

Issue: Group II Written Notice with 1-day suspension (insubordinate statement to supervisor); Hearing Date: 10/27/03; Decision Issued: 10/28/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5836



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5836

Hearing Date: October 27, 2003
Decision Issued: October 28, 2003

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
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 II Written Notice issued for an insubordinate statement to his supervisor.¹ Grievant was suspended for one workday as part of the disciplinary action. At the second resolution step of the grievance procedure, the warden offered to reduce the discipline to a Group I Written Notice with no suspension; grievant rejected the offer.² Following failure of the parties 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 officer for less than two years.

On July 14, 2003, grievant was working the night shift (6:00 p.m. July 13 to 6:00 a.m. July 14) as building supervisor. At 2:45 a.m., grievant's sergeant came to grievant's housing unit and observed three inmates sitting at a card table, two in the television room, and four or five hanging on cell doors.⁴ Hanging on cell doors is prohibited.⁵ Grievant was aware of this rule, having read and reviewed the Post Orders on a quarterly basis.⁶ He also found grievant sitting in the office; corrections officers had been instructed to stay on the floor, not in the office.⁷ This group of inmates had been assigned to cleaning duties in the housing unit. The sergeant instructed grievant to return the inmates to their cells because they were not working. The sergeant left the housing unit and went to Master Control. He then observed the surveillance camera for grievant's housing unit and observed that inmates were still not locked in their cells. He called the booth officer in grievant's building and asked why the inmates had not yet been locked down. The booth officer told the sergeant that he should speak with grievant.

The sergeant then called grievant on the radio and asked why the inmates had not been locked down. Grievant said, "If you have a problem or you don't like the way I'm running the building, you can run it yourself or take me out and put someone else in the building." The sergeant then directed another officer to relieve grievant and directed grievant to come to the OIC (officer-in-charge) office. The sergeant asked grievant what his problem was; grievant responded by repeating what he had said on the radio. The sergeant then directed grievant to return to his building. Grievant returned just as the 3:00 a.m. inmate count was about to begin.

¹ Exhibit 9. Written Notice, issued July 28, 2003.

² Exhibit 10. Second Resolution Step response, September 10, 2003.

³ Exhibit 10. Grievance Form A, filed August 25, 2003.

⁴ Exhibit 1. Sergeant's Internal Incident Report, July 14, 2003.

⁵ Exhibit 3. Inmate Behavior Rules, *Posted Institutional Rules and Regulations*, revised June 27, 2003, states, "No sitting, standing or swinging from rails or cell doors." See also Exhibit 7. *Security Post Order*, July 1, 2003, which lists as a specific duty, "Enforce all housing unit rules and regulations and ensure that inmates conform to those rules."

⁶ Exhibit 13. *Post Order Review Logs*, May 14, 2003 and July 4, 2003.

⁷ Exhibit 4. *Muster Minutes*, July 4, 2003.

Inmates assigned to cleaning duties utilize brooms, mops, buckets, sponges, and spray bottles that are kept in a mop closet. When finished with their cleaning tasks, inmates must return these items to the mop closet, empty the buckets, rinse the mops out, and check off the items returned. Two inmates took a quick shower before returning to their cells.

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.⁸

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.

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

Section V.B.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual Policy No. 1.60* provides that Group II offenses include acts and behavior which are more severe in nature than Group I offenses and are such that an accumulation of two Group II offenses normally should warrant removal from employment.⁹ 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 5-10.16 of the DOC Standards of Conduct addresses Group II offenses, which are defined identically to the DHRM Standards of Conduct.¹⁰

Grievant was disciplined for a statement he made to his sergeant. Grievant admitted under oath that he made the statement. The agency proffered the sergeant's written report, which corroborates grievant's admission.¹¹ There is no question but that grievant's statement was flagrantly insubordinate. When asked a reasonable question by a superior officer, an employee is obliged to respond in a reasonable manner. Grievant's response was flippant, suggesting that grievant might not comply with the sergeant's instruction. Moreover, grievant's response failed to show respect for the sergeant's position and authority, and was totally improper under the circumstances.¹² Therefore, the agency has borne the burden of proof to demonstrate, by a preponderance of evidence, that grievant was insubordinate to a superior officer.

The agency proffered the Muster Minutes for July 14, 2003 to demonstrate that grievant had been instructed to prohibit inmates from hanging on cell doors.¹³ However, the minutes for this date appear to be for the shift that began on the evening of July 14, 2003 – the shift following the one on which the incident occurred. The incident occurred at 2:45 a.m. on July 14, 2003 – during the shift that began on the evening of July 13, 2003. Thus, the muster minutes proffered demonstrate only that officers were reminded of the rule *after* the incident happened.

Much discussion during the hearing centered on the time frames involved in this incident. However, grievant acknowledged that the sequence of events occurred as stated in the Findings of Fact, *supra*. Therefore, the exact amount of time required for each facet of the event is moot.

Grievant also made much of the fact that he did, in fact, comply with the sergeant's instruction to return the inmates to their cells. The sergeant apparently felt that grievant could have locked down the inmates more quickly. Grievant defends the amount of time taken by pointing out that equipment and

⁹ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁰ Exhibit 11. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

¹¹ The sergeant was unable to testify because he has recently been recalled to active duty in the military.

¹² "Boldness, without the rules of propriety, becomes insubordination." – Confucius.

¹³ Exhibit 6. *Muster Minutes*, July 14, 2003.

supplies had to be returned to the mop closet, properly cleaned and stored, and accounted for. Further, some inmates took quick showers before returning to their cells. Thus, grievant correctly states that he did ultimately comply with the sergeant's instruction, albeit more slowly than the sergeant thought was necessary. However, while grievant did comply with the instruction to lock down the inmates, he was disciplined for his insubordinate statement – not for failing to follow instructions.

Grievant suggests that the Assistant Warden did not have authority to issue the disciplinary action and suspension.¹⁴ The current warden assumed his position in April 2003. The previous warden had delegated in writing to grievant the authority to issue disciplinary actions as long as the suspension did not exceed five working days.¹⁵ The current warden has not rescinded the authority granted by his predecessor. The current warden has verbally affirmed the delegation of authority. The warden testified during the hearing and did not disavow the assistant warden's disciplinary action. The warden's offer to reduce the level of discipline was based on grievant's relative inexperience as a corrections officer.

The Department of Corrections is different from most state agencies because it is essentially a paramilitary organization. Because of the need to protect public safety, lines of authority are clearly defined and the need to obey instructions is vital. Although grievant did, in fact, ultimately comply with the instruction, his insubordinate response to the sergeant's question was disrespectful and cannot be tolerated in a paramilitary setting. Insubordination is an offense that, if repeated, certainly warrants removal from employment – the definition of a Group II offense.

DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on July 28, 2003 for insubordination and the one-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.

¹⁴ Exhibit 8. Section 5-10.27.C, Procedure Number 5-10, *Standards of Conduct*, June 15, 2002 states: "Except as otherwise directed by the Director, Deputy Director or Regional Director/Administrator, any employee of an institution or other organizational unit may be removed, suspended, demoted or transferred within the unit with the written approval of the organizational unit head. Organizational Unit Heads may delegate, in writing, the authority to issue written notices and suspensions up to five days to other management and supervisory staff."

¹⁵ Exhibit 15. Memorandum from warden to assistant wardens, *Delegation of Authority to Conduct Employee Disciplinary Hearings*, January 31, 2002.

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.¹⁶ 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.¹⁷

[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

¹⁶ 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).

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

