

Issue: Group III Written Notice with demotion and salary reduction (excessive use of force); Hearing Date: 04/18/05; Decision Issued: 04/21/05; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 8024



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8024

Hearing Date: April 18, 2005
Decision Issued: April 21, 2005

PROCEDURAL HISTORY

On January 7, 2005, Grievant was issued a Group III Written Notice of disciplinary action with demotion and ten percent salary reduction for:

By virtue of your inaction, you authorized the manner in which the ward was handled during the incident of 11/1/04 in violation of SOP 218 "Use of Force." You also violated 05-009.2 "Staff Code of Conduct" in that you provided false or misleading information to an investigator during the investigation of the 11/1/04 incident.

On January 28, 2005, 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 she requested a hearing. On March 15, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 18, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel

Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action for permitting unauthorized use of force on a Ward and providing false or misleading information to an investigator.

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 Corrections Sergeant until she was demoted to a Corrections Officer on January 7, 2005. The Position Objective of a Corrections Sergeant is:

To ensure the protection of the citizens of the Commonwealth by effectively supervising the staff and juveniles involved in the facility's security and treatment program so as to support the overall facility efforts to provide rehabilitative opportunities for juvenile offenders; and by maintaining a safe, orderly, and secure environment in assigned areas. To coordinate these services and programs for assigned unit/area.

Grievant is expected to utilize physical force against wards only as a last resort and in accordance with the Handle With Care Behavior Management System. The Agency devotes substantial time and resources to making sure its security personnel are familiar with how to use physical force. Grievant has received the Agency's training and is knowledgeable regarding Handle With Care standards.

Wards¹ live in rooms surrounding an open living area. This housing unit is known as a pod. In order to exit the pod, one must walk through a door and into a short

¹ Wards are also referred to as cadets.

and narrow hall called a sally port. The sally port has a door opening into the housing control room area. This is an open area with a housing control booth in the middle. A long hallway connects the housing control room area with the master control booth and other portions of the building.

The Agency uses video cameras that take a series of still pictures. Pictures are taken with a short time between the pictures. Two cameras are located in the housing pod. Another camera is located in the middle of the long hallway and aimed towards the housing control area. Because of the camera angle, the camera only shows approximately one foot of the bottom of the door opening into the long hallway. When viewed as a whole, the video presented as evidence shows employee movement but does not accurately depict all of the events that occurred within the view of the cameras. The video also lacks clarity such that the faces of the employees involved cannot be determined without witness testimony. Distances are also difficult to determine from the video.

Wards are not permitted to wear shoes on the pod because doing so enables them to have a better grip on the floor if Wards get into fights. Thus, the Agency requires Wards to wear slippers.

The Ward is a 17 ½-year-old male who is 5'7" and weighs 160 lbs.² He had been convicted of burglary and grand larceny. His intake data sheet shows prior offenses of "Threatening School Personnel, [assault and battery] on School Personnel, disorderly Conduct."³ He resides in the maximum security portion of the Facility. His room and the rooms of other Wards form a living area known as pod A400.

On November 1, 2004, the Ward entered the pod wearing shoes. Officer S⁴ instructed the Ward to return to his room and obtain slippers. The Ward refused to do so and began arguing with Officer S. At some point, the Ward was inside his room but sticking his arm outside the door to block closure of the door. Officer S was standing outside the door trying to get the Ward to stop blocking the door so that it could be closed. The Ward was pushing the door to get out and had an arm outside the door while the rest of his body was inside the room. Officer S called for Master Control staff to look at a camera located in the pod. The Ward pushed his way out of the room. Lt. J, Sgt. J, and Sgt. R began running to the pod to assist Officer S. The Ward was sitting down in the pod living area. Sgt. LB arrived at the pod along with the others.

Once inside the pod, the security staff were able to calm down the Ward. Lt. J told the Ward he could not wear shoes on the pod. The Ward said he did not have any slippers. Sgt. J said he would go to a nearby office and obtain an extra pair of slippers for the Ward. Several security personnel escorted the Ward back to his room. The

² The Ward did not testify at the hearing.

³ Grievant Exhibit 2.

⁴ Officer S remains employed by the Agency but he did not testify at the hearing.

Ward became very aggressive. He continued to refuse to remove his shoes. As the security staff were leaving the Ward's room, Officer B yelled to Officer TB⁵, "watch out". The Ward lunged towards Officer TB and hit the left side of Officer TB's face. Officer B forced the Ward down to the bed. Security staff reentered the room and attempted to restrain the Ward. The Ward was yelling "ya'll can't hold me." Lt. J got out her handcuffs. Officer B held the Ward's left arm while Lt. J handcuffed the Ward's left wrist. Sgt. R grabbed the Ward's right arm and was trying to position it so that Lt. J could place handcuffs on the Ward's other arm. Lt. J then felt Officer TB "coming over her back" towards the Ward. Lt. J yelled "somebody get [Officer TB] out of here." Lt. J focused on getting the Ward into handcuffs and eventually had the Ward handcuffed with his arms behind his back. Sgt. LB was standing near the room doorway but he did not observe Officer TB punch the Ward, but he did hear Lt. J directing Officer TB to leave the room. Officer TB left the Ward's room.

Officer B escorted the Ward out of the room and onto the pod living area. The Ward kicked a plastic trash can as he exited his room. The Ward spit in the direction of Grievant who was standing in the pod living area. Officer B took the Ward to a desk in the middle of the pod and placed him face down on the desk until the Ward calmed down. Officer B then raised the Ward and proceeded to move him toward the door between the pod and the sally port. As the door to the sally port was opened, the Ward observed Officer TB and spit on Officer TB. Officer TB lunged towards the Ward. Lt. J, Sgt. LB, and Officer B lunged toward Officer TB in order to prevent him from reaching the Ward. The three staff attempted to restrain Officer TB and all four of them fell to the floor in the sally port.⁶ The Ward was pushed forward and fell to the floor in the sally port near the door opening from the sally port to the housing unit control area. Officer TB was not able to reach or hit the Ward because the other security officers were able to restrain him.

During the struggle, the Ward fell to the sally port floor near the door between the sally port and the housing unit control area. Sgt. J and Sgt. R remained standing in sally port. They quickly reacted by attempting to remove the Ward from the sally port. Sgt. R told the Ward to stand up. The Ward replied, "No, f—k you, carry me!" Sgt. J reached under one and Sgt. R reached under the other of the Ward's arm pits. They pulled the Ward up and moved him from the sally port into the housing control room area. They positioned the Ward so that he would be facing downward because the Ward continued to spit and the sergeants did not want to be spit on. Sgt. J and Sgt. R had to wait for the door from the housing control room area into the long hallway to be opened. They held the Ward up while they waited as the Ward continued to refuse to stand. Once the door opened, Sgt. J and Sgt. R took the Ward down the hallway. Because of the Ward's weight, his dragging his feet, and his continuing attempts to spit on Sgt. J and Sgt. R, the two sergeants' grip slipped from under the Ward's arm pits to near his wrists which remained handcuffed.

⁵ Officer TB was not employed by the Agency at the time of the hearing. He did not testify.

⁶ Sgt. LB had a tooth knocked out during the struggle.

Lt. J exited the sally port and entered the housing unit control area. She waited for the door to the long hall to be unlocked and opened by an officer in a control booth. Once the door opened she passed through it into the long hall. The door closed and locked behind her.

Grievant had been in the pod living area while the security personnel attempted to restrain Officer TB. She entered the sally port not knowing what had happened but she observed Officer B on the floor complaining about his ankle. She also observed Officer TB bent over but resting against the wall. She asked Officer B if he was able to walk but Officer B did not respond. Grievant became concerned about the two officers and she wanted to find Lt. J. Grievant exited the sally port into the housing unit control area. She waited until the door to the long hall was unlocked and opened by the control booth officer and then entered the long hall. Grievant called to Lt. J. Lt. J was moving down the hallway towards Sgt. R and Sgt. J who were carrying the Ward. Lt. J turned towards Grievant and Grievant told Lt. J that there were injured officers back in the sally port. Lt. J listened to Grievant and then turned back towards Sgt. J and Sgt. R and said words to the effect of “no, don’t drag him” referring to the Ward.

Lt. J began walking towards Sgt. R and Sgt. J and caught up with them. Grievant followed Lt. J. Lt. J. again instructed Sgt. R and Sgt. J to pick up the Ward. Sgt. R and Sgt. J held the Ward up against the wall. At that time, the Ward decided he would walk. Sgt. R and Sgt. J then escorted the Ward to the observation area which was out of the camera’s view. The Ward was placed in soft restraints.

The Ward later complained about his treatment by the security staff. Portions of his story were untrue. The Officer of Inspector General began an investigation. During that investigation the Investigator asked questions of each person involved in the incident and then wrote a report to Agency managers.

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).⁷ 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).

⁷ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

The Agency took disciplinary action against Grievant in part because “*by virtue of your inaction, you authorized the manner in which the ward was handled....*” This allegation is not supported by the evidence.

Grievant did not hold the Ward or instruct how the Ward should be held or carried. Grievant did not observe Sgt. R and Sgt. J nor notice they were improperly holding the Ward until after Lt. J had already instructed Sgt. R and Sgt. J not to drag the Ward. Lt. J was the highest ranking officer. Since Lt. J already was addressing the problem, it would have been unnecessary for Grievant to yell at the two sergeants carrying the Ward. Had Grievant begun issuing orders to the two sergeants, she may have undermined improperly the authority of Lt. J.

The Agency took disciplinary action against Grievant in part because she “*provided false or misleading information to an investigator during the investigation of the 11/104 incident.*” This allegation is unsupported by the evidence.

During the interview, the Investigator asked Grievant to describe her observations and involvement with the restraint of the Ward. The Investigator did not ask specific questions. After the Investigator interviewed Grievant, he drafted her comments in his report.

Grievant provided most of the material facts involving the events being investigated. Her comments included:

- When she arrived at the unit, she described several officers being present in the cadet’s room and she could not see the cadet.
- When the cadet was brought out of the room and they enter the salleyport, ‘you see all this commotion’ and when she gets to the area and can see what is occurring [Grievant] identifies [Officer B] on the floor stating he is hurt and [Officer TB] holding his face.
- She exited the housing unit attempting to get [Lt. J’s] attention to inform her of the officer’s injured condition.
- She entered the hallway and caught up to [Lt. J]
- She does recall hearing [Lt. J] say ‘don’t drag him’ but [Grievant] continued to state that she did not see that occur.

The Agency has not identified any significant facts which Grievant failed to report or facts which she intentionally reported incorrectly in order to deceive the Investigator.

If the Agency believes that Officer TB hit the Ward, the Agency has not presented sufficient evidence to establish that point. None of the witnesses who testified, observed Officer TB hit the Ward. No credible evidence was presented to show that the security personnel conspired to protect Officer TB from being disciplined. Many of the security personnel worked the prior shift. Immediately after the incident, several officers wrote their incident reports and left the Facility.⁸

⁸ For example, Sgt. J and Sgt. R wrote incident reports and then left the Facility.

Grievant did not file an incident report immediately after the incident. She should have done so. She asked Lt. J if she had to write an incident report and Lt. J. incorrectly informed her that she did not have to write a report. The Agency did not discipline Grievant for failing to write an incident report. Even if she had done so, Grievant has the right to rely on a superior officer's instruction that she did not have to write a report. Thus, there is no basis in fact to support any disciplinary action against Grievant.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion is **rescinded**. The Agency is ordered to reinstate Grievant to her position of Sergeant, reinstate her prior salary, and to provide her with **back pay** from the date of demotion.

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 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.⁹

[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

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.