

Issue: Group III Written Notice with termination (criminal conviction for illegal conduct occurring off the job, and conduct unbecoming a Corrections Lieutenant which undermined his effectiveness as a Supervisor and a Law Enforcement Officer); Hearing Date: 08/23/04; Decision Issued: 08/26/04; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 788; **Judicial Review: Appealed to the Circuit Court in Wise County on 08/26/04; Outcome pending**

DECISION OF HEARING OFFICER

IN THE MATTER OF: VIRGINIA DEPARTMENT OF CORRECTIONS

CASE NO: 788

HEARING DATE: AUGUST 23, 2004

DECISION ISSUED: AUGUST 26, 2004

APPEARANCES

Grievant

Counsel for Grievant

Representative for Agency

Two Witnesses for Agency

ISSUES

Did the grievant engage in certain inappropriate acts directed toward a fellow employee of the agency on January 18, 2004?

If proven, were the actions of the grievance sufficient to justify the issuance of a Group III Written Notice and termination from employment?

FINDINGS OF FACTS

In the early morning hours of January 18, 2004, the defendant saw another correctional officer (hereinafter referred to as the complainant) at a convenience store. The grievant approached the complainant calling him a {expletive deleted} snitch and threatening to beat him. The individuals got no closer to each other than 10 feet and no actual acts of violence ensued. The grievant left the scene and the complainant reported the incident to a superior officer with the agency that day.

The incident arose from a belief held by grievant that the complainant had reported him for having inappropriate consensual sexual contact with a female correctional officer while on duty at the work site. At that time the grievant and complainant worked the night shift. The grievant was serving as the watch commander and as such had supervisory responsibility over the complainant. Subsequent to that incident, but prior to January 18, 2004, the grievant and complainant were transferred to different shifts so that they no longer worked together.

On January 18, 2004, the complainant had issued against the grievant a warrant for a charge of violating Section 18.2-57 of the Code of Virginia for a verbal assault. The grievant was convicted in the General District Court of that charge on April 27, 2004. He appealed that conviction to the Circuit Court of the appropriate jurisdiction. The date that the appeal was noted is unclear from the record. On May 4, 2004 the grievant was issued a Group III Notice and was terminated from employment. The bases for the Notice were the criminal conviction for illegal conduct occurring off the job that was “clearly related

to job performance or such a nature as to constitute negligence in regard to the agencies duties to the public or to other state employees” and for conduct unbecoming a Corrections Lieutenant which undermined his effectiveness as a Supervisor and a Law Enforcement Officer. On May 28, 2004 the criminal charge against the grievant was dismissed after a trial in the Circuit Court. This grievance was filed on June 1, 2004 seeking a reinstatement to employment.

APPLICABLE LAW AND OPINION

The Virginia Personnel Act (§2.1-110, et seq.) of the Code of Virginia provides the standards for the disciplining and discharging of employees. Part of those standards includes the state grievance procedure. The Agency, the Department of Corrections, has adopted Procedure No.5-10. The object of the policy is, in part, to “maintain high standards of professional conduct.” The policy set forth certain standards for professional conduct, gives example of unacceptable behavior, and describes the corrective actions that agencies may impose to address behavioral problems.

Section 5-10.17 of the policy defines offenses for which they Group III Notice is appropriate as being “acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” The Section sets out 26 specific types of acts and omissions but further states that the offenses are not limited to those specific behaviors.

The Notice given to the grievant in this matter sets forth two violations. The first violation, a criminal conviction for an illegal conduct, is no longer an issue in this case as

the grievant was found not guilty upon his appeal to the Circuit Court. The second basis, conduct unbecoming a Corrections Lieutenant is not one of the listed acts or behavior in Section 5-10.7.

Therefore, to determine whether the behavior of the grievant supports the issuance of this Notice, I must compare it with the listed acts in order for the allegation to have any sustainable basis. This comparison is not difficult in this case as

Subsection (B) (12) of the section prohibits threatening or coercing persons with a state agency. This section clearly describes and proscribes the activity engaged in by the grievant. The agency could have cited this subsection as basis for termination without changing the nature of the allegations in any respect. Threatening another state employee qualifies as unbecoming conduct by definition.

Finding that the issuance of the notice was proper does not end the inquiry. The remaining issue to be determined is whether termination was an appropriate sanction. My role as Hearing Officer is not to serve as a “super-manager” for the agency. In my limited role I am required to give “an appropriate level of deference to actions by agency management that are consistent with law and policy, and to management,s right to manage the affairs and operations of the agency.” Rules for Conducting Grievance Hearings VI (A). This case is a close one. An argument could be made for a mitigation of punishment based on the good work record of the grievant prior to this incident. A counter-vailing consideration, and one which I believe to be controlling, is the fact that

the grievant was a superior officer to the complainant and had, in fact, been his supervising officer for some time. The grievant has failed to establish any motive for the complainant to fabricate his version of events, which version is denied by the grievant. I find the grievant to be the less-credible witness and that the agency has met its burden of proof.

In a situation such as this the choices made by the agency in disciplining the grievant should be given a significant weight. I note with interest that the decision to terminate was made only after the criminal charge was first heard in the General District Court and that the grievant had not been subject to an investigatory suspension during the approximately 3 months between the incident and trial date. That fact indicates the good faith on behalf of the agency.

DECISION

For the reasons stated above I will uphold the issuance of the Group III Notice and the termination of the grievant by the agency.

APPEAL RIGHTS

There are two types of challenges which may be made to this decision. Challenges must be made in writing within five work days of receipt of the decision with a copy to the other party. A party may request the Hearing Officer to reconsider or reopen the record. The basis for such a request may include newly discovered evidence or evidence of incorrect legal conclusions. The Hearing Officer has sole

authority to grant such requests.

Challenges based on policy should be made to the Director of the Department of Human Resource Management. To make such a request the party must refer to a particular requirement in policy. The authority of the Director is limited to requiring the Hearing Officer to revise the decision to conform it to a provision in written policy.

Challenges to the conduct of the Hearing Officer or the exercise of his authority shall be made to the Department of Employment Dispute Resolution within five work days from the date that the non-compliance was noted. A copy for the request for a ruling must be sent to the opposing party. The sole remedy is for the Hearing Officer to be ordered to take the correct action.

A party may make more than one type of request for review.

This decision issued this August 26, 2004.

Thomas P. Walk, Hearing Officer