

Issue: Group III Written Notice with demotion, transfer and salary reduction (violation of safety rules where there is a threat of physical harm); Hearing Date: 12/01/04; Decision Issued: 12/02/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 7900



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7900

Hearing Date: December 1, 2004
Decision Issued: December 2, 2004

PROCEDURAL ISSUES

Prior to the issuance of the disciplinary action, the agency had considered removing grievant from employment and issuing a second written notice for failure to report the incident. However, the agency ultimately decided upon the disciplinary action described below in the Findings of Fact. The only issue grieved was the disciplinary action that was finally issued; therefore, that is the only issue that may be adjudicated by the hearing officer.

During the hearing, a 35-minute recess was taken during which both parties, their respective counsel, and the hearing officer visited the firing range to view firsthand the physical layout of the range.

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Training Manager

Advocate 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 grievance from a Group III Written Notice issued for violating safety rules where there is a threat of physical harm.¹ As part of the disciplinary action, grievant was demoted to corrections officer, transferred to another facility, and his salary was reduced by ten percent. 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 Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for ten years. He was a Corrections Captain at the time of the disciplinary action. Grievant has been a firearms instructor for several years at DOC. Grievant was also a firearms instructor during military service and while employed for several years by a county police department. He is equally proficient shooting with either hand. His reputation is one of being safety conscious. Grievant completed Firearms Instructor Certification training on September 2, 1994.³ Recertification training is usually given every three years; grievant's last recertification training took place in 2002.⁴

The facility had promulgated an operating procedure for the use of its Firearms Range. That policy provides, inter alia, that "All personnel using this facility are expected to read and follow the range and safety rules posted at all times."⁵ It further requires that "All incidents of ... violation of range and safety rules are to be reported to the TDCS of Institutions-Security at the Academy. Incidents should be reported as soon as possible and followed up by a written incident report within twenty-four (24) hours."⁶ The firearms safety rules, which are posted in the firing range classroom, state, in pertinent part: "Keep the barrel pointed in a safe direction away from people and buildings!"⁷

¹ Agency Exhibit 1. Written Notice, issued August 24, 2004.

² Agency Exhibit 1. Grievance Form A, filed September 10, 2004.

³ Agency Exhibit 1. Training Manager's investigation memorandum, August 18, 2004.

⁴ Agency Exhibit 5. Training Credit Award, October 7, 2002.

⁵ Agency Exhibit 3. Section 6, Procedure IV-O, *Academy Firearms Range*, effective May 16, 1994, reviewed May 31, 1998.

⁶ Agency Exhibit 3. Section 7.a, *Ibid*.

⁷ Agency Exhibit 4. Firearms Safety Rules.

On May 26, 2004, grievant and three other captains had taken approximately 30 students (trainee corrections officers) to the firing range for weapons training and practice. No one captain was designated to be in charge of the training session; the four captains mutually agreed to handle different responsibilities during the session. The range has two rifle targets on the left (as one faces downrange) and two shotgun bobber targets on the right. The left shotgun target is approximately 25 feet to the right of the left rifle target. Directly above the firing line is a tower with four windows facing downrange. Firing practice occurs both at ground level and from the tower windows.

Before firing weapons at the range, it is standard practice to visually check the target areas and firing lanes to assure that no one is downrange. It is also standard practice to announce loudly to all in the area that the "Line is hot," or words to that effect. Instructors wear radio headgear through which they can hear the announcement when made into the microphone on the headgear. The announcement is also made verbally to students behind the firing line. When an instructor goes downrange to change a target, the instructor similarly advises everyone in the area by announcing "Instructor downrange."

Grievant agreed to be in the tower for the session. He went to the tower to boot up the computer used for scoring rifle target shooting and to prepare a weapon. He removed the leftmost tower window cover, looked toward the rifle targets, and stuck his head out to look directly below the tower to assure that no one was forward of the firing line. He did not look toward the shotgun bobber targets. He said "Line hot" into his microphone but did not yell it loudly. Grievant then picked up his AR-15 weapon, braced his right hand on the right side of the window jamb, aimed the weapon at the left-most rifle target, and fired a single shot with his left hand to test whether the target computer was functioning properly. Grievant estimates that no more than 60-90 seconds elapsed between the time he looked out the window to check the firing line and the time he fired the weapon. Immediately after firing his weapon he looked out the window and noticed one of the captains and a student downrange working on the leftmost shotgun bobber target.

One captain and a student had walked downrange to replace the shotgun bobber targets. They replaced the right target by unscrewing the bolts and nuts, removing the old target, and reinstalling the bolts and nuts. This process took between two and five minutes.⁸ They then moved to the left target and were working on it when grievant fired his weapon at the rifle target located approximately 20 feet to the left of where they were standing. They had been downrange for a minimum of three, and probably as much as five, minutes at the time grievant fired the weapon. While they were replacing the targets, one of the captains standing directly below the tower had yelled downrange asking them if it was going to take all day.

⁸ Estimates of the replacement time for each bobber target varied but none were less than two minutes while some were as much as five to seven minutes.

No one reported the incident within 24 hours. The two captains who had been standing with students under the tower assumed that either grievant or the captain who had been downrange would report the incident. Five days later, when they realized no one had reported the incident, the two captains filed written reports to the major, who reported it to the Training Manager (facility head). Written statements were taken from several people on June 3 & 4, 2004. On June 18, 2004, the major suspended the four captains from the firing range until the incident was resolved. The Training Manager interviewed three of the captains on July 15, 2004, interviewed the downrange student on July 30, 2004, and interviewed grievant on August 3, 2004. He prepared a summary report on August 18, 2004. He initially gave serious consideration to issuing two disciplinary actions and removing grievant from employment. However, after giving grievant a due process opportunity to present his case on August 20, 2004, the Training Manager decided to demote and transfer grievant. The three other captains were disciplined for failing to report the incident within 24 hours.

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. In all other actions the employee must present his evidence first and must prove his claim by a preponderance of the evidence.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 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 almost identically to the DHRM Standards of Conduct.¹¹ Violating safety rules where there is a threat of physical harm is one example of a Group III offense.

Offense

The agency has borne the burden of proof to show that grievant knowingly fired a weapon downrange without first having visually checked the entire range to assure that no people were in the firing lanes. It is common knowledge that weapons should not be fired at a range until it is certain that no one is downrange. Grievant's military background, his prior experience in a county police force, his training by the agency, and his experience on the range leave no doubt that grievant knew, or reasonably should have known, of this common practice and policy. Grievant acknowledged as much when he testified that he would not have fired if he had known that people were downrange at the targets. However, the fact is that grievant did not know two people were downrange because *he did not look* at the bobber targets before firing. While there is no evidence that grievant deliberately violated the safety rule, the fact remains that he did violate the rule and, there was a threat of physical harm (either from an errant shot or from a ricochet). Accordingly, the agency has shown that grievant committed a Group III offense.

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 Agency Exhibit 7. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

Grievant testified that he had only removed the leftmost tower window cover and that he could not see the shotgun bobber targets from inside the tower. However, in his statement written soon after the incident, grievant stated that he opened the tower windows. If he did, in fact, open all the tower windows, his view of the bobber targets would have been unobstructed even from within the tower. Grievant's written statement also asserts that the bobber target was 30 yards to the right of the rifle target. In fact, the bobber target is no more than 25 feet to the right of the left rifle target. Grievant's written statement claims the shotgun bobber targets were in the up position, however, grievant testified at the hearing that *he did not look* toward the shotgun bobber targets. Grievant admits in his written statement that his headset was working because he tested it when he first put it on. However, none of the other captains heard him say "the line is hot." The inaccuracies in grievant's written statement, and the inconsistencies between his testimony and the written statement suggest that grievant has been less than fully forthcoming about his actions.

Grievant asserts that the disciplinary action he received was inconsistent with that of an instructor who had been reprimanded approximately six years ago. In that incident, a student had been carelessly allowing the muzzle of her shotgun to drop down facing her feet after firing the weapon. When she failed to correct the behavior after verbal instruction, an instructor took the shotgun from her, pointed it toward the ground downrange from the students, and fired it into the ground. He showed the students the hole the shotgun blast had made in the ground as an object lesson. The instructor was reprimanded but was not demoted or transferred. That incident may be distinguished from the instant case for two reasons. First, the instructor knew that he was directing the blast away from where students were standing. Second, the instructor's intent was to provide a memorable learning experience for the students. In the instant case, grievant had not fully visually checked downrange to assure that no one was in the firing lanes. In addition, grievant fired a rifle; a ricocheting rifle bullet is far more dangerous than shotgun pellets directed into grass and dirt. Finally, grievant's action was not a planned learning experience but rather carelessness.

Grievant explained his failure to report the incident within 24 hours by claiming that he was unaware of Procedure IV-O on firearms. However, grievant also testified that he was too busy and that reporting required too much paperwork. Grievant's admission that he knew of the paperwork requirement is a tacit acknowledgement that he was aware of the reporting requirement. While the agency ultimately elected not to issue separate discipline for grievant's failure to timely report the incident, grievant's equivocation is further evidence of his disingenuousness.

The incident is particularly serious because grievant is a firearms instructor and was training a large group of newly employed corrections officers at the time of this incident. As the instructor, grievant is expected to set an example for students by religiously following all safety rules himself. Rather than

do so, grievant violated two rules by failing to fully visually check the entire range, and by failing to adequately warn all those in the area that he was going to commence firing. While grievant claims to have said “line is hot” into his microphone, none of the instructors heard such a statement. Grievant should have said it loudly enough for all those standing just 12 feet directly below him to hear but he did not do so.¹²

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee’s unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior. Management should issue a written notice as soon as possible after an employee’s commission of an offense.¹³ One purpose in acting promptly is to bring the offense to the employee’s attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless a detailed investigation is required, most disciplinary actions are issued within one or two weeks of an offense.

In the instant case, the Training Manager conducted additional interviews after the written statements were turned in. However, three months between the event and the discipline is an unusually long time for the relatively uncomplicated investigation that took place in this case. While such a delay might under other circumstances be cause to reduce the level of discipline, an extenuating situation exists in this case. Grievant was banned from working on the firing range during the three months between the event and his discipline. The suspension achieved the dual purpose of preventing a recurrence of the offense and also served to keep the matter fresh in grievant’s memory. Therefore, it is concluded that while discipline could have been issued more promptly, the delay in this one case was not so egregious as to merit modification of the disciplinary action.

Appropriateness of discipline

For the reasons discussed in this decision, the agency has demonstrated that grievant committed a Group III offense. While the normal disciplinary action is removal from employment, the agency found that grievant’s length of service and otherwise satisfactory record of performance were mitigating circumstances. It was not unreasonable to transfer grievant to another facility given the nature of his training role. It was also not unreasonable to demote grievant with a salary

¹² Only one student claimed to have heard such a warning.

¹³ Agency Exhibit 7. Section 5-10.7.C.1. *Ibid.*

decrease.¹⁴ However, the grievant's demotion from captain to the lowest possible position of corrections officer appears unnecessarily punitive. Such a four-position reduction is not only unusual but also inconsistent with grievant's experience with the agency.

Within a 40-mile radius of grievant's residence, the agency operates six major correctional institutions and two smaller correctional units, not counting the location at which grievant had been working. It would seem logical that at one of these facilities there might be available a lieutenant or sergeant's position to which grievant could be transferred. Since the agency wants to retain grievant's experience, training and knowledge, it should be interested in utilizing grievant in some other supervisory role rather than demoting him to the lowest beginner level. Testimony at the hearing established that only one facility was contacted to find an opening for grievant. It is troubling that the agency made no effort to determine whether any of the other seven facilities in the area had a more suitable position for grievant.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice, demotion with salary reduction, and transfer to another facility effective August 24, 2004 are hereby UPHELD.

It is RECOMMENDED that the agency revisit grievant's transfer and demotion and determine whether there are other more suitable positions in which grievant's experience can be utilized.

APPEAL RIGHTS

You may file an administrative review request within **15 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

¹⁴ Section II.C, DHRM Policy 1.60, *Standards of Conduct*, revised September 2000, requires that demotion or transfer must be accompanied by a disciplinary salary reduction of *at least* five percent.

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 15 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 15-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.