

Issue: Group I Written Notice (actions unbecoming an officer); Hearing Date:
06/19/03; Decision Issued: 06/20/03; Agency: DOC; AHO: Carl Wilson Schmidt,
Esq; Case No. 5744



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5744

Hearing Date: June 19, 2003
Decision Issued: June 20, 2003

PROCEDURAL HISTORY

On February 20, 2003, Grievant was issued a Group I Written Notice of disciplinary action for:

On 02-04-03 you asked [Officer J] for a copy of an obscene picture. You then made copies and handed them out to several of your fellow officers. Your actions were inappropriate in the workplace and do not support the Goals and Objectives of [the Institution]. Therefore you are being cited with "Actions Unbecoming a Corrections Officer."

On March 13, 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 she requested a hearing. On May 27, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 19, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative

Agency Party Designee
Agency Representative

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for actions unbecoming a corrections officer.

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. No evidence of prior disciplinary action against Grievant was introduced.

On February 4, 2003, Grievant obtained a copy of a picture from another employee. The picture originated from a Lieutenant and Sergeant who printed the picture from the internet. The picture was titled "Don't Mix Steroids and Viagra". It showed a nude male body builder with disproportionately enlarged genitals. Grievant made several photocopies of the picture and began handing them out to other corrections officers. Grievant gave one of the pictures to Officer G.

Several hours later in the day, Grievant observed Officer G away from her post for approximately 20 minutes. Grievant notified the Watch Commander who in turn scolded Officer G. In order to get even with Grievant, Officer G complained that Grievant was passing out inappropriate pictures. Officer G admitted she would not have complained about Grievant had Grievant not first complained about her. None of the employees receiving a picture from Grievant felt that the picture was offensive, but several felt the picture was inappropriate in the workplace.

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.

DOCPM 5-10 lists numerous examples of offenses. These examples “are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of agency head, although not listed in the procedure, undermines the effectiveness of agency’s activities or the employee’s performance, should be treated consistent with the provisions of this procedure.”¹ The agency contends Grievant’s behavior rises to the level of a Group I offense for conduct unbecoming a corrections officer. Based on the evidence presented, the Hearing Officer agrees. Although none of the individuals receiving the picture felt it was offensive, distributing the picture places the agency at risk of tolerating a hostile work environment.²

Grievant argues that the agency has not provided sufficient training regarding what pictures are considered offensive. This argument fails. The picture is sufficiently inappropriate that a typical State employee would know that he or she should not pass the picture to other employees in the workplace.

Grievant argues that the disciplinary action is too severe. The Hearing Officer finds that the level of disciplinary action is appropriate. Grievant’s behavior is consistent with other Group I offenses such as “inadequate or unsatisfactory job performance” or “use of obscene or abusive language.”

Grievant contends that the vindictive motive of Officer G should be considered as a basis to reduce the disciplinary action against her. How inappropriate behavior comes to the attention of an agency is not a basis to reverse disciplinary action so long as the agency can establish that an employee engaged in inappropriate behavior. The Agency has done so.

Grievant questions why supervisors viewed the picture and permitted it to be transferred within the agency. The evidence showed that disciplinary action was taken against supervisors for permitting the passing of the picture within the agency.

Grievant argues the picture she passed to other employees is no more offensive than the pictures posted in inmates’ cells. This argument fails because departmental

¹ DOCPM § 5-10.7(C).

² DHRM Policy 2.30 defines a hostile environment as “A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.”

operating procedure 852 permits inmates to post otherwise offensive pictures in their cells. This procedure reflects the rights of inmates as defined by federal and state courts.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

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.³

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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