

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 09/10/03; Decision Issued: 09/11/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5793



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5793

Hearing Date: September 10, 2003
Decision Issued: September 11, 2003

PROCEDURAL ISSUE

Grievant agreed that the incident between her and another lieutenant occurred. Although there were slight differences in various written accounts of the incident, she agreed that what had occurred was wrong. She grieved the discipline because she contends that the discipline meted out by the agency was too harsh for the circumstances.

APPEARANCES

Grievant
Witness for Grievant
Warden Senior

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 I Written Notice issued for unsatisfactory job performance.¹ As part of the disciplinary action, grievant was suspended for one day. However, the first-step respondent rescinded the suspension during the grievance resolution process.² Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant as a corrections lieutenant. At the time this discipline was issued, grievant had one prior active disciplinary action – a Group I Written Notice for disruptive behavior.⁴ She was subsequently counseled for making a negative statement, and for failing to follow supervisory instructions.⁵

At about 6:15 p.m. on March 17, 2003, grievant was at the end of her day shift (6:00 a.m. to 6:00 p.m.). Lieutenant P was just starting his night shift (6:00 p.m. to 6:00 a.m.). Corrections officer W was working from 11:45 a.m. until 12:00 midnight and had not had a break since coming on duty. Grievant directed that corrections officer D relieve officer W so that he could take his break. She attempted to contact Lieutenant P on the radio but he did not answer. Instead Lieutenant P called officer D on the radio and told him to report to a different housing unit. Lieutenant P then came to the area where grievant was and they had an argument about the situation.

Both grievant and the other lieutenant yelled loudly at each other in the presence of inmates and corrections officers. Both used inappropriate language in addressing the other. A third lieutenant soon intervened and then a captain and a major were summoned. Ultimately, both grievant and Lieutenant P were disciplined with Group I Written Notices.

¹ Exhibit 1. Written Notice, issued April 18, 2003.

² Exhibit 1. First-Step Resolution Response, May 21, 2003.

³ Exhibit 1. Grievance Form A, filed May 15, 2003.

⁴ Exhibit 2. Written Notice, issued August 27, 2001.

⁵ Exhibit 3. Counseling Memorandum, July 1, 2002.

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.⁶

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, 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.3 of the Standards of Conduct Policy No. 1.60 provides that Group I offenses include types of behavior least severe in nature but which require correction.⁷ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the

⁶ § 5.8 Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

⁷ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

unique needs of the Department. Section 5-10.15 of the DOC Standards of Conduct provides that unsatisfactory job performance is a Group I offense.

The underlying facts are not in dispute. Grievant agrees that she and another corrections lieutenant became engaged in an argument that was loud, included inappropriate language, and took place in the presence of several inmates and corrections officers. She also acknowledges that it was wrong to have had such a loud, abusive argument, especially in the presence of inmates and subordinates. Accordingly, grievant does not dispute that she committed an offense, and that the agency had to take some form of corrective action. She grieved only because she believes the discipline was too harsh.

The facts in this case reflect that the heated argument in which grievant participated was disruptive to the workplace. Another lieutenant, a captain, and a major all came to the scene and were thus taken away from their regular duties. Moreover, several subordinate corrections officers watched the confrontation without getting involved themselves. Thus, those officers were distracted from their regular duties and were not devoting full attention to inmate security. The agency characterized the incident as unsatisfactory job performance rather than disruptive behavior. Certainly when one engages in disruptive behavior, it is axiomatic that one's job performance is unsatisfactory. Nonetheless, whatever descriptor is used to summarize the incident, it did amount to behavior that constitutes a Group I offense and requires corrective action.

The agency gave both grievant and the other lieutenant Group I Written Notices. Thus, both of the participants were disciplined in an equal manner. Grievant argues that was too harsh and that counseling would have been sufficient. The hearing officer cannot agree. Grievant has previously been counseled and given a Group I Written Notice for disruptive behavior. Apparently, that prior disciplinary action did not get grievant's attention. Therefore, the agency's decision to issue this additional Group I Written Notice was entirely appropriate.

Grievant contends that a captain who used abusive language in his office in the presence of employees and visitors received counseling, not a disciplinary action. Grievant did not present any testimony or evidence of this alleged incident. Her only knowledge was acquired through the grapevine. Without knowing all of the circumstances involved, the hearing officer is unable to determine whether the two incidents are alike or whether the captain's incident had extenuating circumstances. Moreover, grievant has not shown that the captain had previously been disciplined for similar behavior. If that was a first occurrence for the captain, counseling might have been an appropriate corrective action. In any case, there is simply insufficient evidence in the record to draw any comparison between the captain's incident and grievant's incident.

DECISION

The decision of the agency is hereby affirmed.

The Group I Written Notice issued on April 18, 2003 is 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.
3. If you believe that 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.

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.⁸ 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.⁹

⁸ 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).

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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