of Corrections (DOC), pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses those offenses that include acts and behavior of such a serious nature that a first occurrence normally should warrant removal

[9] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual,* Effective July 1, 2001.
[10] Now known as the Department of Human Resource Management (DHRM).
[11] DHRM Policy No.: 1.60, *Standards of Conduct*, effective September 16, 1993.

from employment. Examples of a Group III offense include violating safety rules where there is a threat of bodily harm, and threatening persons associated with any state agency, including, but not limited to employees, supervisors, patients and inmates.[12] These offenses are also considered Group III offenses under the Standards of Conduct policy applicable to all state employees.[13]

It is uncontroverted, and grievant admits, that he caused a coworker to receive an anonymous letter containing a white, powdery substance. The evidence establishes that the powder was on the coworker's hands and clothes. The coworker was seriously concerned at the time because he did not know what the powdery substance was. In addition, a second coworker was also concerned and upset because the powder got on his hands. A third person (lieutenant) utilized isolation procedures to contain the envelope because he was scared and did not know what the substance was. The two surgical technicians questioned several other coworkers about the envelope, thus making them aware that there was a possible biological threat in their work area. In addition, other safety and security officers were called to the area to investigate. Because of the emotional impact on those involved and the disruption to activity in the workplace, the agency has demonstrated by a preponderance of the evidence, that grievant committed an offense subject to discipline under the Standards of Conduct.

The offenses cited in the Standards of Conduct are only examples. They are not all-inclusive and do not include the specific offense of sending an envelope containing a white, powdery substance. However, it can reasonably be argued that the surgical technicians and lieutenant felt threatened by the unknown white substance that got on their hands and clothes. Even though grievant may not have intended a threat, it is clear that the concern and anger expressed by these coworkers are indicia that they reasonably perceived a threat from this unknown substance. Given the atmosphere in the country and the overwhelming attention being focused on such threats at the time, grievant knew, or reasonably should have known, that those affected would feel scared and threatened.

Regardless of how this offense is categorized, one must conclude that it was an act of such a serious nature that a first occurrence normally should warrant removal from employment. Had grievant sent this envelope to his coworker only two months earlier, its seriousness might not rise to the level of a Group III offense. In considering any such act, however, one cannot ignore the circumstances surrounding it. In this case, at a time when virtually everyone in the country was either scared or at least apprehensive about the possibility of biological attacks, the sending of such an anonymous letter was tantamount to yelling, "Fire!" in a crowded theater.

[12] Exhibit 2. Department of Corrections Procedure No.5-10.17, *Standards of Conduct*, June 1, 1999.
[13] DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

Grievant maintains that he had had intended to hand the envelope directly to the surgical technician but that the technician was not in his office when he went to hand it to him. He left the envelope on the desk, knowing that several other people shared that desk and office. He left the envelope unattended for between 20 and 30 minutes. Grievant knew, or reasonably should have known, that the surgical technician might receive the envelope before grievant could return to explain that it was only a "joke." Moreover, grievant could reasonably have foreseen that, in his absence, fear, consternation and disruption might well be the result.

One factor cited by the agency for the issuance of discipline is that the envelope containing the dental cement powder was left unattended in the surgical technician's office for nearly 20 minutes. Because inmates have access to, and are often told to wait in, this office, an inmate could have obtained the dental cement powder by stealing the envelope. The agency policy for control of contraband defines contraband as:

> Any unauthorized item determined to be in the possession of an inmate or within a correctional institution and accessible to an inmate which is not acquired through approved channels or in prescribed amounts, including: …E. Any drug, chemical compound or controlled substance which has not been issued to an inmate by a proper authority…[14]

If an inmate had taken the envelope, the grievant would have contributed to an inmate coming into possession of contraband. This dental powder, when freshly manufactured and mixed with water, hardens in the shape to which it is molded. In theory, it could potentially be used as part of a weapon. However it is undisputed that the dental cement powder used by grievant was at least 10 years old, well past its expiration date, and would not harden when mixed with water. Grievant knew that the powder was simply an outdated, useless powder that could not be utilized to make a weapon. Accordingly, little weight is assigned to this factor in considering the appropriate level of discipline.

Grievant states that he and the surgical technician to whom he sent the envelope have known each for 10 years, have been and are still good friends, socialize outside work and have regularly played practical jokes on each other. The surgical technician now considers this act only a joke and would be glad to have grievant return to work.[15] These facts are not persuasive. In effect, the surgical technician is now willing to forgive and forget. However, one cannot ignore the impact of grievant's act on the technician, his coworkers and other officers before it was discovered that the envelope was a hoax.

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[14] Exhibit 3. Institutional Operating Procedure 412, *Control of Contraband*, June 16, 2000.

[15] The surgical technician initiated and circulated a petition calling for the reinstatement of grievant. See Exhibit 10.

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.[16]

In this case, the grievant has a moderate length of service with the agency and his performance appraisals have been satisfactory or better. However, the grievant also has an active disciplinary action for offenses that involve an obvious lack of judgement and professionalism. As a supervisor, grievant is expected to set a positive example for subordinates. Here, grievant set a very negative example by perpetrating a hoax when others were being prosecuted for the very same type of hoax. Therefore, the grievant's past service and performance are insufficient to overcome the aggravating circumstance of the prior disciplinary action.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and discharge are AFFIRMED. This Written Notice shall be retained in the grievant's personnel file for the period specified in Section 5-10.19.A of the 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:

[16] Exhibit 2. Section VII.C.1, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

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.

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David J. Latham, Esq.

Hearing Officer