

Issue: Group III Written Notice with suspension (acts which seriously undermine Agency's effectiveness and employee's performance); Hearing Date: 09/25/03; Decision Issued: 10/14/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5802/5807



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 5802/5807

Hearing Date: September 25, 2003
Decision Issued: October 14, 2003

PROCEDURAL ISSUES

Although the hearing was conducted within 30 days of appointment of the hearing officer, the hearing officer was on annual leave for two weeks immediately following the hearing. Therefore, the decision could not be rendered until the 41st day following appointment.¹

Grievant filed two separate grievances. However, the issues raised by grievant arose from the same incident for which he was disciplined. Moreover, the relief sought by grievant is the same in both grievances, i.e., rescission of the disciplinary action and restoration of pay for a suspension of 34.5 hours. Therefore, the agency requested that the two grievances be consolidated for

¹ § 5.1 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001, requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

hearing. The EDR Director ruled that consolidation was appropriate and therefore only one decision is being issued.²

Grievant requested as part of his relief that he receive a verbal apology and a written apology for being issued a disciplinary action. Hearing officers may provide certain types of relief including rescission of discipline and payment of back wages and benefits.³ However, hearing officers do not have authority to require anyone to issue an apology.⁴ Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

One witness was unavailable for the hearing. The hearing officer left open the possibility of reopening the hearing if it appeared that the witness's testimony might change the outcome of the decision. After reviewing the testimony and evidence of those who did testify, the hearing officer concludes that the missing witness's testimony would not alter the decision in this case.

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Warden
Advocate for Agency
Three 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 acts which seriously undermine the effectiveness of the agency's activities or the employee's performance.⁵ As part of the disciplinary action, grievant was suspended for 34.5 hours. The warden offered to remove the suspension during the second resolution step but grievant rejected the offer. Following failure of the

² EDR *Compliance Ruling of Director Number 2003-159*, September 8, 2003.

³ § 5.9(a) EDR *Grievance Procedure Manual*, effective July 1, 2001.

⁴ § 5.9(b)5, 6 & 7. *Ibid.*

⁵ Exhibit 1. Written Notice, issued June 16, 2003.

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

The Department of Corrections (DOC) (Hereinafter referred to as “agency”) has employed grievant for five years. He is a corrections officer senior and is 25 years old. His performance has met or exceeded expectations and he is currently rated a contributor.

On May 12, 2003, grievant worked the 6:00 a.m. to 6:00 p.m. shift. At about noon, he was assigned to work in tower 3.⁷ At about 1:30 p.m., grievant’s second cousin (also a corrections officer) called grievant by telephone from the control room. Their conversation initially involved fishing, bike riding and what they would do on break. Grievant’s cousin had gone to the control room to relieve a female corrections officer. The female officer admittedly has a “flirtatious nature” and had previously engaged in sexual banter with grievant’s cousin.⁸ As grievant’s cousin was talking to grievant on the telephone, the cousin touched the female officer in her crotch area with his finger to simulate vaginal insertion. She giggled and rejected the cousin’s advance, telling him “Stop, don’t do that again.” Grievant heard her and asked his cousin what they were doing. The cousin told grievant “I grabbed it and it was hot and moist and she got to wipe it off.”⁹ Grievant understood from the conversation that his cousin had touched the female officer’s vaginal area.

The female officer did not object to the sexual conversation or being touched in an openly sexual manner by grievant’s cousin. However, by the evening she became upset that the cousin had told grievant on the telephone what he was doing, as he did it. The following day, May 13, 2003, she reported the incident to a sergeant who reported it to his superior officer. The watch commander investigated and asked grievant to write an incident report the same day. Grievant wrote a report but did not include any mention of the sexual touching incident.¹⁰ Grievant verbally denied hearing any conversation between the cousin and female officer, and also denied that his cousin had made the “hot and moist” statement.¹¹

Because the initial interviews on May 13, 2003 produced conflicting information from the interviewees, the warden requested that a departmental

⁶ Exhibit 2. Grievance forms A, filed July 1, 2003.

⁷ The agency contends grievant began working in the tower earlier that morning. However, neither party produced the tower logbook to document when grievant entered the tower. The hearing officer has estimated times based upon an amalgam of the testimony received. In any case, the precise times are not crucial because all involved agree that a telephone conversation did occur sometime during the middle of the day on May 12, 2003.

⁸ The female officer used the term “flirtatious nature” to describe her own behavior with respect to males. See Exhibit 5. *Report of Investigation*. Synopsis, p. 1, which details the long-term sexual banter exchange between grievant’s cousin and the female officer.

⁹ Exhibit 5D. Investigative Interview with grievant, May 20, 2003.

¹⁰ Exhibit 5D. Incident Report written by grievant, May 13, 2003.

¹¹ Exhibit 3. Human Resource Manager’s notes from May 13, 2003 meeting with grievant.

special agent investigate the matter. The special agent conducted a thorough investigation and interviewed all those with possible knowledge of the situation. On May 20, 2003, during grievant's interview by the special agent, grievant admitted that he had heard what was said, and that he understood what had occurred in the control booth. Following completion of the investigation, grievant was disciplined and suspended for 34.5 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.¹²

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

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

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 III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹³ 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 5-10.7 of the DOC Standards of Conduct addresses the general guideline regarding offenses and states:

The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head, although not listed in the procedure, undermines the effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of this procedure.¹⁴

The agency has demonstrated, by a preponderance of the evidence, that grievant knowingly failed to disclose material and relevant information during an investigation. This conclusion is reached for several reasons. First, the grievant failed to include in his May 13, 2003 statement any of the sexual conversation that he admitted knowledge of on May 20, 2003. Second, when specifically questioned on May 13, 2003, grievant denied knowledge of the sexual conversation; the Human Resource Manager witnessed and contemporaneously recorded grievant's denial.¹⁵ Third, grievant's May 20, 2003 admission of the entire conversation is consistent in all material respects with the female officer's statement. She was remarkably forthcoming about her sexual behavior and testified consistently, clearly, and credibly. The consistency between the statements demonstrates that grievant accurately recalled what had occurred during the telephone conversation.

Grievant's cousin testified that he did not touch the female, did not attempt to touch her, and did not make the "hot and moist" statement. Because a preponderance of evidence demonstrated that this testimony was false, the hearing officer found this witness to be less than credible.

During the hearing, much attention was devoted to the time at which the telephone conversation between grievant and his cousin occurred. One witness indicates that it was made between 10:00 and 10:30 a.m. Another suggests 1:30 p.m. The Human Resource Manager thought it might have been 2:30 p.m. Based on the preponderance of evidence, the call was probably made at 1:30

¹³ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁴ Exhibit 7. Section 5-10.7C, DOC Procedure No. 5-10, *Standards of Conduct*, June 15, 2002.

¹⁵ Exhibit 3. *Ibid.*

p.m.¹⁶ However, it is concluded that the precise time of the call is moot. All three witnesses – grievant, his cousin, and the female officer - agree that grievant's cousin called him. Grievant and the female officer agree about what was said.¹⁷ The key issue herein is whether grievant's failure to *initially* admit what was said merits discipline.

Grievant objects that the special agent told him he could face termination of employment if grievant was not fully forthcoming in providing full information about the May 12, 2003 incident.¹⁸ He suggests that this amounted to coercion as that term is used in the Standards of Conduct. If grievant had been coerced into making a *false* statement, grievant's concern would have merit. However, in this case, the investigator only told grievant that a possible consequence of failing to fully cooperate with the investigation could result in disciplinary action up to and including dismissal. This is not coercion because grievant was asked only to tell the full *truth*. Up to that time, grievant had been withholding information crucial to the investigation. Grievant's failure to disclose important facts during an official investigation obstructed the agency's efforts to get to the truth and to protect the rights of a fellow corrections officer. Therefore, the investigator's cautionary admonition to grievant was not coercion.

Grievant contends that on May 13, 2003, he did not remember the details of the telephone conversation with his cousin one day earlier. This assertion is not credible for two reasons. First, it is just not believable that grievant, having heard the conversation, realizing the sexual nature of what was happening, and having made a conscious decision not "to be involved," could forget the details just one day later.¹⁹ Second, grievant's *accurate* recollection of the details one week later, after being warned about the serious consequences for omitting information, indicates that he had remembered the conversation but chose to feign ignorance during the first interview. Third, grievant's contention of temporary memory failure is a self-serving argument designed to shield him from culpability for his willful omission of the facts during the first interview.

The female officer received a Group I Written Notice for her "flirtatious" behavior. Grievant's cousin received a Group III Written Notice and a Group I Written Notice. The agency disciplined grievant with a Group III Written Notice for "Actions unbecoming a corrections officer." Grievant's knowing withholding of material and relevant information during an investigation is a sufficiently serious matter that the level of discipline imposed is not unreasonable.

¹⁶ The special agent reviewed the tower log, which reflects that grievant was not assigned to the tower during the morning of May 12, 2003. However, grievant's cousin could have called grievant in the morning at a location other than the tower.

¹⁷ Only grievant's cousin denies what he said, presumably in an effort to avoid discipline for his own behavior vis-à-vis the female officer.

¹⁸ Exhibit 2. Grievance Form # 1, filed July 1, 2003.

¹⁹ Exhibit 5D. Investigative Interview, May 20, 2003. Grievant stated, "Once I got off the phone I thought that he had touched her on her private area and I didn't want to be involved or have anything to do with what took place."

Moreover, grievant contended that, although he assumed something sexual had occurred between his cousin and the female officer, he did not *know* with certainty what had occurred. This facile attempt to elude culpability demonstrates a lack of remorse and appreciation for the seriousness of his offense.

DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice and suspension issued on June 16, 2003, 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.
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.²⁰ You must file a notice of appeal with the clerk of the circuit court in the

²⁰ 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).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²¹

[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

²¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.