

Issue: Misapplication of policy and retaliation; Hearing Date: 10/06/03; Decision
Issued: 10/20/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5813



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5813

Hearing Date: October 6, 2003
Decision Issued: October 20, 2003

PROCEDURAL HISTORY

On September 4, 2002, Grievant timely filed a grievance alleging the Agency misapplied policy and retaliated against him. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. The Agency denied Grievant's request for a hearing and Grievant sought qualification. On September 3, 2003, the EDR Director qualified the grievance for a hearing. On September 9, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 6, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Seven other witnesses

ISSUE

Whether the Agency misapplied policy or retaliated against Grievant.

BURDEN OF PROOF

The burden of proof is on Grievant to show by a preponderance of the evidence that the relief he seeks should be granted. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employees Grievant as a Corrections Officer Senior at one of its Facilities. Grievant's duties include daily supervision of inmates. One way for Grievant to control an inmate's behavior is to file disciplinary charges against an inmate behaving improperly. When an inmate knows he may suffer consequences for bad behavior, he is less likely to engage in that behavior. A Correctional Facility is an inherently dangerous workplace because inmates are prone to violence when uncontrolled. Corrections Officers are able to control their workplace and make it safe by applying procedures established by the Department of Corrections. When procedures governing inmate behavior are not followed, the risk of injury to a Corrections Officer can increase dramatically.

On July 4, 2002, Inmate E hit another inmate in the chest. Grievant observed this behavior and wrote a Disciplinary Offense Report charging Inmate E for his inappropriate behavior. Inmate E was offered 10 days of dorm restriction as a penalty instead of having the matter resolved through a disciplinary hearing conducted by an Inmate Hearings Officer (IHO). As part of his dorm restriction, Inmate E was prohibited from being in the TV area. He signed a Dorm Restriction form acknowledging the terms of his restriction. Inmate E accepted the offer but shortly thereafter violated the terms of his dorm restriction. Grievant observed Inmate E violating the terms of his dorm restriction and issued another Disciplinary Offense Report. Inmate E was offered a penalty in lieu of conducting a disciplinary hearing. Inmate E rejected the offer and asked for a disciplinary hearing before an Inmate Hearings Officer.

Once the IHO receive the file, he reviewed the Disciplinary Offense Report as well as Grievant's statement. The IHO spoke with the Warden and asked the Warden if watching television was a violation of dorm restriction. The Warden said that watching television in a dorm is not violation of dorm restriction because the inmate remains in the dorm. The IHO did not advise the Warden that the IHO's question involved an ongoing inmate hearing. The IHO dismissed the charge against Inmate E because "Inmate did not leave the dorm." The Warden had not seen or approved the dorm

restriction form applied to Inmate E.¹ He did not realize that Grievant's dorm restriction was intended to prohibit Inmate E from watching television.

On August 8, 2002, Grievant instructed Inmate E to stop letting other inmates use Inmate E's chair at the inmate phones in the dorm. While standing next to Grievant, Inmate E picked up the chair, slammed it on the floor, and swung the chair in a circular fashion in order to hit Grievant. When the inmate slammed the chair on the floor, Grievant turned towards the inmate and observed Inmate E trying to hit him with the chair. Grievant quickly jumped away to avoid being hit by the chair. Initially, Grievant intended to file a disciplinary charge against Inmate E. After speaking with the IHO shortly after the incident, Grievant decided against filing a charge because the IHO discourage Grievant from filing a charge.

On August 18, 2002, Grievant called the IHO at home regarding Inmate E. The IHO told Grievant that Inmate E "had cooperated with [Internal Affairs] and that's why some charges had been torn up."² The IHO told Grievant not to write any "petty charges." The IHO also told Grievant that Inmate E "was working for me (the IHO)."³ In reality, Inmate E was not serving as an informant for Internal Affairs. On August 23, 2002, Grievant met with the Major and the Captain to express his concerns about Inmate E.

The Sergeant testified that he was in the IHO's office in 2002 when the IHO expressed concern about the number of frivolous inmate charges. The IHO picked up a stack of disciplinary charges and began shredding⁴ them in front of the Sergeant. The Sergeant told the IHO that he was not permitted to shred charges. The Sergeant reported the IHO's behavior to the Major. The Major told the Sergeant that she would take care of the matter,⁵ but no evidence was presented regarding what actions, if any, were taken by the Major.

Because Inmate E was given favorable treatment by the IHO, Inmate E challenged Grievant and attempted to increase conflict with Grievant. For example, the Captain observed Inmate E trying to have charges written up against him so that he would "get out of them" thereby enhancing his perceived power among the other inmates. Inmate E and several other inmates would intentionally bump into Grievant and pretend it was an accident. They were attempting to intimidate Grievant.

¹ The form had been created by a prior Inmate Hearings Officer. The Warden later instructed his staff to discontinue using the form.

² Grievant Exhibit 13.

³ Grievant Exhibit 25-A.

⁴ This stack could have included charges filed by Grievant against Inmate E or only charges filed by other corrections officers against other inmates.

⁵ Destruction of official state records is behavior that would warrant disciplinary action against the IHO.

Several security staff testified that they knew of instances where disciplinary charges were brought against inmates for behaving poorly but those charges were never resolved through the inmate hearing process. The Agency's records are insufficient to dispel this assertion.

The Facility does not have a written training policy governing the selection of training for employees. Employees receive mandatory training dictated by the Department of Corrections and discretionary training on an as needed basis as defined by Facility managers.

CONCLUSIONS OF POLICY

Corrections Officers are able to control inmate behavior by charging misbehaving inmates with offenses.⁶ Division Operating Procedure (DOP) 861 sets forth the Agency's procedure for disciplining inmates. This policy states, "A fundamental requirement for institutional order is a fair and impartial⁷ disciplinary process. Any act or attempt by an inmate, which violates the Code of Inmate Offenses or posted institutional rules, should result in appropriate disciplinary action."⁸

Inmate offenses are divided into two categories. Category I offenses are more serious in nature and include things such as killing of any person, escape or attempted escape, or possession of a weapon. Category II offenses are less serious than Category I offenses and include behaviors such as disobeying an order, lying or giving false information to an employee, or threatening bodily harm to any person verbally, by gesture or actions, or in writing.⁹ The charge is entered into the inmate's institutional

⁶ The Agency's Inmate Handbook describes inmate discipline as follows:

A well-disciplined institution facilitates correctional objectives, permits individuals to live safely with one another and allows inmates to concentrate on self-improvement rather than self-protection. A final requirement for institutional order is a fair and just disciplinary process. It is imperative that all inmates be aware of this process as outlined in DOP 861. All inmates are expected to conduct themselves in a manner consistent with the welfare of others, and within the general security guidelines issued by the correctional administration.

⁷ The Inmate Handbook states:

Should you decline a penalty offer your institutional charge will be sent to the Hearings Officer to be heard. He/she will hear the charge and make a determination as to your guilt or innocence, after hearing all the testimony. He/she will then impose a penalty if you are found guilty based on the seriousness of the offense and your prior institutional record. All disciplinary matters will be handled in a fair and impartial manner in an effort to ensure a productive and safe environment for both inmates and staff.

⁸ DOP 861.1.

⁹ DOP 861.4.

record regardless of whether the inmate accepts a penalty agreement or has an adjustment hearing.

A Reporting Officer is “Any employee of the Commonwealth of Virginia who observes or who receives reliable information indicating a violation of the Code of Inmate Offenses, or of institutional rules and regulations, and files a written report.” An employee who has reasonable cause to believe an offense was committed, shall file a written disciplinary report of the incident with the Officer-in-Charge (OIC). The OIC is normally the Shift Commander, or the Assistant Shift Commander. A Reporting Officer cannot request the dismissal of a report he or she filed.

Upon receipt of a disciplinary report, the OIC must determine the appropriate penalty to offer to the inmate, prior to referring the charge to the IHO. Once the penalty offer is made to the inmate, the inmate may accept the officer thereby stopping further disciplinary proceedings or the inmate may ask for a hearing before the IHO. If a hearing is requested, the OIC must forward the original disciplinary report to the IHO.

If the inmate is charged with a Category I offense, the Reporting Officer must provide testimony in person at the hearing. The written disciplinary report stands as the testimony of the Reporting Officer for Category II offenses.¹⁰

For Category II offenses, the IHO “shall examine each witness’ statement for relevance and repetitiveness. *** The witness’ personal appearance at the hearing is not required.” The IHO’s responsibilities include ensuring that the hearing is tape-recorded. An IHO “shall remain objective and render a fair and just decision based solely on the facts presented at the hearing” and “shall make a fair decision of guilty or not guilty.”¹¹

An Inmate Hearings Officer is “The employee who is the sole fact finder in the hearing and decides guilt or innocence of the accused inmate and imposes an appropriate penalty. *** The IHO will report to the Warden/Superintendent, or designee.”¹²

Under the facts of this grievance, the IHO acted contrary to DOP 861 because he (1) dissuaded Grievant from filing charges against Inmate E, (2) arbitrarily dismissed charges against Inmate E while Inmate E “was working for” the IHO,¹³ and (3) shredded a stack of charges pending against Facility inmates. The IHO’s actions made Inmate E

¹⁰ DOP 861.8(D).

¹¹ DOP 861.15.

¹² IOP 861.3.

¹³ IOP 861.3 requires the IHO to be an “objective and impartial decision-maker.” The IHO cannot be objective and impartial when he has a vested interest in an inmate remaining free from disciplinary penalties that might limit his interaction with other inmates or with DOC employees.

believe he could abuse his relationship with Grievant and made Grievant unnecessarily fear injury by Inmate E and by inmates within Inmate E's immediate circle of friends. When considered as a whole, the IHO's actions placed Grievant at personal risk of injury.

Although the IHO may have failed to follow Agency policy, the question arises regarding whether his actions should be attributed to the Agency such that the Agency should be deemed responsible for his actions. In most circumstances, an agency does not act through its line employees. Only actions taken by agency managers should be deemed to be actions of the agency. This is true because it is agency managers who are responsible for managing agency operations. Correctional Facilities operate under a chain of command. Employees observing inappropriate circumstances are expected to report those circumstances up the chain of command. Facility managers are obligated to address those inappropriate circumstances in accordance with their management discretion. When the inappropriate action of a line employee is reported to agency managers and no action is taken, however, it is appropriate to deem the Agency responsible for the actions of a line employee.

The Hearing Officer finds that the Agency should be deemed responsible for the IHO's failure to comply with policy. In this instance, the IHO's behavior of shredding inmate disciplinary charges was reported up the chain of command to the Major who directly reports to the Warden. Although the Warden denies being informed of the IHO's actions, the Major should have reported this to the Warden. When the Major failed to inform the Warden, her actions were in her capacity as an Agency manager. In addition, Grievant reported his concerns about Inmate E to the appropriate staff. The Warden spoke with the IHO who admitted dissuading Grievant from filing charges against Inmate E and telling Grievant that Inmate E was working for the IHO. No action appears to have been taken following the meeting.

DHRM Policy 1.80, *Workplace Violence* requires the Agency to "protect victims of workplace violence." Inmate E engaged in behavior "that creates a reasonable fear of injury to" Grievant. Because Inmate E was given special consideration when facing disciplinary action, the Agency emboldened Inmate E and made him feel protected when making direct or indirect threats against Grievant. Accordingly, Grievant was placed in reasonable fear of injury by Inmate E. By failing to apply IOP 861 the Agency failed to properly protect Grievant from workplace violence. The Agency's actions were contrary to the DHRM Policy 1.80, *Workplace Violence*.

Grievant contends the Agency retaliated against him by denying him training necessary for him to advance his career. No credible evidence was presented suggesting Grievant was denied any mandatory training. Decisions regarding discretionary training were made by the Lieutenant based on recommendations from Watch Commanders. No credible evidence was presented suggesting the Lieutenant or the various Watch Commanders refused to select Grievant for training in order to retaliate against him.

DECISION

The Agency is ordered to require its Agency Facility to comply with IOP 861 and thereby protect Grievant from workplace violence as defined by DHRM Policy 1.80, *Workplace Violence*. Relief based on Grievant's claim of retaliation is denied.

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. 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.¹⁴

[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].

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer