

Issue: Group III Written Notice with suspension (willful or negligent damage to state property, failure to follow supervisory instructions, disruptive behavior, and obscene language); Hearing Date: 07/29/05; Decision Issued: 08/01/05; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 8131



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8131

Hearing Date: July 29, 2005
Decision Issued: August 1, 2005

PROCEDURAL ISSUE

Grievant requested as part of her relief that she be given a formal written apology from the parties involved in her disciplinary action. A hearing officer does not have authority to require anyone to issue an apology.¹ Therefore, the hearing officer is without authority to direct this form of relief requested by grievant. Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Representative for Grievant
Facility Superintendent
Representative for Agency

¹ § 5.9(b)7 & 8. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.

Two witnesses for Agency

ISSUES

Did grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice for willful or negligent damage to state property, failure to follow supervisory instructions, disruptive behavior, and obscene language.² As part of the disciplinary action, grievant was suspended without pay for three days. During the grievance process, the second-step respondent unconditionally reduced the disciplinary action to a Group II Written Notice and deleted from the list of offenses the charge of damage to state property.³ He also reduced the suspension to one day. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.⁴

The Department of Juvenile Justice (hereinafter referred to as "agency") has employed grievant as a juvenile correctional officer for four years.⁵ She has no prior disciplinary actions and has had satisfactory performance evaluations. She received a copy of the Conditions of Employment when first hired.⁶ Employees are required to follow all verbal instructions given by a supervisor.

Late in the evening of March 8, 2005, grievant entered the shift commander's office and placed a physician's note face down on his desk.⁷ The shift commander (a lieutenant) returned to his office while grievant was there, picked up the note, read it, and told grievant that it covered only her February absence (Grievant had also been absent on March 7, 2005 but the physician had not excused grievant for that date). The lieutenant placed the note face up on his desk. At about this time, another correctional officer entered the lieutenant's office. Grievant picked up the note, turned it face down on the desk, and complained to the lieutenant that he was disclosing her medical condition to

² Agency Exhibit 1. Group II Written Notice, issued April 22, 2005.

³ Agency Exhibit 1. See handwritten note dated May 3, 2005 on Group III Written Notice.

⁴ Agency Exhibit 1. *Grievance Form A*, filed April 27, 2005.

⁵ Agency Exhibit 2. Employee Work Profile Work Description, signed November 19, 2004.

⁶ Agency Exhibit 5. Conditions of Employment, signed October 15, 2001.

⁷ Agency Exhibit 1. Physician's note, March 7, 2005, which excused grievant from work on February 2 & 3, 2005.

others.⁸ The lieutenant then had a brief discussion with the other officer while grievant remained in his office. After a few minutes, the lieutenant told both grievant and the other officer to leave his office.

The other officer complied with the instruction by leaving the office and returning to her post in the control room next to the lieutenant's office. Grievant remained in the lieutenant's office and continued to argue with him about the physician's note. The lieutenant told her again to leave and grievant went to a desk just outside his office where she began loudly yelling at the lieutenant.⁹ She reentered the lieutenant's office three more times and each time he told her to leave. Grievant became upset, argumentative, and disrespectful. On the fourth occasion when grievant left his office, the door was slammed.¹⁰ The door's window glass cracked and a Plexiglas mailbox that had been hanging on the outside of the door fell to the floor. Grievant began cursing at the lieutenant referring to him as a "f_____ lieutenant" and a "motherf_____." Finally, the lieutenant called grievant's immediate supervisor (a sergeant) to come to his office and take grievant back to her post. The sergeant arrived and found grievant to be irate and yelling loudly at the lieutenant.¹¹ He calmed grievant down and convinced her to return to her post.

The facility uses a due process form that is given to an employee prior to issuance of disciplinary action. On March 21, 2005, a sergeant handed grievant a *blank* due process form and asked her to respond.¹² The form did not cite any incident, provide any facts, or detail any alleged rule violation. Grievant was never given: an oral notification of the offenses she was to be charged with, or an explanation of agency's evidence.

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

⁸ The note contains a diagnosis that grievant did not want disclosed to others. [NOTE: The word describing the diagnosis is quite difficult to read, but grievant was concerned that the other officer might be able to read it while the note was face up on the desk.]

⁹ Agency Exhibit 1. Statement of other correctional officer, March 8, 2005.

¹⁰ Both grievant and the lieutenant testified that the other one slammed the door. A witness subsequently told the lieutenant that grievant hit the glass as the lieutenant closed the door. However, in her written statement of March 8, 2005 (Exhibit 1), grievant admitted that she slammed the door. She further notes that the lieutenant subsequently also slammed the door. In any case, the charge concerning window breakage was removed from the Written Notice during the second resolution step of the grievance process. Grievant was not required to make restitution for the damage.

¹¹ Agency Exhibit 1. Sergeant's Institutional Incident Report, March 8, 2005.

¹² Agency exhibit 1. Due process form, March 21, 2005.

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 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 grievant must present her evidence first and prove her claim by a preponderance of the evidence.¹³

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 effective September 16, 1993. The *Standards* 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 of Policy No. 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.¹⁴ Failure to follow supervisory instructions is an example of a Group II offense. Group I offenses are the least severe and include offenses such as disruptive behavior, and the use of obscene language.

Following reduction of the disciplinary action to a Group II Written Notice, three offenses remain as part of the disciplinary action. Each is addressed separately below.

Failure to follow supervisor's instructions

¹³ § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

¹⁴ Agency Exhibit 6. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

Grievant's most serious offense was her repeated failure to follow the lieutenant's instruction to leave his office. Grievant and the lieutenant had engaged in an extended discussion regarding her absences and the necessity for her to provide a physician's excuse for the absence incurred on March 7, 2005. The lieutenant then ordered grievant to leave his office (and return to her assigned post). Grievant refused to comply with this instruction and continued to argue with the lieutenant. When she did leave the office, she came back in and had to be told three more times to leave. Subsequently, she stood outside the lieutenant's office and called him foul names. Grievant's refusal to leave the office when directed, and her subsequent verbal abuse directed at the lieutenant were clearly insubordinate. Grievant did not deny that she failed to follow the lieutenant's instructions. Her failure to follow instructions and insubordinate behavior constitute a Group II offense.

Disruptive behavior

Grievant's refusal to leave when directed prevented the lieutenant from attending to his other responsibilities. Such behavior is disruptive to the orderly conduct of necessary agency business. Moreover, when grievant continued to stand outside the lieutenant's office and yell at him, it became necessary to have a sergeant come to calm grievant down. This also was disruptive because it prevented the sergeant from attending to his regular duties. Grievant did not deny this disruptive behavior. Thus, grievant's irate behavior was disruptive and constitutes a Group I offense.

Use of Obscene Language

Although grievant denied using obscene language, the preponderance of evidence demonstrates that she repeatedly called the lieutenant obscene names. Both the lieutenant and the other correctional officer present in the lieutenant's office testified to grievant's use of obscene language. Accordingly, the agency has proven that grievant used obscene language – a Group I offense.

Summary

The agency has demonstrated, by a preponderance of evidence, that grievant committed two Group I offenses and one Group II offense. The agency elected to issue only one disciplinary action that included all three offenses. Accordingly, the issuance of one Group II Written Notice that covers all three offenses is reasonable and appropriate.

Due Process

Grievant argues that the agency did not afford her due process prior to issuance of the Written Notice. When an agency disciplinary action impacts an

employee's salary (as in an unpaid suspension from work), the agency is required to provide advance notice to the employee. Specifically, the agency must give the employee: (i) an oral or written notification of the specific offense(s), (ii) an explanation of the agency's evidence in support of the charge, and (iii) a reasonable opportunity to respond.¹⁵ In the instant case, the agency failed to comply with this requirement. Grievant was given only a blank form which failed to identify both the specific offenses with which the agency planned to charge her, and an explanation of the evidence to support each charge. Thus, in issuing discipline, the agency failed to comply with the due process requirements of the *Standards of Conduct*.

However, prior to this hearing, grievant knew from the Written Notice what the charges were. In addition, prior to the hearing, grievant received a complete copy of all written evidence used by the agency to explain and support the charges. Grievant was represented at this hearing by an experienced advocate who adequately presented grievant's case. Now that the grievant has received a complete and fair hearing before a hearing officer, she has thereby received complete due process. Accordingly, the due process afforded to grievant in this hearing has provided an effective remedy to the agency's earlier failure to provide appropriate due process prior to issuance of the disciplinary action.

Dates of Written Notice Issuance and Inactive Status

When the agency reduced the disciplinary action from a Group III to a Group II offense, it changed the issuance date and the inactive date of the Written Notice. Doing so effectively results in the disciplinary action being active from April 22, 2005 through May 3, 2008 – a period of three years and eleven days. The *Standards of Conduct* provides that the "active" period for a disciplinary action is calculated from date of issuance. In this case, the original date of issuance of the disciplinary action was April 22, 2005. The fact that the agency decided to unilaterally reduce the *level* of discipline does not alter the original date of issuance. Accordingly, the active period of the Group II Written Notice may not exceed three years and must end on April 22, 2008.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and unpaid suspension of one day from work are hereby UPHELD. However, the agency is directed to change the issuance date and the inactive date of the Written Notice to April 22, 2005 and April 22, 2008, respectively.

¹⁵ Agency Exhibit 6. Section VII.E.2, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

It is RECOMMENDED that, in future disciplinary actions, the agency take the necessary steps to assure that proper and complete advance notice is given to employees who are subject to discipline under Standards of Conduct Section VII.E.2.

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

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

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]

David J. Latham, Esq.
Hearing Officer

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.