

Issue: Group III Written Notice with demotion and salary reduction (failure to provide professional competent leadership); Hearing Date: 12/21/04; Decision Issued: 01/31/05; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 7936



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7936

Hearing Date: December 21, 2004
Decision Issued: January 31, 2005

PROCEDURAL HISTORY

On October 13, 2004, Grievant was issued a Group III Written Notice of disciplinary action with demotion and salary reduction for:

As related to the incident that occurred on 6/17/04 in HD300, your conduct was inconsistent with Department Policies – IOP/SOP 218 "Use of Physical Force". You failed to provide professional and competent leadership and failed to ensure that all staff involved provided complete, accurate, and consistent information related to the incident.

On October 13, 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 November 29, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 21, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative

Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with demotion and salary reduction for failing to provide professional competent leadership.

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 Juvenile Justice employed Grievant as a Lieutenant until his demotion to a Security Officer IV with salary reduction. The Position Objective of a Corrections Lieutenant is:

Manages and controls shift and ensures a high level of security at all times to ensure the safety and security of offenders, staff and the general public.

He had been working for the Agency for approximately seven years and had been serving as a Lieutenant for approximately three months. No evidence of prior disciplinary action was introduced at the hearing.

Security officers received training to enable them to deescalate conflicts with wards. Following a conflict, security personnel should limit their contact with a Ward for up to four hours so that the Ward may calm down. The four hour period may be extended to eight hours, if necessary.

On June 17, 2004, Grievant was working as the Shift Commander. He was in charge of security at the facility. Several wards residing in a housing unit objected when they were told to go to their rooms for the night by the Control Room Officer. Ward A lead two other wards in throwing chairs. The Control Room Officer called on her radio for assistance. At least four security staff responded to the housing unit. Ward A and two other wards went back into their room and the door was locked preventing them from leaving.

Grievant arrived after the wards had been returned to their room. After speaking with the Control Room Officer to find out what had occurred, he decided to remove Ward A and place him in the Behavior Management Unit which is an isolated cell. Several officers approach Ward A's room and attempted to persuade him to come out.¹ Ward A refused. As the room door was opened, a struggle followed. Corrections Officer F was punched in the chest. Corrections Officer S was pushed to his knees but not seriously hurt. Ward A was taken to the ground and placed in handcuffs. As a corrections officer attempted to hold the room door closed while the two other wards inside the room were pushing outward, the Control Room Officer rushed to the door to assist. Ward A was moved to the Behavior Management Unit.

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." DHRM § 1.60(V)(B).² 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." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

DHRM § 1.60(V) lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section."

Before a ward may be placed in the Behavior Management Unit, administrative segregation or pre-detention forms connected to a charge must be filed against the Ward. Only the Administrator On Call can authorize placing a ward in the Behavior Management Unit. Grievant failed to seek approval prior to placing Ward A in the Behavior Management Unit.

As Shift Commander, Grievant was subject to Security Post Order 2 which requires that in the event of a disturbance by wards, Grievant should:

¹ 10 minutes had passed since Ward A had returned to his room and the door was locked.

² The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

Respond to ward disturbances as necessary and requested by officers and Sergeants. Ensure appropriate documentation and medical attention as necessary.

Notify Administrator on Call of all incidents which meet the criteria for Serious Incidence.³

Grievant did not notify the Administrator on Call of the disturbance. His actions were contrary to Post Order 2.

The Agency argues that Grievant should have left Ward A in his room to deescalate. Because Grievant chose to remove Ward A immediately, the conflict was revived rather than deescalate. Consequently, several correctional officers were injured unnecessarily. When the facts in this case are considered as a whole, the Agency has presented sufficient evidence to support its issuance of a Group III Written notice with demotion.

Grievant contends that under IOP 209, the key participants in a riot or major disturbance should be isolated. Grievant argues that by moving Ward A to the Behavior Management Unit, Grievant was complying with IOP 209. Grievant's argument fails because once Ward A had returned to his room and the door was locked, any prior riot or major disturbance had ended. By removing Ward A from his room without giving Ward A time to deescalate, Grievant revived a major disturbance.

The Agency contends that Grievant failed to properly complete the Serious Incident Report and other related documents. The evidence is insufficient to support this conclusion. Grievant prepared reports based on the information available to him at the time. He did not intentionally misrepresent or omit any facts. The Agency's inability to establish Grievant's failure to complete necessary forms, does not affect the outcome of this case.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion and salary reduction is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

³ Agency Exhibits 9.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.