

Issue: Group II Written Notice with suspension and transfer (intimidating a coworker while on duty); Hearing Date: 06/20/05; Decision Issued: 06/21/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8073



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8073

Hearing Date: June 20, 2005
Decision Issued: June 21, 2005

PROCEDURAL ISSUE

Grievant requested as part of her relief that her transfer to a different correctional center be rescinded. However, at the hearing, grievant retracted her request stating that she no longer wants to have her transfer rescinded.

APPEARANCES

Grievant
Representative for Grievant
Assistant Warden
Advocate for Agency
Two 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 against grievant? Did the agency misapply policy or procedure?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice issued for intimidating a coworker while on duty.¹ Because grievant had two active prior disciplinary actions – a Group I Written Notice and a Group II Written Notice – the agency could have removed her from state employment. In lieu of termination, grievant was suspended for six days and transferred to another facility. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.² The Department of Corrections (DOC) (Hereinafter referred to as “agency”) has employed grievant for 10 years. She is a Corrections Officer Senior.

In July 2003, grievant was counseled verbally and in writing for using repeated and vulgar language to a captain.³ In September 2003, grievant was disciplined for using obscene language in the presence of a supervisor.⁴ In April 2004, grievant was again disciplined for loud, disrespectful, and unprofessional to a sergeant in the presence of a captain, other staff, and visitors.⁵

Agency policy provides that “employees should be respectful, polite, and courteous in their contact with ... other employees.”⁶ Facility policy provides that “Employees ... will exercise a high level of professional conduct when dealing with ... other staff members.”⁷ The same policy states “No profane, indecent, or insulting language, or words with racial or ethnic connotations will be directed towards inmates, other staff, or the public.”⁸

On December 3, 2004, grievant reported for work on the day shift. She was delayed in master control and did not arrive in her assigned building when the officer she was relieving was ready to leave. That officer was at the end of a 12-hour shift, tired, and unhappy that she could not leave her post at the usual time. The officer went to the control booth officer and asked where grievant was. The control booth officer had heard on the radio that grievant was in master control. The control booth officer called master control on the telephone asking for grievant. Another officer said that grievant had just left master control.

¹ Agency Exhibit 1. Group II Written Notice, issued December 16, 2004.

² Agency Exhibit 1. Grievance Form A, filed January 12, 2005.

³ Agency Exhibit 3. Memorandum from assistant warden to grievant, July 10, 2003.

⁴ Agency Exhibit 3. Group I Written Notice, issued September 12, 2003.

⁵ Agency Exhibit 3. Group II Written Notice, issued April 1, 2004.

⁶ Agency Exhibit 4. Section IV.E, Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*, effective February 15, 2004.

⁷ Agency Exhibit 5. Section 51-5.0, IOP 51, *Employee Demeanor and Appearance*, May 1, 2002.

⁸ Agency Exhibit 5. Section 51.7.0.5, *Ibid*.

When grievant entered her assigned building, she went to the control booth officer and spoke to her in a loud and nasty voice, using vulgar language.⁹ The control booth officer felt that she had done nothing wrong by calling the master control booth. Grievant's loud voice, nasty tone, and foul language upset the control booth officer. She believed grievant was angry because grievant's late arrival had been brought to the attention of others. The control booth officer felt that grievant was just taking out her anger on the control booth officer. The control booth officer became upset, and teary-eyed at the way she had been treated.

An inmate outside the control booth heard grievant cursing at the control booth officer. He told two other officers what he had heard and the two officers came to check on grievant within the next several minutes to be sure she was alright. Those officers also reported the incident to a sergeant. The sergeant spoke with the control booth officer about three hours later. She was still red-eyed and teary and told the sergeant that grievant had spoken to her in a loud and nasty voice; she did not mention the vulgar language. She also told the sergeant that she did not want to pursue the matter and preferred to drop it. However, the sergeant told the control booth officer that he had no choice but to report the incident.

The assistant warden had individually counseled grievant on multiple occasions about how grievant's interactions with other employees sometimes were inappropriate and upset them. Grievant was given Anger Management Training at the Academy for Staff Development.¹⁰ During a pre-disciplinary meeting, the warden advised grievant that her past disciplinary history, combined with this incident, could possibly result in her removal from state employment. He offered grievant two days to consider whether she would prefer to resign in lieu of termination but grievant elected not to resign. While a first incident of this type might have constituted only a Group I offense, the agency felt that a Group II Written Notice was necessary because of grievant's prior similar history.

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

⁹ Agency Exhibit 2. Internal Incident Report of grievant, December 3, 2004, and statement of inmate, December 5, 2004.

¹⁰ Agency Exhibit 3. Memorandum from assistant warden to warden, December 7, 2004.

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 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 the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹¹

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.2 of the Commonwealth's policy 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.¹² 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 5-10.16 of the DOC Standards of Conduct addresses Group II offenses, which are defined identically to the DHRM Standards of Conduct.¹³ Failure to follow a supervisor's instructions and, failure to comply with applicable established written policy are two examples of Group II offenses.¹⁴

¹¹ § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

¹² DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹³ Agency Exhibit 6. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

¹⁴ Agency Exhibit 6. *Ibid.*

Although grievant denies using vulgar language or speaking to the control booth officer in a nasty tone, the agency has borne the burden of proof to show that grievant did so. Grievant's denial of wrongdoing is more than counterbalanced by four factors. First, the control booth officer testified credibly that grievant did speak to her in a loud and nasty voice and used vulgarity in her language. Second, the control booth officer had no prior adverse interactions with grievant and, therefore, no reason to falsely accuse grievant. Third, grievant's statements were heard by an inmate. Although grievant avers that the inmate was not present, the inmate's presence is corroborated by the fact that two other corrections officers learned about the incident from the inmate. If the inmate had not heard the incident, the two other corrections officers would not have known about it. Fourth, the sergeant corroborated the control booth officer's account of the incident from his conversation with her three hours after the incident. He also corroborated that the control booth officer was still visibly upset at the time of his interview with her.

Grievant denies using vulgar language. However, both the control booth officer and the inmate stated that grievant was cursing. Grievant has an established history of using vulgar language in the past to superior officers. If grievant was willing to curse at superior officers, it would not be surprising that she used similar language with a peer. In any case, even if grievant did not use vulgar language, she spoke to the control booth officer in an unnecessarily loud and nasty voice – which by itself is contrary to the applicable established agency and facility policies.

Grievant suggested that the control booth officer may have had personal problems on the day in question that made her more prone to being upset. However, grievant did not explore this issue during cross-examination of the control booth officer. Since grievant had an opportunity to question the witness on this issue but did not do so, it must be presumed that grievant's suggestion is only speculative. Moreover, one should always speak to another employee respectfully, regardless of whether that person has personal problems on any given day.

Retaliation

Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.¹⁵ To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Generally, protected activities include use of or participation in the grievance procedure, complying with or reporting a violation of law to authorities, seeking to change a law before the General Assembly or Congress, reporting a violation of fraud, waste or abuse

¹⁵ § 9, EDR *Grievance Procedure Manual*.

to the state hotline, or exercising any other right protected by law. In this case, grievant failed to state any protected activity that she had engaged in. Accordingly, grievant failed to prove the first prong of the test necessary to demonstrate retaliation.

Moreover, grievant's allegation of retaliation was merely a blanket accusation that a captain, a major, and the assistant warden were retaliating against her "maybe just because I'm outspoken." Other than speculation, grievant presented no testimony or evidence that would demonstrate that any of the accused individuals retaliated against her.

Misapplication of Procedure

Grievant asserted that the agency misapplied Procedure 5-10 because others who have been involved in interpersonal differences or altercations were treated differently. Grievant mentioned three instances of persons who had not been transferred following such interpersonal altercations. However, grievant does not know what discipline the persons received or, whether the persons had active prior disciplinary actions. Unless the other people had sufficient active prior disciplinary actions to warrant removal from state employment, they would not be subject to transfer. If this had been grievant's only active disciplinary action, she also would not have been transferred. Grievant's transfer resulted from the fact that she does have a sufficient accumulation of active disciplinary actions to warrant removal from employment. It is only because the agency elected to mitigate the discipline and transfer grievant to another facility, that she is still employed by the agency. Accordingly, grievant has failed to demonstrate that the agency misapplied procedure.

DECISION

The decision of the agency is affirmed.

The Group II Written Notice, six-day suspension, and transfer to another facility are hereby UPHELD.

Grievant has failed to bear the burden of proof to demonstrate that the agency retaliated against her, or that the agency misapplied procedure.

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. 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.¹⁶ 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.¹⁷

[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]

¹⁶ 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).

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer