

Issue: Group III Written Notice with 2-day Suspension (acts of physical violence);
Hearing Date: March 8, 2002; Decision Date: April 9, 2002; Agency: Department of
Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5389



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5389

Hearing Date: March 8, 2002
Decision Issued: April 9, 2002

PROCEDURAL HISTORY

On December 18, 2001, Grievant was issued a Group III Written Notice of disciplinary action with two workdays suspension for:

Acts of Physical Violence – On December 17, 2001 at approximately 3:22 P.M., [Grievant] entered [the Facility] sorting out [Corrections Officer TC]. [Grievant] questioned several Officers about officer [TC]'s post location. [Grievant] went to [TC] work station and willingly and intentionally tried to force her into participating in acts of physical violence. Two staff persons had to physically separate the two Officers to prevent physical assaultive behavior. This incident occurred in the presence of several corrections staff.

On January 11, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On February 14, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 8, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Legal Assistant Advocate
Five Corrections Officers
Sergeant
Lieutenant
Major

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 Corrections employs Grievant as a Corrections Officer. She has been working for the Agency for approximately five years and has a good work history without any prior disciplinary action being taken against her.

In early December 2001, Grievant's mother, Corrections Officer MM ("MM") observed another corrections officer permitting an inmate to dance on a table. MM's supervisor instructed her to write an incident report and she did so. By writing an incident report, the other corrections officer was reprimanded. Corrections Officer TC ("TC") is a friend of the other corrections officer and did not like the fact that MM wrote an incident report. As MM left work at the end of her shift, TC and the other corrections officer followed MM as MM drove on a four-lane highway¹ towards a Wal-Mart. They attempted to intimidate MM. MM was driving in the right lane. TC positioned her

¹ The highway had two lanes in each direction.

vehicle to the left of MM's rear driver's side door. The other corrections officer positioned her vehicle immediately in front of MM's vehicle. MM could not pass the other corrections officer's vehicle because she was blocked by TC's vehicle. Eventually, MM broke free and continued on to the local Wal-Mart. TC followed her. As MM exited her vehicle in the parking lot, TC threatened MM not to write an incident report again on the other corrections officer.

MM reported the incident to her supervisor and a cursory investigation was done. The Agency concluded that because TC denied the allegations and the matter occurred outside of agency property, no disciplinary action would be taken against TC.

MM tried to avoid telling Grievant about the incident, but Grievant learned what happened from someone else.

On December 17, 2001 at approximately 3:22 p.m., Grievant went to B control and spoke with Corrections Officer LJ ("LJ"). Grievant said, "Where that bitch at" referring to Corrections Officer TC. LJ tried to calm down Grievant. Grievant told LJ that TC had called Grievant's mother a bitch and would "whoop her ass." Grievant grabbed the radio and called for TC three times. LJ told Grievant to put down the radio and she would tell Grievant the location of TC. Grievant agreed and LJ told Grievant that TC was working in the mailroom. Grievant left B control and walked towards the mailroom. Meanwhile, LJ called Sgt. G and Grievant's mother to tell them that Grievant was heading to confront TC.

Grievant arrived at the mailroom before anyone could stop her. She approached TC and said "Can I speak to you?" and TC said "yes" and they walked down the hall. Grievant said, "What did you say to my mother at Wal-Mart?" TC responded "That is none of your business and what happens on the street stays on the street." Grievant and TC continued to argue. Corrections Officer KG ("KG") was standing approximately 15 to 20 feet away from Grievant and TC. She realized that Grievant and TC were having a heated conflict. KG walked down to Grievant and grabbed Grievant's arm and led Grievant into another room and away from TC. As Grievant was being led away, she stated, "bitch you right, I don't have to say anything to you here, we can take this on the street." TC responded "Whatever." The Lieutenant approached TC and told her to go back to the mailroom and TC did so.

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.

Group III offenses include, “Threatening or coercing persons associated with any state agency (to include employees, supervisors, patients, visitors, students, etc.)” Grievant threatened TC through the intensity of her pursuit of TC and her statement “we can take this on the street.” Grievant was adamant about confronting TC even though several people tried to stop her. She expressed her displeasure with TC through her demeanor and her harsh words and tone with TC. Her statement that “we can take this on the street” reflected the threat of a future confrontation with TC and was intended to make TC fearful of that confrontation. Issuance of a Group III Written Notice must be upheld.² Given the nature of Grievant’s behavior and potential for a far greater disruption of the Agency’s operations, a two workday suspension is appropriate.

Grievant contends she did not engage in a physical altercation with TC and did not intend to engage in such an altercation. The Hearing Officer agrees. Issuance of a Group III for acts of physical violence or fighting is not appropriate; but a Group III for threatening another employee is appropriate.

The Hearing Officer is mindful that Grievant was attempting to right a wrong done to her mother. Her emotions and sense of frustration with what she perceived as the Agency’s poor response is understandable. Addressing the matter at the work site, however, was the wrong approach.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension 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 three types of administrative review, depending upon the nature of the alleged defect of the decision:

² The Agency has not established that Grievant “willingly and intentionally tried to force [TC] into participating in acts of physical violence” and that “Two staff persons had to physically separate the two Officers to prevent physical assaultive behavior.” It is not necessary for the Agency to establish each detailed fact upon which it relied so long as it can establish sufficient facts to met its burden of proof. The Agency has done so.

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 Resource 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 DHRM, 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

