

Issue: Group III Written Notice with suspension (failure to report an inmate death threat to supervisory staff); Hearing Date: 05/24/05; Decision Issued: 05/25/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8064



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8064

Hearing Date: May 24, 2005
Decision Issued: May 25, 2005

PROCEDURAL HISTORY

On February 23, 2005, Grievant was issued a Group III Written Notice of disciplinary action with a five workday suspension for:

On January 8, 2005, while in HU-4(B) pod, a death row inmate called you to his cell and told you that he was going to kill one of your fellow officers or he was going to have someone else kill her. You did not take his threat seriously and you failed to report the threat to supervision.

On March 22, 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 he requested a hearing. On April 27, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 24, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative

Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with suspension for failure to report an inmate death threat to supervisory 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 Corrections Officer Senior. He has been employed by the Agency for approximately six years. Grievant received a Group II Written Notice on September 5, 2003 for leaving doors unsecured.¹

The Facility houses "death row" inmates who are awaiting execution for committing murder. These inmates are often among the most dangerous because they have demonstrated an ability to kill and they have little to lose by engaging in poor behavior while incarcerated. Death row inmates are confined to their cells on a nearly continuous basis. On those occasions when they are outside of their cells, they are shackled. Death row inmates can communicate with security staff by speaking through small windows in their cell doors or by using an intercom located inside each cell and connected to an intercom located in the control booth for that living unit ("a pod"). The security officer sitting in the control booth can activate the intercom and listen to sound inside the inmate's cell without the inmate's knowledge.

The Inmate resides in HU-4B and is awaiting execution. On two prior occasions, the Inmate figured out some way to stop the door to his cell from closing securely yet the Facility's electronic door security system showed the Inmate's door was closed and locked. The Inmate was able to get out of his cell and enter the main floor of the pod.

On January 8, 2005 at approximately 5:50 a.m., Grievant entered Housing Unit 4B. He was assigned to another post at the Facility but had been instructed to go to a

¹ Agency Exhibit 6.

Sergeant's office on the second floor of HU-4B and obtain the count sheets for that pod. While inside the pod, the Inmate called for Grievant. Grievant went to the Inmate's cell door and conversed with the Inmate.

Officer C was working inside the control booth. She became concerned about the loudness of the conversation between the Inmate and Grievant. She could not tell what was being said and was unsure whether Grievant and the Inmate were simply being loud or whether Grievant needed some assistance. Officer C activated the intercom inside the Inmate's cell without him knowing. She heard the Inmate say to Grievant, "I heard [Officer C] drove a Cadillac Escalade." Grievant responded, "That's not in the parking lot." The Inmate responded, "I hate that bitch and I will kill her or get somebody to kill her." Grievant laughed at the Inmate and said "Yeah, right!" Grievant left the pod without reporting the threat to anyone else because he did not believe the Inmate would or could kill Officer C.

Officer C was upset and frightened by the Inmate's comments. She was also upset that Grievant did not say anything to her about the threat. She quickly reported the Inmate's threat to her supervisor. The Agency began an investigation.

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 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."²

² The Agency argues Grievant acted contrary to DOCPM § 5-22 *Rules of Conduct Governing Employees' Relationships with Inmate, Probationers, or Parolees*. The focus of this policy is the relationship between an employee and an inmate, probationer or parolee. Grievant's behavior with the Inmate does not give rise to disciplinary action. Grievant's failure to report information is the behavior giving rise to disciplinary action. A failure to report information is not an impropriety or fraternization. Thus, DOCPM § 5-22 is not applicable to this hearing. The Written Notice accurately states the factual allegations against Grievant without mentioning DOCPM § 5-22. Thus, the Agency has properly placed Grievant on notice of its allegations against him.

In the Agency's judgment, when a death row inmate threatens to kill a corrections officer that threat should be reported to Agency supervisors. The evidence supports this conclusion. The Inmate is someone who has already killed and would not suffer any material consequences if he were to kill again. It is reasonable to conclude that the Inmate, if given the opportunity to do so, would attempt to harm Officer C. On two prior occasions, the Inmate was able to get out of his cell while unrestrained. There is sufficient evidence to support the Agency's issuance of a Group III Written Notice. A suspension of five workdays is permitted upon the issuance of a Group III Written Notice.³

Grievant argues that inmates frequently make death threats but lack the intent or ability to carry out the threats. He believes it was appropriate to disregard the Inmate's threat. Grievant's argument fails because, based on the evidence presented, inmates pose a risk of injuring corrections officers. There is no reason to believe Grievant should have assumed that the decision was his to determine whether the Inmate's threat was valid.

Grievant argues that Officer C failed to file charges against the Inmate under Departmental Operating Procedure 861 and, thus, the Inmate's threat did not have the level of significance suggested by the Agency. Grievant's argument is untenable because Officer C immediately reported the matter to her superior. Another security employee at the Facility filed charges under DOP 861 against the Inmate.⁴

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III 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.

³ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

⁴ Grievant also points out that Officer C incorrectly stated the time that Grievant entered HU-4B to the Agency's investigator. Officer C testified at the hearing that she was uncertain what time Grievant entered the housing unit. Any discrepancy in Officer C's statement to the Agency's investigator is irrelevant since it is not material and because Grievant admitted that the Inmate made the threat against Officer C. Officer C's credibility is not at issue in this hearing.

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.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.