

Issue: Group III Written Notice with 10-day suspension (physical, verbal or mental abuse which constitutes recognized maltreatment of offenders); Hearing Date: 02/26/04; Decision Issued: 03/01/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 576



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 576

Hearing Date: February 26, 2004
Decision Issued: March 1, 2004

PROCEDURAL ISSUES

The grievant requested a compliance ruling from the Director of the Department of Employment Dispute Resolution (EDR) regarding whether his two grievances should be consolidated for a single hearing. The EDR Director ruled that the two grievances would be consolidated for the purpose of hearing them together, but directed the hearing officer to issue two separate decisions.¹

Grievant requested five forms of relief in his grievance, only two of which a hearing officer has the authority to grant. A hearing officer does not have authority to: require the agency to place a letter in his file stating that he acted appropriately²; grant him a salary increase³ or; direct the agency to have management personnel interview road officers regarding the problems they encounter.⁴

¹ *Compliance Ruling of Director*, Ruling Number 2004-591, February 6, 2004.

² § 5.9(b)7, *EDR Grievance Procedure Manual*, effective July 1, 2001.

³ § 5.9(b)3, *Ibid.*

⁴ § 5.9(b)4 & 7, *Ibid.*

APPEARANCES

Grievant
Attorney for Grievant
Superintendent
Advocate for Agency
Two witnesses for Agency

ISSUES

Did grievant's conduct 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 III Written Notice issued for physical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of offenders.⁵ As part of the disciplinary action, grievant was suspended without pay for ten days. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁶

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for 14 years. He is a Corrections Officer Senior.⁷

Grievant was assigned as a road gang officer (gun gang officer). This correctional facility normally operates several road gangs that are used to clear brush and shrubbery along state highways. Each road gang includes one corrections officer, a foreman from the Virginia Department of Transportation (VDOT), and ten inmates. Grievant is armed with a shotgun and a .38 caliber pistol; the VDOT foreman is unarmed. However, the VDOT foreman receives annual qualification training on both weapons. When the grievant takes a break during the day, he is required to give the weapons to the foreman until grievant returns. Corrections officers are trained that they should never approach inmates with weapons. The post order for a gun gang officer provides that armed

⁵ Exhibit 1. Written Notice, issued November 14, 2003.

⁶ Exhibit 1. Grievance Form A, filed December 7, 2003.

⁷ Exhibit 4. Grievant's Employee Work Profile, October 25, 2002.

corrections officers should generally remain 50 feet from inmates.⁸ The group is bused to a work site along the highway. Signs stating "Road Work Ahead" are placed an appropriate distance from the site on both sides of the work site to alert motorists of work ahead and the possibility that people may be in the roadway.

On November 10, 2003, grievant and his road gang were assigned to clear brush adjacent to a bridge on a narrow rural road. The road was so narrow and the ditches so steep on either side of the road that the bus had to park partly on the shoulder and partly on the road. When the inmates disembarked from the bus, they gathered at the rear of the bus to ready their equipment (primarily weed eaters with sickle bars and bush axes). As required, grievant and the foreman stood well apart from the inmates. As the inmates were starting the weed eater engines, grievant noticed a car approaching. He also observed that one inmate was standing on the left side of the bus with a weed eater in his right hand and a cup of coffee in the other hand. Because the road was so narrow and the bus was half in the road, the inmate was partially blocking the remaining half of the road. Grievant motioned the car to stop and at the same time yelled, "Traffic, get out of the road." Because of the loud noise from multiple weed eater engines, the inmate apparently did not hear grievant and did not move. Grievant repeated his warning and the inmate still did not move.

Grievant then walked past the group of nine inmates (within five or six feet) and came up to the inmate blocking the road. Grievant had his pistol in its holster and his shotgun in his right hand. Both weapons were loaded but no rounds were chambered. Grievant placed his left hand on the inmate's chest and pushed him backwards toward the bus to make room for the car to pass. After the car passed, grievant walked back to where the foreman was standing. As he did so, the inmate began using vulgar language telling the grievant that he could not put his hands on the inmate. Grievant handed his shotgun to the foreman and returned to the inmate. Grievant still had his pistol. He put the inmate facing against the bus with his hands up and then handcuffed the inmate. As he did so, one inmate told the foreman he wanted to approach grievant and the inmate. The foreman firmly told him not to. Grievant then returned to where the foreman was standing. The inmate complained that the handcuffs were too tight and grievant returned to the inmate a third time to loosen the handcuffs. Grievant still had his pistol at this time.

The superintendent interviewed grievant later that day about the incident. Grievant explained what occurred and the superintendent's secretary typed up his statement. Grievant carefully read and then signed the statement.⁹ The

⁸ Exhibit 3. Specific Duty 7, *Post Order #26, Gun Gang Officer*, January 14, 2004, states: "Inmates generally will not be permitted within fifty (50) feet of the armed officer. When situations require them to be closer, the officer should be alert and ready." The alert and ready language means that officers should have their shotgun in both hands and ready to use it if necessary.

⁹ Exhibit 1. Grievant's statement, November 10, 2003.

inmate was not physically injured and has not alleged any mental or emotional distress as a result of this incident.¹⁰

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹¹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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.

¹⁰ The inmate did not testify at the hearing.

¹¹ § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹² The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses Group III offenses, which are defined identically to the DHRM Standards of Conduct.¹³ Among the examples of Group III offenses is physical abuse or other abuse, either verbal or mental, which constitutes maltreatment of offenders.

The Standards of Conduct do not define physical, verbal, or mental abuse. The most relevant dictionary definitions of abuse include "improper use or treatment," and "physical maltreatment."¹⁴ The agency has not demonstrated that the inmate suffered any physical, mental, or emotional injury from this incident. Proving such a charge requires more than merely making the allegation. No medical reports were provided and the inmate did not testify that he had sustained any abuse. None of the witnesses at the hearing had any knowledge either of actual injury or of statements from the inmate that would suggest any injury. The best witness to resolve this issue would have been the inmate, however, the agency elected not to have the inmate testify. There is a rebuttable presumption that when a party fails to offer the testimony of a witness who had the most knowledge about an issue, the testimony of that witness would not have been favorable to the party. Accordingly, it is presumed that the inmate would not have alleged any injury or abuse had he testified.

Based on the available testimony of the only witness with first-hand knowledge (grievant), grievant used an open hand on the inmate's chest to move him back from the center of the road to the side of the bus. Subsequently, he placed the inmate in restraints (handcuffs). Neither of these interactions suggests any physical injury, or any mental or emotional abuse. The grievant did not strike or violently shove the inmate; his open-handed pushing of the inmate did not inflict any injury and was used only to move the inmate from the path of the oncoming vehicle. This was undoubtedly not the first time the inmate had been handcuffed. In the absence of any evidence to the contrary, it is concluded that it was an occurrence the inmate had previously experienced. It is a not uncommon experience for inmates in correctional institutions to be restrained from time to time or, to observe others being restrained for any number of security reasons. Thus, there is no evidence that grievant's handcuffing of the inmate was in any way unusual or traumatic.

This decision does not address the issue of whether grievant should have approached the inmate while retaining his weapons because that issue was

¹² DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹³ Exhibit 5. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

¹⁴ *Webster's Ninth New Collegiate Dictionary*.

separately disciplined and grieved, and is the subject of the companion decision to this decision. This decision concludes only that the agency has not demonstrated, by a preponderance of evidence, that grievant abused or maltreated the inmate.

DECISION

The decision of the agency is hereby reversed.

The Group III Written Notice and ten-day suspension issued on November 14, 2003 for physical, verbal or mental abuse is RESCINDED. The agency shall remove this disciplinary action from grievant's personnel file and shall reimburse him for the ten days of suspension.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.¹⁵ 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.¹⁶

[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

¹⁵ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.