

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 06/28/05; Decision Issued: 07/11/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8089



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8089

Hearing Date: June 28, 2005
Decision Issued: July 11, 2005

PROCEDURAL HISTORY

On February 15, 2005, Grievant was issued a Group I Written Notice of disciplinary action for:

On February 1, 2005, [Grievant] and [Lt. R] had a conversation over the radio which led to an unprofessional meeting in the Watch Commander's Office. Approximately 10:00 a.m., [Lt. R] contacted [Grievant] by radio to have an inmate report to Personal Property. [Lt. R] advised [Grievant] the inmate was called for over an hour and a half. [Grievant] responded that we would get him there. [Lt. R] advised that he would check or expect the inmate to be a Personal Property in five minutes. The exchange over the radio was intense. [Grievant] requested [Lt. R] to give him a 10-21 (a call). The Lt. replied 10-10 (negative). [Grievant] requested [Lt. R] to 10-25 (report) to the Watch Office. [Lt. R] replied 10-10. Shortly thereafter, they met in the Watch Office. They exchanged words which became very unprofessional. Reports indicate [Grievant] tossed his hat and began to walk towards [Lt. R]. He appeared highly agitated (eyes watering and lips trembling). [Grievant] admitted he used vulgar language and stepped towards [Lt. R]. [Captain] was present and stepped between [Grievant] and [Lt. R]. He instructed [Lt. R] to leave the room while he talked with [Grievant].

On March 4, 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 June 1, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 28, 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 I Written Notice of disciplinary action for unsatisfactory job performance.

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 Sergeant at one of its facilities. The purpose of his position is to, "provide security, custody, and control of inmates according to post orders, Departmental and Institutional Operating Procedures. Maintain a safe & orderly environment in assigned areas."¹ No evidence of prior disciplinary action against Grievant was introduced during the hearing.

On February 1, 2005, Lt. R received a call from Sgt. G complaining that the employee had asked Grievant to move an inmate to the Personal Property section of

¹ Agency Exhibit 5.

the facility but Grievant had not timely responded. Lt. R called Grievant over the radio and said "can you find out why the inmate is not down to personal property." Grievant replied "10-21" which means Grievant was asking Lt. R if Lt. R was available for a telephone call. Lt. R replied "10-10" to indicate that he could not receive a telephone call. Lt. R had left the Watch Office and was in route to find the inmate and, thus, was not near a telephone. Shortly thereafter, Grievant asked Lt. R to meet at the Watch Office.

Grievant and Lt. R met at the Watch Office. Sgt. M was already in the Watch Office when Grievant arrived. Lt. R entered the Watch Office and said to Grievant, "Let me talk to you over here" referring to an adjoining office with no one inside. Grievant said "No, we can talk right here." Grievant was standing approximately 15 feet from Lt. R when they began their conversation. Grievant yelled, "you are not going to threaten me!" Lt. R asked how he was threatening Grievant. Grievant took off his hat and threw it on a cabinet. Grievant replied, "Damn it, you are not going to be threatening me." Grievant began moving slowly towards Lt. R until he was approximately five feet from Lt. R. Lt. R's voice was raised while he was telling Grievant that he was not threatening Grievant but was going to make sure Grievant did his job properly.

The Captain was also in the room. As the conversation became more heated, the Captain moved between Grievant and Lt. R to block Grievant from moving any closer to Lt. R. The Captain told Lt. R to go outside of the room. Lt. R did not move, and the Captain had to repeat his instruction at least three or four times before Lt. R walked out of the room.

As the Captain focused on Lt. R., Sgt. M moved next to Grievant and put her hand on his chest to block his advance. She told Grievant to calm down.

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.

"[D]isruptive behavior" is a Group I offense.² Grievant's behavior was disruptive because he yelled at a superior officer, cursed, threw his hat down, and caused Sgt. M

² DOCPM § 5-10.15(B)(5).

and the Captain to have to intervene. The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice.³

Grievant contends the Agency has inconsistently taken disciplinary action. He argues that Lt. R was also disruptive and should have received written notice. Since Lt. R did not receive a written notice, it was not appropriate to issue Grievant a written notice, according to Grievant.

It is true that Lt. R could have been disciplined for his behavior. He yelled at Grievant and refused to immediately comply with the Captain's instructions to leave the room. The Captain verbally counseled both Grievant and Lt. R because he felt they were both unprofessional.

The Agency's failure to issue a written notice to Lt. R, however, is not an inconsistent application of discipline. Grievant's behavior was more serious than was Lt. R's behavior. Grievant initiated the argument in the Watch Office by beginning to yell at Lt. R and by cursing. Lt. R yelled but only in response to Grievant's actions and did not curse. Grievant threw his hat down to express his anger. Lt. R did not throw anything. Grievant began moving towards Lt. R such that the Captain and Sgt. M felt it was necessary to intervene. Lt. R remained in place. These are sufficient distinctions between the behavior of Grievant and Lt. R to justify the Agency's different treatment of the two employees.

Grievant presented testimony of corrections officers who overheard the radio communication between Lt. R and Grievant. They felt Lt. R had been unprofessional because his communication amounted to a criticism of Grievant that should have been addressed by telephone out of the hearing of inmates and staff. Assuming Lt. R's radio communication was unprofessional, Grievant was not justified in his abrasive interaction with Lt. R. Grievant could have handled his concerns in using a less confrontational tone or by other means. Thus, Lt. R's radio communication does not provide a basis to mitigate disciplinary action against Grievant.

DECISION

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

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

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.⁴

[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].

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer