

Issue: Group III Written Notice with termination (assaulting and fighting an inmate);
Hearing Date: 08/31/05; Decision Issued: 09/30/05; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 8162



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8162

Hearing Date: August 31, 2005
Decision Issued: September 30, 2005

PROCEDURAL HISTORY

On June 16, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Fighting with an inmate and assault on an inmate. On June 12, 2005, you struck an inmate in the face with your elbow which resulted in a physical altercation between you and the inmate. After the inmate was under the control of other correctional staff you struck him in the back of the head.

On June 24, 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 August 10, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 31, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee

Agency Advocate
Witnesses

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

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 employed Grievant as a Corrections Officer until his removal effective June 16, 2005. Grievant's work performance had been satisfactory to the Agency prior to the incident giving rise to this disciplinary action. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

On June 12, 2005, Grievant was working in a housing unit with three tiers, A, B, and C. The C tier is the top tier. Inmates are permitted to move from tier to tier only at certain times of the day. Inmates are also expected to follow the orders of Corrections Officers. The Inmate was attempting to move between tiers when Grievant observed him. Grievant yelled at the Inmate to stop and then approached him and said, "Sir, lock up" meaning the Inmate should return to his cell. The Inmate explained that he needed to go to the medical unit. Officer B joined Grievant and the Inmate. Officer B told the Inmate to give Officer B his paperwork and that Officer B would notify the medical unit and then would escort the Inmate to the medical unit, but that the Inmate should lock up until then. The Inmate told Grievant that he did not have to take Grievant's "sh-t and he was not one of these bit-h ass nig—rs." The Inmate approached Grievant and placed his face within an inch or two of Grievant's face. Grievant responded by hitting the Inmate in the face with his right elbow.¹ Officer B separated Grievant and the Inmate.

¹ The Agency did not discipline Grievant for hitting the Inmate in the face with his elbow even though the Written Notice mentions Grievant's action. The Agency considered this self-defense after the Inmate had invaded Grievant's personal space.

Grievant called a 10-33 on his radio to let others know immediate assistance was needed. Officer B began moving the Inmate away from Grievant.

Sergeant B overheard the 10-33 radio call and responded to Grievant's location. The Inmate broke loose from the grasp of Officer B and began moving quickly towards Grievant with the intent to harm Grievant. The Inmate swung his closed fist at Grievant at approximately the same time Sergeant B moved between the Inmate and Grievant. The Inmate's fist hit Grievant in the face knocking Grievant's head up and back. Sergeant B forced the Inmate against a wall with the Inmate's face towards the wall. Sergeant B grabbed the Inmate's arm and had one of the Inmate's arms behind the Inmate's back. Approximately 2 or 3 seconds after being hit, Grievant used his right hand and punched his fist over Sergeant B's shoulder and into the back of the Inmate's head. Grievant hit the Inmate hard enough to fracture his ring finger and thumb. Later, he had to wear a cast for his injury.

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.

"[P]hysical violence or fighting" is a Group III offense.² Grievant punched the Inmate while the Inmate was under the control of Sergeant B. It was not necessary for Grievant to punch the Inmate. Grievant's action amounts to physical violence. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice. Under the EDR Rules for Conducting Grievance Hearings, the Hearing Officer must give deference to the Agency's level of discipline if it is consistent with law and policy. Since removal from employment is an authorized action upon the issuance of a Group III Written Notice, the Hearing Officer must uphold Grievant's removal from employment.³

Grievant contends he was exercising his right to self defense protected by Institutional Operating Procedure 431-4.0 which states:

² DOCPM § 5-10.17(B)(5).

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

Correctional Officers and non-custodial staff have the right to protect themselves and a duty, consistent with their self-protection, to protect other staff, members of the public who are threatened by actions of offenders, prevent escapes, maintain order and control within the facility, and protect State property.

This case is close. Grievant was acting in response to the Inmate's punch. His reaction, however, occurred 2 or 3 seconds after the punch and after Sergeant B had positioned himself between Grievant and the Inmate. An important factor is the height of the individuals involved. The Inmate is 5'8", Sergeant B is 6'1" and Grievant is 5'10" tall. In order to hit the Inmate, Grievant had to punch over the shoulder of Sergeant B. Grievant should have been able to see that Sergeant B was blocking the Inmate from hitting Grievant and that Sergeant B had the inmate under control. Grievant's perception that he needed to defend himself was unrealistic. Self-defense is not a basis to justify Grievant's action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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.
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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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