Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 02/25/05; Decision Issued: 02/28/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 7986

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7986

Hearing Date: February 25, 2005
Decision Issued: February 28, 2005

PROCEDURAL ISSUE

Grievant requested as part of the relief he seeks that the Warden and Assistant Warden issue written apologies for comments made to grievant. Grievant also requested that he be reassigned to day shift. A hearing officer does not have authority to direct anyone to issue a written apology, or to direct an agency how to best utilize its employees.[1] Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Two witnesses for Grievant

[1] § 5.9(b)6, 7, & 8. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.

Warden
Advocate for Agency
Four 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? Did the agency retaliate, discriminate, or inconsistently apply policy?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group I Written Notice issued for unsatisfactory job performance.[2] As a result of the disciplinary action, the warden removed grievant from his assignments as Assistant Training Officer and as a member of the institution's Strike Force. After 45 days, grievant was reassigned from day shift to night shift. 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") employed grievant for nine years; he is a Security Officer IV (Sergeant).[4] Grievant has an inactive disciplinary action for conduct unbecoming a corrections officer.[5]

At the time of the incident addressed herein, grievant had been the Assistant Training Officer. This assignment does not involve any extra salary or benefits. Grievant was also a member of the 15-person Strike Force.[6] This assignment also does not include any extra salary or benefits. The Post Order for the Assistant Training Officer requires that he conduct himself towards others in a professional manner at all times.[7] A condition of employment for all security employees requires them to work any shift, weekends and holidays as institutional needs dictate.[8]

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[2] Exhibit 1. *Written Notice*, issued July 9, 2004.
[3] Exhibit 1. *Grievance Form A*, filed July 19, 2004.
[4] Exhibit 8. *Employee Work Profile Work Description*, November, 2003.
[5] Exhibit 9. Group II *Written Notice*, issued December 10, 1998.
[6] Each corrections center has a Strike Force, which is utilized to respond to emergency crisis situations and could involve the use of weapons and the application of lethal force. Members of the Strike Force are selected by the Warden with input from the Chief of Security. The warden's policy is to select the best employees who have no performance or disciplinary problems. She does not allow on the Strike Force any employee who has an active disciplinary action.
[7] Exhibit 7. *Post Order # 80*, November 16, 2004.
[8] Exhibit 10. *Conditions of Employment*, signed by grievant March 11, 1996.

As the Assistant Training Officer, grievant conducted training classes for new employees. In June 2004, grievant had a class of five students (three male and two female) who were from his facility and two other corrections centers in the region. During the first two days of training class, grievant had observed a female student doodling at her desk, playing with training aids, being inattentive during class, and sometimes returning late from break. On the third day, June 10, 2004, grievant found it necessary to speak to the female student and told her that she "needed to go home and get some from her husband to improve her attitude."[9] Grievant made this statement in front of the entire class. The following day during break, grievant asked the female student "Did you get some from your husband?"[10] A male student in the class corroborated the latter statement.[11] The other female student corroborated both of grievant's statements.

During the same week, grievant had reassigned seating in the classroom for both female employees. When he changed the seating again, he told the second female employee to "get your butt over there."[12]

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

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9 Exhibit 2. Internal Incident Report, June 10, 2004.
10 Exhibit 4. Memorandum from Major to Assistant Warden re: female employee, June 15, 2004.
11 Exhibit 3. *Internal Incident Report*, June 18, 2004.
12 Exhibit 4. Memorandum from Chief of Security to Assistant Warden re: grievant, June 15, 2004.

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. In all other actions, such as misapplication of policy, discrimination, and retaliation, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[13]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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.

Section V.B.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group I offenses include acts and behavior of the least serious nature.[14] 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 5-10.15 of the DOC Standards of Conduct addresses Group I offenses, which are defined almost identically to the DHRM Standards of Conduct.[15] Unsatisfactory job performance is an example of a Group I offense.

The agency has shown, by a preponderance of evidence, that grievant made an inappropriate suggestion to a female student that she should have sexual intercourse with her husband in order to improve her attitude. During the hearing, grievant acknowledged that he had told the student that she should "get some" from her husband. Such a suggestion from a male training sergeant to a newly hired female officer is clearly inappropriate and constitutes unsatisfactory work performance – a Group I offense.

Grievant attempts to justify his comments to the female on the basis that he had walked into the classroom at the end of a break and heard the female talking with classmates about what "appeared to be a topic with possible sexual overtones."[16] When the female saw grievant enter, she became "very embarrassed" and the conversation abruptly ended. Grievant concluded that if

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[13] § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[14] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[15] Exhibit 11. Procedure Number 5-10*, Standards of Conduct,* June 15, 2002.
[16] Exhibit 5. Grievant's *Internal Incident Report*, June 18, 2004.

the female was willing to discuss topics with possible sexual overtones, he had justification to make a statement to her suggesting that she should have sexual intercourse with her husband. Grievant's argument is not persuasive. First, grievant's characterization of the female's conversation is very tentative, stating only that it *appeared* to be a topic with *possible* sexual *overtones*. Grievant does not state unconditionally that the discussion was about sexual issues. Second, even if the conversation was what grievant believed it to be, that does not give him carte blanche to tell a new employee how she should manage her personal sexual life. Third, grievant recognized that the female was embarrassed that he had overheard her conversation; it is only logical that she would be even more embarrassed to have him tell her in front of a class that she should have sexual intercourse with her husband.

In his Internal Incident Report, grievant did not acknowledge telling the female to go and "get some from your husband." Grievant stated instead that he told her only that she needed to go home and get happy, cheery, cheered up and come back in a better mood. However, during his sworn testimony, grievant specifically used the words "get some" in describing what he had told the student. While grievant's candor during the hearing demonstrates a willingness to now come clean, his incident report reflects an attempt to obfuscate the truth.

Grievant claimed that aspects of his personal life[17] had been putting him under stress and suggested that these stressors should be considered as mitigating circumstances. Most employees have stressors in their personal lives at one time or another. While an employer can attempt to accommodate such temporary situations, and while the stressors may be a partial explanation for unusual behavior, an employee must not allow such stressors to affect work to the extent that he behaves inappropriately. If one's personal life is so stressful that it affects work, the employee should seek family medical leave, a leave of absence, or some other accommodation that would give him time to address his personal situation.

Grievant contends, without presenting any corroborating documentation, that verbal sexual harassment is the least severe form of sexual harassment. Even if grievant's contention is correct, the fact is that *any* sexual harassment, including verbal harassment, is unacceptable and therefore constitutes unsatisfactory work performance.

Grievant offered the testimony of two witnesses who had been disciplined (one in 1997 and the other in 1999) but had been allowed to remain on the Strike Force while their disciplinary actions were active. However, the current warden[18]

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[17] Grievant separated from his wife in December 2002; he served in the military and returned from Iraq in November 2003; he has had to postpone a wedding to his fiancée because his divorce is not yet final; and, he moved into a new residence in 2004.

[18] The current warden assumed her position in an acting capacity in 2002 and was made permanent warden in 2003.

has consistently maintained a policy that anyone on the Strike Force who is disciplined will be removed from the Strike Force, and that no one with an active disciplinary action is appointed to the Force.

Grievant alleges that the agency has applied policy inconsistently. However, he has offered no documentation or witnesses to verify the allegation. The agency has shown that it has applied discipline consistently, and that the warden's consistent policy is not to allow anyone on the Strike Force who has an active disciplinary action. Accordingly, grievant has not borne the burden of proof to show that the agency applied policy inconsistently.

Grievant contends that his punishment was too severe. Grievant's conduct constituted a Group I offense. Therefore, a Group I Written Notice is not too severe, and in fact, is the appropriate level of discipline for a Group I offense. However, grievant appears more concerned about the fact that he was relieved of his responsibilities as Training Officer and as a member of the Strike Force. Both of these responsibilities do not include any extra rank, salary, or other tangible benefits. The agency has offered reasonable business reasons for assigning these responsibilities to others. The warden reasonably concluded that grievant's suggestions to the female student were a negative reflection on the facility and that grievant could not be trusted not to behave in a similar fashion again. She felt that a training officer should be a role model of behavior and that grievant's conduct was contrary to being such a role model. The warden removed grievant from the Strike Force because she has consistently applied a policy for two years that prohibits officers with active disciplinary actions from being on the Force.

As grievant notes, neither his removal from the Strike Force nor his removal as Assistant Training Officer were made a formal part of the Written Notice. They were direct consequences of the disciplinary action because of the warden's policies. Moreover, grievant has not shown that reassignment of these responsibilities to others has adversely affected him. Grievant retains the same rank, salary and benefits as before. Grievant knew, or reasonably should have known, that the job duties he performed carried with them the responsibility to set an appropriate example to others. When grievant failed to set an appropriate example, he could reasonably expect that the agency might not want him to continue performing those duties. Therefore, it is concluded that grievant's discipline was not too severe for the circumstances.

Grievant contends that the agency violated his confidentiality because others were present when his supervisor counseled him. He mentioned the Employee Handbook as authority for his contention but he did not provide either a copy of the Handbook or cite a section of Handbook. In fact, the Employee Handbook addresses the disciplinary process on page 27 but makes no mention

of how a counseling session should be conducted.[19] In any case, grievant acknowledged during the hearing that the meetings to which he referred were not counseling but were, in fact, meetings conducted as part of the investigation in this case.

Grievant argues that mitigating circumstances (the stressors in grievant's personal life) were not considered. The agency stated that it had considered these circumstances but concluded that they could not serve to mitigate grievant's actions. When an agency *considers* such circumstances, it means only that the agency evaluates those circumstances, along with the nature of the offense and any aggravating circumstances before deciding on the appropriate level of discipline. As one might expect, agencies and grievants are not always in agreement about the weight to be given to possible mitigating circumstances.

Grievant argues that he was discriminated against. In fact, under examination, grievant acknowledged that he was not alleging discrimination on the basis of any protected classification such as race, age or gender. Rather he used the word discrimination to mean that he had been treated unfairly.

Finally, grievant suggests that he was subjected to retaliation. First, he claims that the female employee retaliated against him because she did not like grievant's classroom seating and reading assignments. While it is possible that the female's complaint was partially motivated by retaliation, the fact is that her specific complaint of inappropriate comments has been substantiated and proven by a preponderance of evidence. Second, grievant suggests that the agency retaliated against him because he had offered constructive criticism of two programs in which the agency is engaged (Community Service and Pacesetter). However, the warden offered unrebutted testimony that all employees have been encouraged to offer comments about the programs. Some have been favorable and some have been unfavorable but grievant's feelings about the programs were not a basis for his disciplinary action.

DECISION

The decision of the agency is affirmed.

The Group I Written Notice issued on July 9, 2004 is hereby 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:

[19] Employee Handbook, July 7, 2004 [NOTE: The current version of the Employee Handbook is now available only online at www.dhrm.state.va.us/resources/manuals.html.]

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. Address your request to:

> Director
> Department of Human Resource Management
> 101 N 14th St, 12th floor
> Richmond, VA 23219

3. If you believe 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. Address your request to:

> Director
> Department of Employment Dispute Resolution
> 830 E Main St, Suite 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.[20] 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.[21]

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[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).

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

[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]

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David J. Latham, Esq.
Hearing Officer