

Issue: Group III Written Notice with 5-day suspension (physical abuse of inmate);
Hearing Date: 06/05/03; Decision Date: 06/06/03; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 5736



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5736

Hearing Date: June 5, 2003
Decision Issued: June 6, 2003

PROCEDURAL HISTORY

On February 19, 2003, Grievant was issued a Group III Written Notice of disciplinary action with 5 workday suspension for:

Physical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of an inmate. On February 8, 2003, you encountered a disturbance with [Inmate] in the dining hall. You failed to call for any assistance to help diffuse the situation. You ordered the inmate to leave the dining hall. He refused to leave so you left the dining hall and allowed the inmate to follow you. A confrontation followed outside the dining hall door which resulted in your hitting the inmate on the right side of his face.

On March 19, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 19, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 5, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Two witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with suspension for physical abuse of an inmate.

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 is responsible for providing security at a correctional facility. He has a reputation for exercising good judgment when dealing with inmates. Grievant received a Group II Written Notice on December 19, 2002 for failure to follow a supervisor's instructions.

On February 8, 2003 at approximately 8:37 a.m., Grievant was searching inmates exiting the dining hall. The Inmate was next to be searched. When Grievant started searching the Inmate, the Inmate handed Grievant his jacket. Grievant noticed that the Inmate's pants were hanging off of his buttocks and his shirt was not tucked in. Grievant ordered the Inmate to fix his clothes. The Inmate replied, "F—k that, now what are you going to do." Grievant then ordered the Inmate to give Grievant his I.D. card but Grievant noticed it was on the Inmate's jacket which was in Grievant's possession. The Inmate started yelling at Grievant saying "What the f—k you take my I.D. for." Inmate then turned around standing inches from Grievant's face and yelled "Give me my I.D. card back you punk motherf—ker." Grievant ordered the Inmate to leave the dining hall. While standing inches from Grievant's face, the Inmate responded, "What are you going to do, you just a scared ass bitch." Grievant ordered the Inmate to leave the dining hall three more times because the other inmates in the dining hall were

encouraging the Inmate to fight Grievant. Another inmate, Inmate F, yelled, “Everybody look at that motherf—ker scared, go ahead, and punch him in the f—king face, that bitch ass ni—er is scared, look at him he is scared to death.” The Inmate did not move and remained inches from Grievant’s face. Grievant walked toward the exit door and ordered the Inmate to walk outside. The Inmate walked with Grievant and continued to yell at Grievant. They stopped and Grievant ordered the Inmate to turn around and submit to be handcuffed. The Inmate replied, “F—k you, bitch ni—er. If you are so bad make me submit to be cuffed.” The Inmate walked up to Grievant’s face and Grievant backed up and ordered the Inmate to back up. The Inmate refused and continued coming toward Grievant in a very aggressive manner. Grievant ordered the Inmate to back away three more times. The Inmate then balled his fists and positioned his fists in front of his chest as if about to strike Grievant. The Inmate had one leg in front of the other and was standing in a fighting stance. Grievant believed the Inmate was about to strike Grievant. Grievant told the Inmate to back up again and Grievant continued to walk backwards while the Inmate continued moving towards Grievant and yelling at Grievant. At this point, Grievant struck the Inmate on the right side of the Inmate’s face with Grievant’s left hand in an effort to stop the Inmate from advancing and prevent the Inmate from striking Grievant.

While the Inmate was confronting Grievant, an officer inside the dining hall made an emergency radio call. After Grievant struck the Inmate, Grievant positioned himself behind¹ the Inmate in order to subdue the Inmate. By this time, other staff had responded to the radio call and several security staff helped Grievant subdue the Inmate.

The Gun Turret Officer observed the Inmate swinging at Grievant, but it is unclear whether this was before or after Grievant hit the Inmate.

CONCLUSIONS OF POLICY

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.

“Inadequate or unsatisfactory work performance” is a Group I offense.² In order to prove inadequate or unsatisfactory work performance, the Agency must establish that

¹ Officer B described Grievant’s action as a “bear hug” designed to immobilize the Inmate.

² DOCPM § 5-10.15(B)(4).

Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. Grievant should have used his walkie-talkie to ask for the assistance of a supervisor or other staff once he realized the Inmate presented a considerable risk of danger. Grievant's failure to do so is inadequate work performance. The Group III Written Notice must be reduced to a Group I Written Notice.

Institutional Operating Procedure 431 states that "employees have the right to protect themselves and a duty, consistent with their self protection, to protect inmates, other staff, and members of the public who are threatened by actions of offenders." In addition, IOP 431 permits security staff "to use as much force as they reasonably perceive necessary to perform their duties and to protect themselves and others from harm." Grievant perceived that the Inmate was about to hit Grievant. Grievant's perception was reasonable given the hostile behavior displayed by the Inmate throughout their interaction. The Inmate had his fists clinched and positioned to strike. The inmate was so close to Grievant that if the inmate had struck Grievant, Grievant would not have been able to block the strike. Grievant exercised his right to protect himself from the Inmate by hitting the Inmate as the Inmate was about to strike Grievant.

The amount of force Grievant used was no more than necessary to "sting" the Inmate and disrupt his attack. The Inmate refused medical treatment. By hitting the Inmate, Grievant was able to move behind the Inmate and hold him while other corrections officers came to assist.

There is a difference between what Grievant could have done and what Grievant should have done. The Agency has offered examples of what Grievant could have done such as running away or waiting until the inmate swung at Grievant. What the Agency has failed to prove is what Grievant should have done based on the training he had received and his experience working in a correctional institution. When asked during the hearing what Grievant should have done as the Inmate was about to hit him, the Captain offered no definitive response. The Captain suggested Grievant could have again radioed for help but that Grievant had the right to defend himself. He also indicated he was unsure of what he would have done in Grievant's situation since he was not in Grievant's situation. Officer B testified also that he was unsure of what he would have done had he been in Grievant's position but indicated he would not have run away since doing so would have resulted in a loss of respect by the Inmate thereby causing problems in future interaction between Grievant and the Inmate. Officer B said he would have attempted to block the Inmate's strike.

It is clear that Grievant should have called for assistance from other employees as the circumstances escalated. Failing to timely ask for assistance, however, is not inmate abuse.

Before the Agency can establish that Grievant engaged in behavior that would otherwise justify his removal from employment, the Agency must show that Grievant

knew or should have known what he was suppose to do when faced with an inmate poised to strike him. The Agency has not done so.

The Agency argues that the Inmate did not hit Grievant first and, thus, there was no reason for Grievant to strike the Inmate. No evidence was presented suggesting that a corrections officer is obligated by policy or training³ to wait until he is first hit by an inmate before he may take action to protect himself. If Grievant had waited until the Inmate hit Grievant, the Inmate's blow may have disabled Grievant to the extent he was unable to protect himself and others around him.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a five day suspension is **reduced** to Group I Written Notice. Because the normal disciplinary action for a Group I offense is issuance of a Written Notice, Grievant's suspension for five days is **rescinded**. GPM § 5.9(a)(2). Standards of Conduct, Policy No. 1.60(D)(1)(a). The Agency is directed to provide the Grievant with **back pay** for the period of suspension, February 20, 2003 through February 25, 2003 less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3). Standards of Conduct, Policy No. 1.60(IX)(B)(2).

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.

³ For example, the Department of Mental Health Mental Retardation and Substance Abuse Services has an extensive training program designed to teach employees what to do when confronted with hostile patients.

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.⁴

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.