

Issue: Group II Written Notice with suspension (failure to follow supervisor's instructions); Hearing Date: 05/28/04; Decision Issued: 06/01/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 715



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 715

Hearing Date: May 28, 2004
Decision Issued: June 1, 2004

PROCEDURAL HISTORY

On January 12, 2004, Grievant was issued a Group II Written Notice of disciplinary action with sixteen hours suspension¹ for:

On November 16, 2003, while assigned to Housing Unit 3, you approached an inmate in an aggressive and threatening manner. This would normally be grounds for a Group II Written Notice, physical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of offenders. Such an offense could warrant termination of employment. However, after much deliberation, I have opted for a Group II Written Notice for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy and I am suspending you for 16 hours.

On February 17, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 3, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 28, 2004, a hearing was held at the Agency's regional office.

¹ During the grievance step-process, the Agency removed the suspension.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for failure to follow supervisor's instructions,

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. 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 employs Grievant as a Correctional Officer Senior at one of its Facilities. On July 31, 2000, Grievant received a Group III Written Notice with demotion to Corrections Officer Senior for criminal conviction for acts of conduct occurring on or off the job which were plainly related to job performance. On November 22, 2002, Grievant received a Group II Written Notice with suspension for inappropriately pointing a gun at an inmate.²

On November 16, 2003, the Control Room Officer called the Sergeant and told him that he needed to come to the floor because "something was getting ready to happen." The Sergeant quickly left his office and went to the housing pod. From the pod door, the Sergeant observed Grievant standing within a few inches of an inmate and "in his face" arguing with the inmate. The inmate was backing up with his hands in the air as Grievant moved forward. This interaction began several minutes before the Sergeant arrived at the pod. The conflict began after Grievant instructed the inmate to

² Agency Exhibit 5.

take a shower but the inmate wished to take his shower later on. The inmate began arguing with Grievant and told Grievant he would not comply with those instructions. Grievant began telling the inmate he needed to comply and explaining to him the consequences to him if he failed to comply.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

“Inadequate or unsatisfactory job performance” is a Group I offense.³ In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant is responsible for providing security at one of the Agency’s correctional facilities. The manner in which he interacts with inmates governs his job performance. When a correctional officer is overly aggressive with an inmate, the inmate may “lose control” thereby transforming a minor argument with a correctional officer into a major disturbance among inmates within the facility. Grievant was overly aggressive because he confronted the inmate by “getting in the face” of the inmate and forcing the inmate to walk backwards. Grievant’s actions amount to unsatisfactory job performance justifying issuance of a Group I Written Notice.

The Agency contends Grievant’s behavior rises to the level of a Group II Written Notice. This argument fails because no credible evidence was presented showing Grievant violated any written policy, acted contrary to any specific instruction from a supervisor, or refused to perform assigned work. Grievant was performing his assigned work; he simply performed it inadequately.

Grievant contends he did not act aggressively towards the inmate. He contends he was simply talking to the inmate and trying to calm him down by remaining calm and respectful in his demeanor towards the inmate. The standard of evidence in this case is to establish an offense occurred by a preponderance of the evidence. It is not necessary for the Agency to show evidence beyond a reasonable doubt as to Grievant’s unsatisfactory job performance. Based on the preponderance of evidence standard, the

³ DOCPM § 5-10.15(B)(4).

Agency has met its burden of proof by presenting credible testimony from the Sergeant with supporting incident reports.

Grievant contends the Sergeant was attempting to get even with Grievant because of Grievant's conflicts with a co-worker who the Sergeant favored. The Sergeant's testimony was credible. There is insufficient evidence of any conflict that would justify the Sergeant misstating what he observed. The Control Booth Officer corroborated part of the Sergeant's testimony when she wrote in an Incident Report, "[Grievant] walked towards the inmate and the inmate was backing up, this little charade lasted for 5 to 6 minutes, I called [Sergeant] to advise what was going on."⁴

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

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.

⁴ Agency Exhibit 4.

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.⁵

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.