

Issue: Group III Written Notice with termination (use of excessive force with ward, failure to report incident, humiliating ward in front of others); Hearing Date: 10/07/04; Decision Issued: 10/15/04; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 7876



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No. 7876

Hearing Date: October 7, 2004
Decision Issued: October 15, 2004

APPEARANCES

Grievant
Three witnesses for Grievant
Superintendent
Representative for Agency
Six 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 grievance from a Group III Written Notice issued for using excessive force with a ward, failing to document the incident,

and humiliating the ward in front of others.¹ As part of the disciplinary action, grievant was removed from employment effective July 19, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.²

The Department of Juvenile Justice (Hereinafter referred to as “agency”) has employed grievant for five years. He was a corrections sergeant at the time of his separation from employment. Grievant had one other active disciplinary action - a Group I Written Notice issued for unsatisfactory job performance.³

The agency has published a Code of Ethics that employees are expected to subscribe to, which says, “I will perform all my duties professionally and competently and will treat all persons in an evenhanded and courteous manner, humanely and with respect.”⁴

The institution has a written procedure that defines Pre-hearing Detention as “Detaining a ward in a specific location ... prior to a Due Process Hearing for the purpose of security or to control behavior.”⁵ A sergeant may place a ward in pre-hearing detention if the ward exhibits behavior which is disruptive to the orderly operation of the facility, or the ward is reasonably believed to be a security risk or imminently dangerous to self or others.⁶ Another institutional policy addresses the use of physical force and provides that “Physical force is authorized for self-defense, the defense of others, to prevent an escape, to prevent property damage, to protect a ward from harming herself, and to prevent the commission of a crime. Physical force should be used only when other alternatives have failed or appear unsuitable.”⁷

On June 18, 2004, grievant had good cause to search a female ward and her cell for contraband.⁸ Although the grievant knew that the ward had a long-standing shoulder injury,⁹ he handcuffed her hands behind her back and required her to sit in a chair outside the cell during the search. The ward had not been physically disruptive prior to being handcuffed; she was not believed to be either a security risk or imminently dangerous to herself or others. At the beginning of the search, the ward was told not to speak without permission; however, she starting speaking loudly and cussing. Grievant directed one of the corrections

¹ Exhibit 3. Group III Written Notice, issued July 19, 2004.

² Exhibit 1. Grievance Form A, filed August 18, 2004.

³ Exhibit 2. Group I Written Notice, issued August 7, 2002.

⁴ Exhibit 14. Administrative Directive 05-009.2, *Staff Code of Conduct*, December 20, 2002. See also Exhibit 15. Administrative Directive 05-009.1, *Code of Ethics for Employees of the Virginia Department of Juvenile Justice*, November 5, 2002.

⁵ Exhibit 19. Section 108-3.6, Institution Operating Procedure (IOP) 108, *Ward Discipline Procedure*.

⁶ Exhibit 19. Section 108-4.9.1, *Ibid*.

⁷ Exhibit 18. Section 218.4.0, IOP 218, *Use of Physical Force*, November 6, 2002.

⁸ The ward was suspected of failing to turn in a popsicle stick after eating a popsicle. The stick constitutes contraband because it can be sharpened and used as a shank (homemade knife).

⁹ Exhibit 13. Email from Head Nurse to grievant (and others), June 17, 2004.

officers to place her in an isolation cell for 15 minutes after which the search resumed. During the search, personal letters from another ward to the handcuffed ward were found. Grievant stood in the pod area and read portions of the letters aloud; the ward, correction officers, and other wards in the area heard grievant read the letters' contents.

When the search was completed, grievant tilted the chair forward as the ward arose, and placed his hands on her shoulders to push her into her cell. The videotape of the pod during this incident shows the handcuffed ward sitting in a chair, grievant reading the letter to others within earshot, and partially shows grievant pushing the ward into her cell after she stood up.

Subsequently, grievant asked his supervisor if he could file an incident report regarding the search via email; the supervisor agreed to this method of submission. Grievant emailed the written incident report of the incident to the supervisor the day after the incident.¹⁰ The ward filed a written complaint against grievant alleging that grievant hurt her shoulder when he pushed her into her cell.¹¹ The ward saw a nurse the same day and complained of shoulder pain.¹² Grievant told his supervisor about the search but did not initially disclose his physical encounter with the ward. The supervisor learned about the physical encounter from another shift commander who had heard that the ward sought medical attention for her shoulder pain.

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

¹⁰ Exhibit 11. Email report from grievant to his supervisor, June 19, 2004.

¹¹ Exhibit 12. Complaint filed by ward, June 18, 2004.

¹² Exhibit 7. Statement of licensed practical nurse, June 19, 2004.

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.¹³

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.¹⁴ The offenses listed in the Standards of Conduct are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head undermines the effectiveness of the agency's activities or the employee's performance should be treated consistent with the provisions of the Standards of Conduct.¹⁵

There are four components to the disciplinary action which are addressed separately below:

Inappropriate use of handcuffs

Grievant handcuffed the ward during a search of her cell. There is no evidence that the ward had been disruptive, that she posed a security risk, or that she was in imminent danger of injuring anyone. The videotape reflects that whenever the ward is visible on camera, she was compliant and calm. There is no indication that she was physically resisting instructions of the corrections staff. Both of the female officers conducting the search with grievant testified that the ward was not physically aggressive or out of control at any time. Grievant handcuffed the ward because she cussed when she found out that her cell was to be searched. Under the agency's policy, cussing without some evidence of

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

¹⁴ Exhibit 5. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁵ Exhibit 5. Section V.A, *Ibid.*

disruption or physical aggression is not sufficient reason to detain a ward in handcuffs. Accordingly, handcuffing of the ward was an inappropriate detention.

Excessive force

There were two instances in which grievant is alleged to have used excessive force. First, grievant handcuffed the ward *behind her back* despite his knowledge that the ward had a long-standing shoulder injury. The agency maintains that handcuffing the ward in front would have been less stressful to the ward's shoulder injury. Since the ward had not been disruptive or physically aggressive, there was no reason that grievant could not have handcuffed her in front. On the other hand, the agency did not offer either the ward's testimony or a written statement from the ward. The ward did not tell the investigator that she was injured or in any physical pain as a consequence of the handcuff restraints. Accordingly, the agency has failed to produce any evidence, other than speculation, that handcuffing the ward behind her back constituted the use of excessive force.

Second, grievant is alleged to have used excessive force in returning the ward to her cell. The videotape shows only a small portion of this incident because the action occurs at the extreme right side of the camera's view.¹⁶ From the visible portion of the incident, it can be seen that the grievant tilted the chair in which the ward was seated forward as she was getting up. When the ward had stood up, she was no longer on camera. The grievant can be seen leaning forward (presumably toward the ward's back) and raising his hands to shoulder level. As grievant moves forward, his movements are consistent with pushing the ward in the direction of her cell.

Grievant told the investigator he had only touched the back of the ward's chair and pointed to her room.¹⁷ Grievant's version of this encounter does not square with the videotape; it is self-serving and factually incorrect.

Although the ward told the investigator that she struck her shoulder on the door jamb as grievant pushed her into the room, neither the grievant nor the corrections officer who watched the incident saw the ward strike her shoulder. Nonetheless, the testimony and evidence fails to show that grievant had any justification to use physical force to push the ward into her cell. None of the criteria cited in IOP-218 (self-defense, escape, property damage, harm to the ward, commission of a crime) were present. Moreover, grievant did not exhaust the alternatives available to him. He did not allow ample time for the ward to enter her cell voluntarily and did not use verbal persuasion to coax her into the cell before immediately pushing her physically. Accordingly, the best available evidence demonstrates that grievant used unnecessary physical force when he pushed the ward into the cell.

¹⁶ Exhibit 22. Videotape of pod area where incident occurred, June 18, 2004.

¹⁷ Exhibit 4. Investigative Report, July 3, 2004.

Humiliation of a ward

The undisputed evidence establishes that grievant read aloud to both staff and other wards portions of personal letters found in the ward's cell. Cells may be searched for contraband and unauthorized correspondence may constitute contraband. If one finds unauthorized correspondence, it should be brought to the attention of institutional management for appropriate action. However, the reading aloud of personal correspondence to all those within hearing range clearly constitutes an unwarranted invasion of personal privacy. In this case, the letters contained the personal feelings of one ward toward another. To read such correspondence aloud for others to hear was both degrading and humiliating to the two wards involved.

Grievant has not offered any policy, either written or verbal, that would support taking such action. Grievant contends that other officers have read such letters aloud in similar situations and offered the names of two officers (including a shift commander) alleged to have read letters aloud.¹⁸ However, grievant did not offer the testimony of a single witness to corroborate this allegation. Even if someone else engaged in a similar action, that does not excuse grievant's actions. Grievant knew, or reasonably should have known, that reading someone's personal mail to other wards and corrections officers constitutes a gross invasion of privacy. It is patently obvious that the sole reason for reading letters aloud to others is to embarrass the person whose letters are being read. This violates the agency's Code of Ethics (Directives 05-009.1 & 05-009.2) which requires that wards be treated humanely and with respect.

Failure to document the incident

The written notice cites grievant for failing to document or report the incident to his supervisors. The evidence fails to support this allegation. Grievant verbally reported the incident to his supervisor and obtained permission to submit a written report via email, which he did the following day.

During the hearing, the agency cited grievant for failing to file the incident report *using a prescribed form*. However, this was not mentioned on the written notice. The agency cannot add or amend charges at a hearing when it has failed to state the charge on the written notice. Moreover, grievant presented sufficient testimony and evidence to show that both he and others had previously filed descriptions of other incidents via email memoranda.¹⁹ In addition, grievant's supervisor agreed to grievant's request to submit the incident report via email. Since the agency did not raise the issue of a prescribed form until the hearing, it

¹⁸ The agency can investigate whether these two officers (and others) have engaged in such actions, and if so, take appropriate corrective action.

¹⁹ Exhibit 23. Email memoranda describing prior incidents.

was apparently not a basis for the discipline. If it was an unwritten basis for the discipline, the grievant has shown that the agency had accepted incident reports via email in the past. Therefore, in this case, grievant's failure to use the prescribed form did not constitute an offense subject to discipline.

Summary

Of the four charges made by the agency, three are sustained. Grievant handcuffed a ward without sufficient justification, humiliated the ward by reading aloud to others personal letters addressed to the ward, and used unnecessary physical force when he returned the ward to her cell. The charge of failing to report the incident to his supervisor or document the incident is not sustained.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice and grievant's removal from employment effective July 19, 2004 are hereby 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.²⁰ 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.²¹

[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

²⁰ 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).

²¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.