Issue: Group III Written Notice (threatening a ward); Hearing Date: 04/15/04; Decision Issued: 04/19/04; Agency: DJJ: AHO: David J. Latham, Esq.; Case No. 642

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 642

Hearing Date: April 15, 2004
Decision Issued: April 19, 2004

PROCEDURAL ISSUE

Grievant objected to the fact that the first-step respondent to his grievance did not comply with the requirement to respond within five workdays of receiving the grievance.[1] However, grievant failed to raise his claim of noncompliance immediately.[2] The procedure to remedy noncompliance is clearly explained in the Grievance Procedure Manual. Accordingly, grievant has forfeited his right to challenge the noncompliance. In any case, this grievance hearing has provided grievant ample opportunity to present his case, thereby curing any potential due process concerns.

[1] *See* §3.1, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001. "Within five workdays of receiving the grievance, the first-step respondent must provide a written response on the grievance 'Form A' or an attachment."

[2] §6.3, *Ibid*. "All claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge the noncompliance at a later time."

APPEARANCES

Grievant
Three witnesses for Grievant
Superintendent
Representative for Agency
Five 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 threatening a ward.[3] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[4] The Department of Juvenile Justice (Hereinafter referred to as "agency") has employed grievant for seven years. He is a Juvenile Corrections Officer.[5]

In August 2003, a ward reported to a behavioral services therapist that grievant had made a sexual advance toward him. The Inspector General investigated the allegation but the evidence was insufficient to draw a conclusion and the final report was inconclusive.[6] Nonetheless, to assure that there was no further contact between grievant and the ward, the superintendent assigned the ward to a restricted unit, assigned grievant to perimeter duty and, directed grievant not to have any contact with the ward.

On September 28, 2003, during the course of duties assigned to him, grievant walked through the special housing unit in which the ward is housed. The restricted unit is an enclosed pod that houses up to six wards, a communal

[3] Exhibit 2. Written Notice, issued October 24, 2003.
[4] Exhibit 1. Grievance Form A, filed November 10, 2003.
[5] Exhibit 11. Grievant's Employee Work Profile, October 25, 2002.
[6] The allegation of misconduct in August 2003 is not the subject of this grievance and, therefore, the hearing officer draws no conclusion regarding that incident. It is mentioned in this decision only to give historical context to the reader.

area and, one corrections officer.[7] As grievant walked down a hall, he passed a window into the restricted unit. The ward was sitting at a table in the communal area watching a television mounted on the wall directly above the window. When the ward saw grievant, he began yelling at grievant asking, "Why, are you looking in my fucking face." Grievant walked to the restricted unit's locked entrance door, the top half of which has a glass window approximately two feet wide by three feet tall.[8] Grievant loudly said to the ward, "You're a liar. You didn't think I was going to come back. The first chance I get, I'm running up in your room."

The ward perceived this comment to be threatening and reported it to the Administrator on Call who instructed the officer stationed inside the special unit to write an incident report. A lieutenant then interviewed grievant and they both wrote incident reports. The lieutenant asked grievant what he meant by his statement to the ward. Grievant explained that sooner or later he would be conducting an inspection in the ward's room. The superintendent requested that the Inspector General investigate the incident. The inspector General interviewed those with relevant knowledge and submitted his report on October 2, 2003, concluding that grievant had engaged in unprofessional conduct. The superintendent gave grievant an opportunity to offer his side, consulted with her superior and with human relations and, after due consideration, issued a Group III Written Notice to grievant for threatening the ward.

At some point after this incident, the ward was transferred to another juvenile corrections facility and subsequently, he was apparently released from custody. On April 6, 2004, someone claiming to be the ward called the facility and spoke with a corrections officer who answered the telephone (the officer had no other involvement or connection to this case). He asked to speak with grievant. When told that grievant was not on duty that day, he said that he wanted to call grievant and tell him that he was sorry for lying. He said he had lied in hopes of getting an early release. He did not explain what lie he was referring to.

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

[7] Exhibit 16. Floor plan of special housing unit. The restricted pod is labeled "Release" in the floor plan.
[8] Exhibit 22. Photograph of entrance door into restricted unit.

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.[9]

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.

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.[10] Among the examples of Group III offenses is threatening or coercing persons associated with any state agency (including, but not limited to, employees, supervisors, patients, inmates, visitors, and students).

The agency has proven, by a preponderance of evidence, that grievant made a threat to the ward. First, the unit officer who was inside the restricted unit heard grievant's statement in essentially the same words as the two wards.[11] She said grievant was speaking in a loud, angry tone. Second, within half an hour of the incident, the lieutenant interviewed grievant. Grievant told the

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[9] § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

[10] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[11] Exhibit 5. Incident report of unit officer, September 28, 2003.

lieutenant that he had meant that sooner or later he would be doing a search of the ward's room.[12] The obvious inference was that grievant would have an opportunity to find something inappropriate in the ward's room. Third, the IG interviewed another ward who was also watching television on September 28, 2003. That ward corroborated that grievant had said, "he was going to run up in [the ward's] room."[13] Fourth, the ward that grievant yelled at verified that grievant had made the statement.[14] Fifth, on the morning after the incident, the ward advised the facility's supervising psychologist of the statement grievant had made.[15]

Grievant contends that he said, "You don't have to worry about me coming up in your room." However, grievant's version of what he said is substantially outweighed by the statements of the two wards, the unit officer, and the lieutenant. Grievant makes the specious argument that the ward may have misunderstood what he said. However, grievant admits that he spoke loudly enough for the ward to hear him and, that he intended the ward should have been able to hear him. The evidence is that grievant did speak sufficiently loudly that not only the ward heard him clearly, but another ward and the corrections officer inside the unit also heard him clearly.

Grievant alleges that the ward had called him a "fucking faggot," but the ward maintains that he said, "Why are you looking in my fucking face." The ward's version is corroborated by the unit officer. Therefore, it is more likely than not that the ward did not call grievant a derogatory name. Grievant contends that the ward had threatened him on three previous occasions. However, grievant offered no witnesses to corroborate the alleged threats. Moreover, grievant characterized the ward's words on September 28, 2003 as a threat. In fact, even if one accepts grievant's version, the ward's words amounted to a vulgar epithet, not a threat.

It is interesting that, only nine days before this hearing, someone claiming to be the ward called the facility and said that he was sorry for having lied about grievant. There is no proof that the caller was the ward. Further, the caller did not say what he had lied about. One can only speculate as to whether he was referring to the sexual advance allegation in August, the September incident, or both. However, the preponderance of evidence, as corroborated by two officers and one other ward, demonstrates that the September 28, 2003 incident occurred as stated. Thus, it is more likely than not that even if the ward was the caller, he was apologizing for having lied about the sexual advance allegation in August 2003 – not about the September 28, 2003 incident.

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[12] Exhibit 6. Lieutenant's written report, October 1, 2003.
[13] Exhibit 4, p.3. IG report, October 2, 2003.
[14] Exhibit 9. Ward's written statement, September 28, 2003.
[15] Exhibit 8. Memorandum from supervising psychologist to superintendent, September 29, 2003.

Grievant alleges that the disciplinary action was arbitrary and capricious. For the purpose of administering the grievance procedure, "arbitrary or capricious" is defined as, "In disregard of the facts or without a reasoned basis."[16] In this case, after being told to stay away from the ward, grievant responded to the ward by making a statement that was intended to be threatening. As noted earlier, grievant meant by his statement "he would run up into his room" that he would retaliate against the ward in some way when he later had occasion to inspect his room. Certainly the ward perceived it as threatening. In view of these facts, the agency reasonably concluded that grievant's statement was a retaliatory threat against the ward. The agency had a reasonable basis to discipline grievant and, therefore, the discipline was not arbitrary or capricious.

Grievant also alleges that the Inspector General (IG) made a biased statement before the issuance of his report. The IG had interviewed all relevant persons before he interviewed grievant. After the IG interviewed grievant, grievant thanked the IG for issuing an inconclusive report regarding the August incident. The IG responded with words to the effect of, "Yes, well this next one might not be too flattering." By this time, the IG had gathered sufficient evidence to reasonably conclude that his report would be unfavorable to grievant. Even though he had not yet memorialized this conclusion in the written report, the evidence against grievant was preponderant. Therefore, it is concluded that the IG's statement was not a reflection of bias, but rather a reflection of his assessment of the evidence at the point in time he made the statement.

Grievant alleges that the corrections officer in the housing unit was intimidated by the ward into making an unfavorable written statement against grievant. The unit officer testified forthrightly, clearly, and directly during the hearing. Her testimony was consistent with her written statement. Her demeanor during the hearing, and especially during cross-examination by grievant, was self-assured, and reflective of one who would not be easily intimidated.

At the time of this incident, there was a surveillance camera inside the restricted unit. A videotape, without an audio track, was reviewed after the incident. It showed only the ward standing near the table but the grievant was not within camera range.[17] The videotape was therefore not probative. The tape was not retained as evidence and was reused after 30 days.

Finally, grievant claims that he has been defamed, presumably by the two wards, unit officer and, lieutenant, whose statements of what occurred are all essentially consistent and contradict grievant's version. First, this hearing is a grievance proceeding – not a civil action for defamation. Second, the weight of the evidence in this case supports a conclusion that the four people who provided evidence were truthful in reporting what they observed and heard.

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[16] P. 23, Definitions, *Grievance Procedure Manual*, effective July 1, 2001.
[17] Exhibit 17. IG's handwritten notes, October 1, 2003.

DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice issued on October 24, 2003 for threatening a ward is UPHELD. The disciplinary action shall remain active for the period specified in Section VII.B.2 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. 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.[18] 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.[19]

[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]

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David J. Latham, Esq.
Hearing Officer

[18] 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).

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