

Issues: Group II Written Notice (failure to report fraternization); Group III Written Notice with termination (verbal abuse of inmate); Hearing Date: 08/05/04; Decision Issued: 08/09/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 803



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 803

Hearing Date: August 5, 2004  
Decision Issued: August 9, 2004

PROCEDURAL ISSUES

On the day before the hearing, grievant called the hearing officer to discuss the possibility of having someone represent her at the hearing. After the hearing officer explained the role of a representative, grievant decided that she would represent herself but that someone would sit with and assist her during the hearing. On the day of the hearing, grievant appeared and announced that the person with her would be her representative. Grievant's representative attempted from the outset to dictate to the hearing officer how the hearing would be conducted. When the hearing officer attempted to explain the hearing process, grievant's representative became confrontational. Despite the hearing officer's repeated attempts to explain the hearing process, the representative continued to be obstreperous and argumentative. The hearing officer then advised grievant that if her representative continued to be unruly, the hearing officer would have no alternative but to eject him from the hearing.<sup>1</sup> Grievant

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<sup>1</sup> The hearing officer based his decision solely on the evidence presented during this hearing. This decision was not affected in any way by the representative's behavior.

decided that she would represent herself from that point forward. She conducted herself politely and appropriately during the entire hearing.

Grievant asserted that a witness she had asked to testify did not come to the hearing because a supervisor threatened her with being “blackballed” if she testified. The witness failed to appear at the hearing to make this accusation in person. Grievant failed to submit an affidavit or even a signed statement from the witness to support the allegation. The warden stated that he would not tolerate any supervisor making such a threat.<sup>2</sup> The matter was left to the warden to investigate and take any necessary action. Grievant proffered that the missing witness would have testified that she had only been counseled in 2001 for calling an inmate a bitch.<sup>3</sup>

### APPEARANCES

Grievant  
Assistant for Grievant  
Warden  
Human Resource Officer  
Three witnesses for Agency  
Observer for EDR

### 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?

### FINDINGS OF FACT

The grievant filed a timely grievance from two disciplinary actions - a Group II Written Notice issued for failure to report a rumor involving possible fraternization between a correctional officer and an ex-inmate<sup>4</sup> and, a Group III Written Notice issued for verbal abuse of an inmate.<sup>5</sup> Following failure of the

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<sup>2</sup> An agency may not retaliate against anyone, including witnesses, who participates in the grievance process or a grievance hearing. Employees who allege retaliation may report it to the Director of the Department of Employment Dispute Resolution (EDR), who will investigate the complaint and advise the agency head of the findings.

<sup>3</sup> Exhibit 14. Counseling memorandum for the reluctant officer witness, March 29, 2001.

<sup>4</sup> Exhibit 2. Group II Written Notice, issued May 10, 2004.

<sup>5</sup> Exhibit 3. Group III Written Notice, issued May 10, 2004.

parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>6</sup>

The Department of Corrections (DOC) (Hereinafter referred to as “agency”) has employed grievant as a corrections officer for four years. Grievant has three other active disciplinary actions – a Group II Written Notice issued for failure to follow supervisory instructions,<sup>7</sup> a Group I Written Notice issued for unsatisfactory attendance<sup>8</sup> and, a Group I Written Notice issued for unsatisfactory attendance and tardiness.<sup>9</sup>

The facility has established a post order applicable to corrections officers assigned to housing unit control rooms. One of the specific job duties requires officers to report any weakness or breach of security to the Supervisor immediately, followed by an Incident Report.<sup>10</sup> Another post order applicable to housing unit and floor officers requires officers to conduct themselves towards inmates in a professional manner at all times and, to report all breaches of security to their supervisor.<sup>11</sup> The agency has established a policy regarding rules of conduct to be observed by employees when dealing with inmates. At all times, employees should be respectful, polite, and courteous in their contact with inmates, probationers, or parolees, as well as with citizens and other employees.<sup>12</sup> No profane, demeaning, indecent, or insulting language, or words with racial or ethnic connotations shall be directed towards such persons.<sup>13</sup>

In January 2004, grievant heard a rumor from an inmate alleging that a female corrections officer was “messing around” with an inmate who had recently been released. Grievant asked the female corrections officer whether the rumor was correct; the other officer denied the rumor. Grievant thought nothing more about the rumor and did not report the matter to a supervisor. She put little credence in the rumor because inmates sometimes spread malicious rumors to amuse themselves or stir up trouble.<sup>14</sup> In fact, the rumor was true; the other female corrections officer was confronted about the allegation, admitted contact with the ex-inmate and subsequently resigned in lieu of termination.<sup>15</sup>

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<sup>6</sup> Exhibit 1. Grievance Form A, filed June 9, 2004.

<sup>7</sup> Exhibit 8. Group II Written Notice, issued April 1, 2002.

<sup>8</sup> Exhibit 9. Group I Written Notice, issued October 28, 2002.

<sup>9</sup> Exhibit 10. Group I Written Notice, issued June 10, 2003.

<sup>10</sup> Exhibit 6. Specific Job Duty 22, Security Post Order *Housing Unit Control Room Officer*, September 24, 2003.

<sup>11</sup> Exhibit 7. General Job Duties 4 & 8, Security Post Order *Housing Unit/Floor Officer*, September 24, 2003.

<sup>12</sup> Exhibit 5. Section 5-22.6.E, Agency Procedure Number 5-22, *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*, June 15, 2002.

<sup>13</sup> Exhibit 5. Section 5-22.6.F. *Ibid.*

<sup>14</sup> Exhibit 2. Investigative Interview, May 6, 2004.

<sup>15</sup> Exhibit 12. Female officer's resignation, May 6, 2004.

In late April 2004, an inmate told grievant that he was going to masturbate on her.<sup>16</sup> Grievant called him a pervert. She then spoke on the housing unit's public address system calling the inmate by name and said, "[Inmate's name], you won't have anything to worry about if you just keep it in your pants." She did not report this incident to any supervisor. On May 2, 2004, the same inmate told grievant to "suck my dick." Grievant responded by telling the inmate, "I'll see if I can find somebody that can do it for you." Grievant reported this incident to a lieutenant and completed a disciplinary offense report.<sup>17</sup> On the same date, the inmate filed a complaint form against grievant complaining that she called him a pervert, and had embarrassed him on the intercom system with her earlier "keep it in your pants" statement.<sup>18</sup>

### 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, such as allegations of harassment and

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<sup>16</sup> Just before this, the inmate had been released from a special housing unit where he had been confined for a period of time for the offense of masturbating on another female corrections officer.

<sup>17</sup> Exhibit 3. Investigative Interview, May 6, 2004. See *also* Disciplinary Offense Report, May 2, 2004.

<sup>18</sup> Exhibit 3. Inmate's complaint form, May 2, 2004. NOTE: It appears that the inmate erroneously dated his complaint April 2, 2004 when, in fact, he wrote it on May 2, 2004.

retaliation, the employee must present her evidence first and must prove her claims by a preponderance of the evidence.<sup>19</sup>

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.2 of the Standards of Conduct policy provides that Group II offenses include acts and behavior that are more severe in nature than Group I offenses and are such that an accumulation of two Group II offenses normally should warrant removal from employment.<sup>20</sup> 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 5-10.16 of the DOC Standards of Conduct addresses Group II offenses, which are defined identically to the DHRM Standards of Conduct.<sup>21</sup> One example of a Group II offense is failure to follow a supervisor's instructions or otherwise comply with applicable established written policy. Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. Examples of Group III offenses include physical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of offenders.

#### Failure to comply with applicable established written policy

The underlying facts in this case are undisputed. Grievant acknowledges that she became aware of a rumor that a female corrections officer and an ex-inmate might be involved in a relationship but failed to report this to a supervisor. Because this constituted a weakness or breach of security, grievant should have reported it to a supervisor. Her failure to do so was a failure to comply with applicable established written policy, i.e., the post orders for both floor officers and control room officers – a Group II offense.

Grievant's defense is that she, in effect, conducted her own investigation by asking the female officer if the charge was true. When the officer denied the rumor, grievant assumed the rumor to have been malicious and false, and she dismissed it as untrue. The reason for the post order requiring reporting of such

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<sup>19</sup> §5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

<sup>20</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>21</sup> Exhibit 4. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

information is so that agency management can conduct a thorough investigation to ascertain whether the information is valid. In this case, such an investigation revealed that the information was correct, and appropriate action was thereafter taken. Accordingly, grievant's *ad hoc* investigation was not a substitute for reporting to a supervisor. Even if she believed the information was not credible, she had a specific duty to report what she had heard.

### Verbal or mental abuse

With regard to the second disciplinary action, the underlying facts are also undisputed. Grievant admitted that she had called an inmate a pervert, called him by name on a housing unit public address system and told him to keep it in his pants,<sup>22</sup> and subsequently told him that she would see if she could get someone to suck it for him. Grievant's statements were plainly disrespectful, impolite, discourteous, and indecent. Her statement to the inmate over the intercom was demeaning, as well as impolite and indecent. A demeaning statement in the presence of peers constitutes verbal or mental abuse – a Group III offense.

It may reasonably be argued that vulgar language, such as that used by both grievant and the inmate, is not uncommon in correctional institutions among inmates, and even between inmates and correctional officers. It further appears from the totality of the circumstances that the inmate deliberately provoked grievant when he made inappropriate, vulgar statements to her. Despite this, grievant had a duty and responsibility not to respond in kind. Moreover, there was no reason for grievant to use an intercom system to respond to the inmate. She could have made her comment to him one-on-one. Instead, grievant deliberately chose to make sure that everyone in the building could hear the comment. In addition, she assured that the inmate would feel demeaned by addressing him on the public address system *by name*. Thus, even if one were to conclude that grievant's behavior is not abuse, it is unquestionably demeaning and a failure to comply with the post order to conduct herself in a professional manner at all times. Therefore, at the very least, this offense constitutes a Group II offense for failure to comply with applicable established written policy.

### Workplace harassment

Grievant claimed that a specific captain had harassed her for three years because of her three previous disciplinary actions. In fact, however, the three prior disciplinary actions had been prompted by reports from three different captains on three separate occasions. To establish a claim for workplace harassment, grievant must prove that: (i) the conduct was unwelcome; (ii) the harassment was based on a protected classification; (iii) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (iv)

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<sup>22</sup> Exhibit 13. Office of Inspector General *Report of Investigation*, June 19, 2004.

there is some basis for imposing liability on the employer. Grievant cites the disciplinary actions as unwelcome conduct. While grievant understandably found the disciplinary actions to be unwelcome, she has not offered any evidence to show that they were based on any protected classification. Disciplinary actions issued in compliance with the Standards of Conduct do not constitute an abusive work environment but are necessary to address unacceptable performance and/or behavior. Since grievant has failed to prove the second prong of the test, there is no need to address the third and fourth prongs. Moreover, grievant failed to present any testimony or evidence on this issue during the hearing.

### Retaliation

Grievant also alleged retaliation because she had grieved her previous disciplinary actions.<sup>23</sup> Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.<sup>24</sup> To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Generally, protected activities include use of or participation in the grievance procedure, complying with or reporting a violation of law to authorities, seeking to change a law before the General Assembly or Congress, reporting a violation of fraud, waste or abuse to the state hotline, or exercising any other right protected by law.

Because grievant's past participation in the grievance process is a protected activity, grievant has met the first prong of the test. Grievant also meets the second prong because she has suffered an adverse employment action, i.e., disciplinary actions and removal from employment. However, grievant had failed to demonstrate any connection between the past grievances and the current disciplinary actions. There is nothing in the record that would suggest any nexus. To the contrary, the evidence suggests that the grievant's actions in failing to report the rumor and her behavior toward the inmate were the only events that precipitated the disciplinary actions taken against her. Further, during the hearing, grievant failed to offer any testimony or evidence in support of her allegation.

It must be noted that, prior to these two disciplinary actions, grievant had accumulated three active written notices. Therefore, even one additional Group I Written Notice would have been sufficient to justify grievant's removal from employment pursuant to the Standards of Conduct.<sup>25</sup> In this case, the Group II

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<sup>23</sup> After each of grievant's three previous disciplinary actions, she filed grievances that advanced to hearings before other hearing officers; all three disciplinary actions were upheld.

<sup>24</sup> EDR *Grievance Procedure Manual*, p.24.

<sup>25</sup> Exhibit 4. Section 5-10.15.C.2, Procedure 5-10, Standards of Conduct, June 15, 2002, states: "A fourth active written notice should normally result in removal [from employment]."



and Group III disciplinary actions, in conjunction with the three active prior disciplinary actions, left the agency no alternative but to remove her from employment.

### DECISION

The decision of the agency is affirmed.

The Group II Written Notice, the Group III Written Notice, and grievant's removal from state employment effective May 10, 2004 are hereby UPHELD. The disciplinary actions shall remain active for the period specified in Section 5-10.19.A 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 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>26</sup> 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.<sup>27</sup>

[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

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<sup>26</sup> 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).

<sup>27</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.