

Issue: Group III Written Notice with demotion and pay reduction (assaulting an inmate);
Hearing Date: April 26, 2002; Decision Date: May 31, 2002; Agency: Department of
Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5418



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5418

Hearing Date: April 26, 2002
Decision Issued: May 31, 2002

PROCEDURAL HISTORY

On January 23, 2002, Grievant was issued a Group III Written Notice of disciplinary action with demotion and ten percent pay reduction for:

As a result of an Internal Affairs investigation, it was founded that you assaulted an inmate on July 27, 2001. Any subsequent written notice, regardless of the level, issued during the active life period of this written notice may result in removal.

On February 19, 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 he requested a hearing. On March 26, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 26, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee

Legal Assistant Advocate
Two Corrections Officers
Assistant Warden Operations
Special Agent
Two Sergeants
Lieutenant
Captain

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with demotion and pay reduction.

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 employed Grievant as a Sergeant at one of its maximum security correctional facilities. As a result of the disciplinary action, he was demoted to a Corrections Officer with a ten percent pay reduction. No evidence of prior disciplinary action against Grievant was presented. With the exception of this disciplinary matter, Grievant's work performance was excellent.

The Facility where Grievant works incarcerates some of the most dangerous and unpredictable inmates in the Commonwealth. Supervising these inmates requires a level of personal strength, discipline, and training that few members of the general public would understand or appreciate. The level of professionalism exhibited by correctional officers can be the difference between chaos and the rule of law.

There are some inmates at the Facility whose behavior is so incorrigible that they must be placed in five point restraints for their own safety, the safety of other inmates, and the safety of correctional officers. An inmate in five point restraints is placed on his back on a bed. The bed resembles a large metal tray with legs containing a mattress. The mattress is approximately two inches thick and is held in by the thin walls of the

metal bed which are approximately one and a half inches tall. Extending from the left and right corners at the foot of the bed are metal bars designed to serve as shackles holding the inmate's legs. Extending near the middle of the bed are metal bars designed to serve as shackles holding in the inmate's arms. Once the inmate's arms and legs are secured, a strap is placed across the inmate's chest and secured to the sides of the bed. Once all parts of the restrains are secured a nurse checks each of the restrains to make sure that they are not so tight as to injure the inmate. When the restrains are properly used, an inmate is essentially immobile. Inmates are removed from restraints for restroom breaks and are allowed to sit up to eat meals.

Inmates in five point restraints often file frivolous claims alleging mistreatment by security staff. In order to protect security staff from unfounded complaints, the Agency videotapes each time correctional officers enter a cell with an inmate in restraints. Agency policy prohibits a corrections officer from entering an inmate's cell without another corrections officer being present.

Inmate G is one of the inmates requiring five point restraint. On July 26, 2001 at 4:45 p.m., several corrections officers entered Inmate G's cell and gave him his meal to eat. He appeared in good spirits and his face appeared normal. At 12:45 a.m. on July 27, 2001, corrections officers opened the door to Inmate G's cell. He did not wish to get up but otherwise appeared in good health. The bed mattress was properly positioned underneath him.

On July 27, 2001 at approximately 6:30 a.m., Grievant entered the cell of Inmate G without the assistance of another officer. He did so knowing that his entry was contrary to the Agency's policy requiring two corrections officers to be present when an officer enters an inmate's cell. Grievant hit Inmate G in the face causing injury to the inmate's left eye. Grievant exchanged curse words with the inmate and left the cell. Grievant's entry into the cell was not videotaped.

At approximately 7 a.m. on July 27, 2001, corrections officers open the inmate's cell. Inmate G yelled "Sergeant [E] did not shut my eye. None of these Cos did it. Sergeant [Grievant] did it." Inmate G's left eye is swollen and darker than his right eye. He demands to speak with Captain [C] who serves as the liaison for certain inmates. The bed mattress is properly positioned under Inmate G. A nurse enters the cell and Inmate G says "My eye needs to be checked." The nurse looks at Inmate G's eye. She says "the left eye is swollen up."¹ Inmate G repeats, "Sergeant [Grievant] did this." The nurse checks the restraints and leaves the cell. Once Inmate G realizes that his request to speak with Captain [C] will not be honored, he begins twisting his body and using his hands to pull and push the mattress to the side of the bed. He begins moving his head upward and back down to bang the back of his head on the metal bed.

¹ The nurse did not record Inmate G's injury in the Treatment Log because she wanted to "keep from causing a fellow co-worker from getting in trouble."

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, “Acts of physical violence or fighting” and “Physical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of inmates or wards.”² Intentionally striking an inmate is an act of physical violence and abuse. Grievant intentionally struck Inmate G thereby justifying issuance of a Group III Written Notice. An employee receiving a Group III Written Notice may be demoted with a salary reduction.³ The Agency’s actions must be upheld.

Grievant contends that he did not strike Inmate G and that the Agency has not proved by a preponderance of the evidence that he hit Inmate G. He contends the injuries were self-inflicted by an inmate who saw an opportunity to seek revenge against a corrections officer. He presented credible evidence that many inmates in the Facility were willing to injure themselves in order to blame falsely security staff for the injuries.

It is unlikely that an inmate in five point restraints could injure himself without removing or altering the mattress underneath him. Grievant presented evidence that an inmate in restraints can remove the mattress underneath him thereby enabling the inmate to obtain enough room to position himself in a manner so as to injure himself. No evidence was presented, however, showing that once an inmate removed or repositioned a mattress that the inmate could restore the mattress to its original placement on the bed. Indeed, once a mattress is moved from underneath an inmate, an inmate would need to use his hands in a sweeping fashion to restore the mattress to its proper position.

In order to support Grievant’s theory that the inmate injured himself, it would be necessary for the inmate to both move the mattress from underneath him and then to replace the mattress in its original position. The Hearing Officer finds that it is unlikely that Inmate G both moved and replaced the mattress. Thus, the only logical explanation for Inmate G’s injuries is that Grievant hit the inmate when he entered the cell.

² DOCPM § 5-10.17(B)(6) and (17).

³ DOCPM § 5-10.13(B)(3) and DHRM Policy 3.05(Demotion).

Grievant contends he entered the cell because Inmate G complained about being unable to breathe.⁴ This contention is not credible because the nurse checked Inmate G's restraints. In addition, if Inmate G had had difficulty breathing, Grievant should have filed an incident report; but Grievant filed no such report. Grievant could have looked through the cell window to determine whether Inmate G was having difficulty breathing or he could have waited until a second correctional officer was present before entering the cell. Grievant's allegation of urgency is not supported by the evidence.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion and pay reduction 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:

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.

⁴ Not all of Grievant's testimony was credible. He testified that the first time he received a copy of the Investigator's report was as part of the disclosure of documents ordered by the Hearing Officer. In his step response filed well before the hearing, however, Grievant quotes and discusses in detail the Investigator's report. He clearly had some level of access to the Investigator's report before the grievance was qualified for a hearing.

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