

Issue: Group III Written Notice with 5-day suspension (physical violence);  
Hearing Date: 12/30/03; Decision Issued: 12/31/03; Agency: DOC; AHO:  
David J. Latham, Esq.; Case No. 480



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 480

Hearing Date: December 30, 2003  
Decision Issued: December 31, 2003

APPEARANCES

Grievant  
Warden  
Assistant Warden  
One witness 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 physical violence.<sup>1</sup> Grievant was suspended for five workdays as part of the disciplinary action. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> The Department of Corrections (DOC) (Hereinafter referred to as “agency”) has employed grievant for over four years. He is currently a counselor.

The Commonwealth’s policy defines workplace violence to include any physical assault occurring in the workplace by an employee.<sup>3</sup> Prohibited conduct includes engaging in behavior that creates a reasonable fear of injury to another person. Employees who violate this policy are subject to disciplinary action up to and including termination of employment.

During the morning of September 24, 2003, grievant’s supervisor met with grievant and his coworkers. She advised them that one counselor who was knowledgeable about the segregation data roster would be training grievant and two others how to enter this data into the computer database. The training was tentatively scheduled for the following day. In mid-afternoon, the training counselor approached grievant and told him he wanted to conduct the training. Grievant said he was not volunteering for anything. The training counselor returned to grievant twice more during the afternoon and grievant continued to state that he was not volunteering. On the third occasion, the training counselor was frustrated at grievant’s response and told grievant to “Shut the fuck up!” Grievant jumped up from his chair and forcefully shoved the training counselor in the chest with the palms of both hands. The impact caused the training counselor to take two steps backward in order to maintain his balance.

Grievant and the training counselor have known each other for more than a year and have always been on good terms. After this incident, they promptly reconciled and remain friends at this time. The training counselor was disciplined with a Group I Written Notice for his use of obscene or abusive language.

## 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

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<sup>1</sup> Exhibit 1. Written Notice, issued September 30, 2003.

<sup>2</sup> Exhibit 1. Grievance Form A, filed October 20, 2003.

<sup>3</sup> Exhibit 5. Department of Human Resource Management (DHRM) Policy No. 1.80, *Workplace Violence*, May 1, 2002.

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.<sup>4</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 promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. 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 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.<sup>5</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 5-10.17 of the DOC Standards of Conduct addresses Group III offenses, which are defined identically to the DHRM Standards of Conduct.<sup>6</sup> An act of physical violence is a Group III offense.

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<sup>4</sup> § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

<sup>5</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>6</sup> Exhibit 4. Department of Corrections (DOC) Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

The essential facts in this case are undisputed. After grievant repeatedly resisted the training counselor's request to participate in training, the training counselor became frustrated and cursed at grievant. Grievant became incensed by the cursing and forcefully shoved the counselor in the chest with both hands, sending him backward two steps. Grievant takes issue with the characterization of his actions as "violent" but agrees that he did shove the training counselor hard enough to send him reeling backward by a couple of steps. Accordingly, the agency has demonstrated by a preponderance of evidence that grievant did engage in an act of physical violence - a Group III offense.

Grievant argues that the discipline was too harsh. He claims that he felt physically threatened because the training counselor was pointing his finger and was in grievant's "personal space." He also contends that the training counselor was the aggressor because he cursed at grievant. These arguments are not persuasive. There is no doubt that the training counselor committed an offense by cursing at grievant; and he has been appropriately disciplined for that offense. However, the use of a single vulgar word does not justify physically striking a coworker.

There are numerous methods of resolving workplace disputes short of physical violence. Grievant could have walked away and asked his supervisor to intercede. If the supervisor was not available, he could have asked for assistance from another supervisor or from human resources. If he felt that the training supervisor was standing too close, he could have asked him not to stand so close. Grievant failed to make such a request and instead immediately resorted to hitting his coworker. The use of physical violence to resolve a dispute in the workplace is not acceptable. The Standards of Conduct applicable to all state employees prohibit acts of physical violence. This prohibition is even more important for the Department of Corrections because agency management has an established goal of minimizing the level of violence in corrections facilities. Key in this effort is assuring that employees working at the facilities do not engage in physical violence.

Grievant's demeanor during the hearing was polite and respectful. Based on his demeanor and the available evidence, it appears that grievant is not normally disposed to physical violence. However, in this case, grievant reacted to a verbal provocation by physically striking a coworker – an offense that requires firm disciplinary action. The agency has issued the appropriate level of discipline called for by the Standards of Conduct. Grievant has not presented any mitigating circumstances that would justify changing the level of discipline. Although grievant feels the discipline is harsh, part of the intent behind such discipline is to prevent a recurrence of the use of physical violence in the future.

## DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice issued on September 30, 2003 for an act of physical violence and the five-day suspension are **UPHELD**. The disciplinary action 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>7</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>8</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>7</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>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.