

Issue: Group II Written Notice with separation (making inappropriate comments to staff); Hearing Date: 03/17/05; Decision Issued: 03/24/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8010



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8010

Hearing Date: March 17, 2005
Decision Issued: March 24, 2005

PROCEDURAL HISTORY

On December 17, 2004, Grievant was issued a Group II Written Notice of disciplinary action with suspension from December 20, 2004 through December 27, 2004 for:

On October 27, 2004, you addressed the morning muster of security staff using profanity and demeaning female staff. The comments made showed a lack of respect for staff, are contrary to the values and Vision of the Department, undermine your ability to manage the facility, and undermine staff morale.

On December 29, 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 February 15, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 17, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with five workday suspension for making inappropriate comments to subordinate staff.

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 Warden at one of its Facilities. The Facility houses some of the most dangerous felons in the Commonwealth. The purpose of his position is to:

Plan, organize, and direct the operation of a major maximum-security prison providing comprehensive secure confinement, and other programs by setting policy and ensuring adherence to policies and procedures for the most difficult inmates in the Virginia Prison System.¹

Grievant reports to the Regional Director. Grievant began working for the Agency in 1999. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

“Dirty staff” are employees who bring contraband into the Facility to sell or distribute to inmates. They are also female officers who fraternize with inmates. Some of the Facility’s employees were dirty staff. On October 26, 2004, the Warden received evidence confirming that a female security officer had been sending romantic letters to

¹ Agency Exhibit 5.

an inmate. She was removed from the Facility. Another male officer was suspected of bringing contraband into the Facility. The Warden had difficulty catching the male officer.

On October 27, 2004 at approximately 5:45 a.m., Grievant met with approximately 36 to 40 security staff during their morning muster. He expressed his displeasure with "dirty staff" at the Facility and indicated that employees should not let dirty staff remain at the Facility because having dirty staff inside the Facility could result in having security staff killed. In order to emphasize his point, Grievant stated, "I am tired of all you skinny ass bitches and whores coming up into my institution and having relations with these convicts." He added, "Not only will I catch you, I will choke you if you decided to engage with any inmate in my institution." Grievant repeated these remarks three or four more times before concluding. Grievant was expressing anger when he made his comments.

At least half of the security staff on the shift were female.² None of the female in the muster were suspected of fraternizing with inmates. Officer S was suspected of being dirty staff and he was present during the muster when Grievant spoke. He was suspected of bringing drugs into the Facility.

Grievant realized his remarks were inappropriate and called the Regional Director. Without giving details, Grievant told the Regional Director that he had made inappropriate comments in muster. The Regional Director responded that Grievant "should take care of it." On October 30, 2004, Grievant went to the security shift muster and apologized for his comments.

Several employees at the muster were union members and they reported their concerns to a Lieutenant at another Facility. The Lieutenant notified the Agency of Grievant's comments. The Agency also received an anonymous "hotline" telephone call informing the Agency of Grievant's comments.

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.

DOCPM § 5-10.7(C) states, "The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the

² One member of the muster testified that approximately 70 percent of the staff at muster were female.

agency head, although not listed in the procedure, undermines the effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of this procedure."

In the Agency's judgment, a Warden who speaks to a muster and refers to catching and choking skinny assed bitches and whores should received a Group II Written Notice with five work day suspension. The Warden is the leader of the Facility. He sets the tone and example for other staff at the Facility to follow. Grievant's comments were offensive references to women. Grievant's assertion that he would choke dirty staff was inappropriate. The Agency's concern that Grievant's subordinates might mimic his behavior or attitude is legitimate. Grievant's behavior is such that if he were to repeat that behavior, it would warrant removal. Accordingly, the Agency has presented sufficient evidence to support its issuance of a Group II Written Notice. A suspension of up to ten workdays for a Group II Written Notice is permitted under the Standards of Conduct. Grievant's five workday suspension is within the appropriate range.

Grievant contends that the Agency's discipline against him is not appropriate because the source of the compliant against him were union members anxious to undermine him. Grievant asserts that the union had a vendetta against him because he denied the union use of a conference room at the institution. No credible evidence was presented showing the Agency's level of discipline depended on the source of the complaint.

Grievant presented testimony of some of the employees at the muster who did not find Grievant's comments offense. One employee at the muster testified, however, that she believed a majority of the employees at the muster were offended by Grievant's comments. Whether some staff were offended is a consideration, but it is not the only consideration when determining the justification for taking disciplinary action. The Facility can be a harsh and difficult place, but it remains a work place for employees. Grievant's comments must be judged in the context of the work place, the Agency's performance expectations for a Warden as well as the reaction of corrections officers in the muster. Given that none of the female staff at the muster were dirty staff, it is likely that several of the female staff were offended by Grievant's reference to catching and choking "you skinny ass bitches and whores."³ Those corrections officers who supported the Warden's comments were supporting the point he was making, namely, that the Facility would not tolerate dirty staff. They were not supporting the Warden's particular choice of words. The Warden could have made his point using non-offensive words.⁴

³ The one dirty staff was male. Comments about bitches and whores are directed at females and would not apply to a male employee.

⁴ Grievant adds that profanity is commonplace in a correctional institution. Grievant's offensive behavior is not merely the use of profanity, but the use of profanity along with a threat directed at subordinate staff and in the context of expressing anger.

Grievant argues the Agency's disciplinary action against him is motivated by the Regional Director's dislike of Grievant and as an attempt to undermine and retaliate against Grievant. Grievant's evidence of alleged retaliation included a 2003 investigation of Grievant where the investigator concluded Grievant created an offensive work environment and had engaged in verbal abuse. The investigation was initiated after a corrections lieutenant filed a grievance against Grievant. Upon receiving the lieutenant's grievance, the Regional Director assigned the matter to an investigator without first attempting to influence the investigator's findings. After interviewing numerous employees, the investigator submitted her recommendation to the Regional Director. Despite the investigator's negative finding, the Regional Director took no disciplinary action against Grievant. Based on the evidence presented, there is no reason to believe the Regional Director used the 2003 investigation of Grievant to retaliate against Grievant. Indeed, it appears the Regional Director did not initiate disciplinary action against Grievant despite having a report that might form a basis for taking action against Grievant.

Grievant objects to being suspended over the Christmas holiday and not being able to obtain personal items from his office. He views this as evidence of retaliation. DOCPM § 5-10.24(A) provides that "Employees who are suspended from work normally shall not be allowed on agency premises" Suspension usually takes place immediately upon issuance of disciplinary action.⁵ The Agency did not retaliate against Grievant for suspending him over the Christmas holiday and preventing him from removing his personal items.

Grievant asserts the Regional Director has been attempting to undermine his authority for at least two years. Grievant's October 20, 2004 evaluation, however, reveals that the Regional Director has a favorable opinion of Grievant. Grievant received an overall rating of "Exceeds Contributor." The Regional Director wrote:

[Grievant] does a very good job of managing the affairs of [the Facility]. Staff morale is very good and the facility is managed in a sanitary and efficient manner.⁶

The Deputy Director for Operations reviewed Grievant's evaluation and wrote, "Another great year. Thank you." The comments of the Regional Director and Deputy Director are not the words of individuals attempting to undermine Grievant and hoping he will fail.

Grievant contends the Agency has taken inconsistent disciplinary action. He presented evidence of employees engaging in more serious behavior yet receiving "light" treatment by the Regional Director. What Grievant has failed to do is present examples of disciplinary for similarly situated employees such a Facility managers or

⁵ See, DOCPM § 5-10.22(D).

⁶ Agency Exhibit 5.

Agency managers who have engaged in similar behavior to Grievant's behavior and shown that the Agency has disciplined those other employees less severely.⁷ Without such evidence, the Hearing Officer cannot conclude that the Agency has inconsistently disciplined its employees.

As a warden at a maximum security prison, Grievant holds one of the most difficult positions in the Commonwealth. He correctly described his workplace as a "battlefield." Grievant's normal job duties are stressful. Not many individuals can function as successfully as has Grievant. The Agency's expectations of Grievant are set at a high level. Even the best of employees can make a mistake. On October 27, 2004, Grievant made a mistake when speaking to his subordinates. The Agency's expectation that Grievant not repeat such a mistake is understandable.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension 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:

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

⁷ Grievant presented evidence of offensive jokes being told at a meeting of managers. He asserts that no disciplinary action was taken. It is unclear what action has been taken or if the Agency's investigation is completed. Insufficient facts were presented to enable the Hearing Officer to determine whether the Agency is inconsistently disciplining its managers.

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.