

Issue: Group III Written Notice with 10-day suspension (violating safety rules where there is a threat of physical harm); Hearing Date: 02/26/04; Decision Issued: 03/01/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 577



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 577

Hearing Date: February 26, 2004  
Decision Issued: March 1, 2004

**PROCEDURAL ISSUES**

The grievant requested a compliance ruling from the Director of the Department of Employment Dispute Resolution (EDR) regarding whether his two grievances should be consolidated for a single hearing. The EDR Director ruled that the two grievances would be consolidated for the purpose of hearing them together, but directed the hearing officer to issue two separate decisions.<sup>1</sup>

Grievant requested five forms of relief in his grievance, only two of which a hearing officer has the authority to grant. A hearing officer does not have authority to: require the agency to place a letter in his file stating that he acted appropriately<sup>2</sup>; grant him a salary increase<sup>3</sup> or; direct the agency to have management personnel interview road officers regarding the problems they

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<sup>1</sup> *Compliance Ruling of Director*, Ruling Number 2004-591, February 6, 2004.

<sup>2</sup> § 5.9(b)7, *EDR Grievance Procedure Manual*, effective July 1, 2001.

<sup>3</sup> § 5.9(b)3, *Ibid.*

encounter.<sup>4</sup> Grievant does not want to be transferred back to this correctional facility because he would refuse to work on road gangs.

### APPEARANCES

Grievant  
Attorney for Grievant  
Superintendent  
Advocate for Agency  
Two 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 appeal from a Group III Written Notice issued for violating safety rules where there is a threat of physical harm.<sup>5</sup> As part of the disciplinary action, grievant was suspended without pay for ten days and transferred to a different correctional facility. Following failure of the 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 for 14 years. He is a Corrections Officer Senior.<sup>7</sup>

Grievant was assigned as a road gang officer (gun gang officer). This correctional facility normally operates several road gangs that are used to clear brush and shrubbery along state highways. Each road gang includes one corrections officer, a foreman from the Virginia Department of Transportation (VDOT), and ten inmates. Grievant is armed with a shotgun and a .38 caliber pistol; the VDOT foreman is unarmed. However, the VDOT foreman receives annual qualification training on both weapons. When the grievant takes a break during the day, he is required to give the weapons to the foreman until grievant returns. Corrections officers are trained that they should never approach inmates

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<sup>4</sup> § 5.9(b)4 & 7, *Ibid.*

<sup>5</sup> Exhibit 2. Written Notice, issued November 14, 2003.

<sup>6</sup> Exhibit 2. Grievance Form A, filed December 7, 2003.

<sup>7</sup> Exhibit 4. Grievant's Employee Work Profile, October 25, 2002.

with weapons. The post order for a gun gang officer provides that armed corrections officers should generally remain 50 feet from inmates.<sup>8</sup> The group is bused to a work site along the highway. Signs stating "Road Work Ahead" are placed an appropriate distance from the site on both sides of the work site to alert motorists of work ahead and the possibility that people may be in the roadway.

On November 10, 2003, grievant and his road gang were assigned to clear brush adjacent to a bridge on a narrow rural road. The road was so narrow and the ditches so steep on either side of the road that the bus had to park partly on the shoulder and partly on the road. When the inmates disembarked from the bus, they gathered at the rear of the bus to ready their equipment (primarily weed eaters with sickle bars and bush axes). As required, grievant and the foreman stood well apart from the inmates. As the inmates were starting the weed eater engines, grievant noticed a car approaching. He also observed that one inmate was standing on the left side of the bus with a weed eater in his right hand and a cup of coffee in the other hand. Because the road was so narrow and the bus was half in the road, the inmate was partially blocking the remaining half of the road. Grievant motioned the car to stop and at the same time yelled, "Traffic, get out of the road." Because of the loud noise from multiple weed eater engines, the inmate apparently did not hear grievant and did not move. Grievant repeated his warning and the inmate still did not move.

Grievant then walked past the group of nine inmates (within five or six feet) and came up to the inmate blocking the road. Grievant had his pistol in its holster and his shotgun in his right hand. Both weapons were loaded but no rounds were chambered. Grievant placed his left hand on the inmate's chest and pushed him backwards toward the bus to make room for the car to pass. After the car passed, grievant walked back to where the foreman was standing. As he did so, the inmate began using vulgar language telling the grievant that he could not put his hands on the inmate. Grievant handed his shotgun to the foreman and returned to the inmate. Grievant still had his pistol. He put the inmate facing against the bus with his hands up and then handcuffed the inmate. As he did so, one inmate told the foreman he wanted to approach grievant and the inmate. The foreman firmly told him not to. Grievant then returned to where the foreman was standing. The inmate complained that the handcuffs were too tight and grievant returned to the inmate a third time to loosen the handcuffs. Grievant still had his pistol at this time.

The superintendent interviewed grievant later that day about the incident. Grievant explained what occurred and the superintendent's secretary typed up

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<sup>8</sup> Exhibit 3. Specific Duty 7, *Post Order #26, Gun Gang Officer*, January 14, 2004, states: "Inmates generally will not be permitted within fifty (50) feet of the armed officer. When situations require them to be closer, the officer should be alert and ready." The alert and ready language means that officers should have their shotgun in both hands and ready to use it if necessary.

his statement. Grievant carefully read and then signed the statement.<sup>9</sup> The inmate was not physically injured and has not alleged any mental or emotional distress as a result of this incident.<sup>10</sup> Grievant told the Chief of Security on the day of the incident that he had done wrong and hoped that he could keep his job.

#### 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.<sup>11</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.

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<sup>9</sup> Exhibit 1. Grievant's statement, November 10, 2003.

<sup>10</sup> The inmate did not testify at the hearing.

<sup>11</sup> § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

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.<sup>12</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>13</sup> Among the examples of Group III offenses is violating safety rules where there is a threat of physical harm.

The agency has demonstrated that grievant was aware of the safety rule that requires armed corrections officers to remain 50 feet from inmates, unless a situation requires a closer distance, in which case the officer must be alert and ready to use the weapon. In previous situations where grievant had to approach inmates, he had complied with the rule by giving his weapons to the VDOT foreman. On November 10, 2003, however, grievant acknowledges that he was not in compliance with the rule on the three occasions he approached the inmate. On the first occasion, grievant had both weapons; on the second two occasions, he had his loaded .38 pistol. Accordingly, the agency has demonstrated by a preponderance of evidence that grievant violated Post Order # 26.

Grievant maintains that he had no choice but to take the action he did because he was faced with a *split-second decision*. He contends that he had to move the inmate out of the road promptly for the inmate's own safety because of the oncoming automobile. However, grievant's contention does not fully square with his description of what occurred. First, the oncoming motorist had already been alerted by the "Road Work Ahead" signs that people might be in the road and should have been prepared for the possibility that he would have to slow down or stop. Second, grievant testified that when he saw the oncoming car, he raised his left hand with palm toward the vehicle motioning the driver to stop. The car did slow to a stop or near-stop; grievant then walked up to the inmate and moved him out of the car's path. Only then did grievant motion to the driver to resume travel down the road.<sup>14</sup> Accordingly, while grievant acted promptly to move the inmate, it was not a split-second decision. Third, the foreman had heard grievant yell "Traffic – get out of the road." Thus, the foreman was alerted to the situation and would have been able to hold the weapons had grievant given them to him.

It is concluded that grievant felt that he could control the situation without the need to hand his weapons to the foreman. Grievant chose to handle the

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<sup>12</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>13</sup> Exhibit 5. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

<sup>14</sup> It is highly unlikely that a motorist who has been told to stop by a uniformed officer carrying a shotgun and a pistol would proceed until told to do so.

matter in the most expedient manner by approaching the inmate first without handing the weapons to the foreman. While one could argue that grievant merely made a poor judgment, his actions constituted a serious rule violation that could have had disastrous consequences.

Grievant argues that there was not a threat of physical harm and that his offense should therefore be no more than a Group II.<sup>15</sup> This argument is not persuasive. In this case, grievant was carrying two loaded weapons when he approached the inmate. Grievant carried his shotgun pointing up in the air in his right hand only, so that he could not have used it immediately. The inmate had a cup of hot coffee in one hand and a weed eater with sickle bar in the other hand. If the inmate had been intent upon escaping or causing trouble, he could easily have used the sickle bar as a weapon, or thrown the hot coffee into grievant's face. Thus, there was a clear and present threat of potential physical harm that could have erupted in an instant. Therefore, grievant's actions constituted a Group III offense.

When the grievant decided to approach the inmate a second time to handcuff him, he gave his shotgun to the foreman so that he would have both hands free. However, grievant nevertheless put himself into close proximity with the inmate while carrying a loaded .38 pistol. Grievant knew at that point that the inmate was hostile and angry at him because the inmate was yelling profanities at grievant. By this time, the inmate had already set his weed eater and cup of coffee down and thus had both hands free. Accordingly, grievant violated the safety rule a second time when the inmate was not only more angry than the first time, but also when the inmate had the ability to physically grapple with grievant.

Grievant argues that he did not give his pistol to the foreman because in the past, the foreman had "frozen" when an inmate approached him in a threatening manner even though the foreman had the pistol in his belt at the time. However, grievant had never related this story to the warden during the investigation and grievance resolution process. No other officers have ever complained that the foreman had acted inappropriately during his 37 years as a VDOT road gang foreman. The warden offered un rebutted testimony that he had no doubt that this foreman would use a gun if necessary.

Grievant contended that two other officers carrying weapons had previously been observed standing too close to inmates but that neither officer was disciplined. Neither the warden nor the Chief of Security had heard of such incidents. Grievant did not offer any witnesses to corroborate his contention.

This decision does not address the issue of whether grievant's treatment of the inmate constituted maltreatment because that issue was separately disciplined and grieved, and is the subject of the companion decision to this decision.

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<sup>15</sup> Exhibit 5. Section 5-10.16.B.2, *Ibid*.

## DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice, ten-day suspension, and transfer to a different correctional facility issued on November 14, 2003 for violating a safety rule where there is a threat of physical harm 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>16</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>17</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>16</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>17</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.