

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: July 22, 2002; Decision Date: July 23, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5467;
Administrative Review: Hearing Officer Reconsideration Request received 08/01/02; Reconsideration Decision Date: 08/02/02; Outcome: No basis to change decision; request denied; Administrative Review: EDR Ruling Requested 08/01/02; EDR Ruling Date: 10/08/02 [Ruling #2002-154]; Outcome: Decision is not out of compliance with grievance procedure [Ruling No. 2002-154]; Judicial Review: Appealed to the Circuit Court in the County of Brunswick on 08/19/02; Outcome pending



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5467

Hearing Date: July 22, 2002
Decision Issued: July 23, 2002

PROCEDURAL ISSUES

Due to availability of the participants, the hearing could not be docketed until the 35th day following appointment of the hearing officer.¹

In addition to requesting that his disciplinary action be reversed, grievant requested that two witnesses be disciplined, demoted and given training. Hearing officers have the authority to uphold, reduce or rescind disciplinary action.² Hearing officers do not have the authority to discipline, demote or require training.³

¹ § 5.1, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001, 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.

² § 5.9(a)2, *Ibid.*

³ § 5.9(b)5 & 6, *Ibid.*

APPEARANCES

Grievant
Representative for Grievant
Four witnesses for Grievant
Warden
Four witnesses for Agency

ISSUES

Did the grievant's actions on March 8, 2002 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 I Written Notice issued for unsatisfactory job performance on March 8, 2002.⁴ Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.⁵

The Virginia Department of Corrections (hereinafter referred to as agency) has employed the grievant as a correctional officer senior for 20 years. The grievant has no other active disciplinary action and is a good corrections officer.

At about 5:40 a.m. on March 8, 2002, grievant approached a female correctional officer who was standing against a wall outside the muster room. Grievant walked directly up to her and used both hands to grab her coat lapels in the upper chest area. He pulled her toward him, pushed her against the wall, leaned into her with his clenched fists against her chest and asked why she had not been at home the previous day.⁶ At the same time, the chief of security (a major) and a captain were walking toward the two officers and noticed the incident. The major spoke to grievant, who then released the female officer from his grasp. Another correctional officer who was standing inside the muster room witnessed the incident through the open door of the muster room.

The major then conducted separate interviews with, and obtained written statements from, both grievant and the female officer. She complained of

⁴ Exhibit 1. Written Notice, issued March 13, 2002.

⁵ Exhibit 2. Grievance Form A, filed April 5, 2002.

⁶ Exhibit 3. Memorandum from Major to Warden, March 8, 2002.

soreness in her upper chest area where the grievant had leaned against her with his clenched hands. As a precautionary measure, the major recommended that the female officer go to a local hospital for evaluation.⁷ The examination revealed no injury. When the major asked grievant for his written statement, grievant refused to write anything until he talked with a lawyer. After an assistant warden spoke with grievant, he agreed to complete an incident report.⁸ He maintained that the incident was merely “horseplay.” The female officer stated that grievant had physically attacked her and that it was more than just horseplay.

Grievant and the female officer have been friends but are not involved in any type of relationship other than sharing an interest in basketball. From time to time, they have played basketball together. The female officer acknowledged that grievant had previously engaged in friendly horseplay by grabbing her from behind in a bear hug. However, she maintained that the incident on March 8, 2002 was much rougher and that she did not view it as horseplay.

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 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.

⁷ The facility routinely takes this precaution in cases of potential injury because of concerns about possible workers’ compensation claims.

⁸ Exhibit 3. Internal Incident Report completed by grievant, March 6 (sic), 2002.

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 Training¹⁰ promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the 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. Section V.B.1 defines Group I offenses to include behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.

The Department of Corrections, pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct. One example of a Group I offense is inadequate or unsatisfactory job performance.¹¹ Group III offenses include acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment; one example of a Group III offense is acts of physical violence.¹²

The undisputed evidence establishes that grievant had a physical interaction with a female corrections officer on March 8, 2002. Of the five people who were involved or who witnessed the incident, only grievant maintains that the incident was merely horseplay. The other four state that the incident went beyond play. The female officer feels she was physically attacked; the major views the incident similarly; the captain concluded it was far more than just horseplay; and the corrections officer thought the incident was serious. The captain testified that it appeared grievant had lifted the female officer off the ground as he held her against the wall.

In addition, there is ample corroborative evidence to conclude that this incident went well beyond simple horseplay. First, the female officer complained of soreness in her upper chest area. The grievant is significantly taller than the female officer. By his own admission, grievant clenched his fists when holding the female's coat and leaned into her as he spoke to her. It is therefore

⁹ § 5.8, Grievance Procedure Manual, Department of Employment Dispute Resolution, July 1, 2001.

¹⁰ Now known as the Department of Human Resource Management (DHRM).

¹¹ Exhibit 6. Department of Corrections Procedure Number 5-10.15.B.4, *Standards of Conduct*, June 1, 1999.

¹² Exhibit 6. Section 5-10.17A & B.6, *Ibid*.

consistent that the female officer would have felt soreness as grievant shoved her into the wall and leaned against her with balled fists. Second, all those who observed the female officer said she was not laughing or smiling, as one would expect in horseplay. Rather, she appeared to be, "upset," and "surprised." Third, the female officer testified that, if the major had not intervened, she was prepared to hit grievant to get him to release her.

Grievant has alleged that the major and captain fabricated the incident report. There is simply no basis for such an accusation. Even grievant acknowledges that the incident occurred. However, his opinion of the seriousness of the incident is quite different from the views expressed by the victim and three other witnesses. Grievant also alleges that the Major coerced the female officer into signing her incident report; both the major and the female officer deny that she was coerced.

Grievant asserts this incident was mere horseplay. However, a preponderance of the evidence establishes that, even if grievant intended to engage in horseplay, he in fact engaged in physical behavior that was rougher than horseplay. The victim perceived it to be significantly rougher than horseplay, as did three other witnesses who were all within approximately 15 feet from grievant. Moreover, since the victim had a sore chest immediately after the incident, it is clear that grievant's actions constituted deliberate physical contact – contact that is totally inappropriate in any workplace.

The agency could have concluded that this incident was an act of physical violence. Such acts warrant a Group III offense and could result in the grievant's removal from employment. However, the agency decided that grievant's length of employment and his otherwise good record constitute mitigating factors which justify retaining him. The agency could also have given grievant a Group III Written Notice with demotion, suspension, or transfer as an alternative to removal. However, the Warden decided to further reduce the discipline to the lowest disciplinary level - a Group I offense for unsatisfactory work performance. Under the circumstances, the discipline was entirely appropriate and reasonable.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued on March 13, 2002 is hereby **AFFIRMED**. The 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

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹³

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

David J. Latham, Esq.
Hearing Officer

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5467

Hearing Date:	July 22, 2002
Decision Issued:	July 23, 2002
Reconsideration Received:	August 1, 2002
Reconsideration Response:	August 2, 2002

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision 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. A copy of all requests must be provided to the other party and to the Director of the Department of Employment Dispute Resolution.¹⁴

¹⁴ § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

PROCEDURAL ISSUES

Grievant submitted a request for reconsideration that is defective in two respects. First, grievant was represented during the hearing but submitted his request pro se with no indication that he is no longer represented. Second, grievant failed to submit copies of his request both to the agency and to the EDR Director. Despite these procedural deficiencies, the hearing officer will respond to grievant's request because of its brevity.

Grievant contends that he has new evidence but his request fails to proffer any evidence not already in the record. His request is, in essence, an argument that takes issue with the Hearing Officer's decision. Grievant has not provided any new evidence that would support either a reopening of the hearing or a reconsideration of the decision.

DECISION

The hearing officer has carefully reviewed grievant's request but declines to reopen the hearing or to reconsider the Decision issued on July 23, 2002.

APPEAL RIGHTS

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.

David J. Latham, Esq.
Hearing Officer