

Issue: Group I Written Notice (abusive language); Hearing Date: 01/23/06;
Decision Issued: 01/24/06; Agency: DOC; AHO: David J. Latham, Esq.;
Case No. 8239; Outcome: Agency upheld in full



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8239

Hearing Date: January 23, 2006
Decision Issued: January 24, 2006

APPEARANCES

Grievant
Two witnesses for Grievant
Associate Warden
Advocate for Agency
One witness for Agency

ISSUE

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?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group I Written Notice for use of abusive language.¹ The grievance proceeded through the resolution steps; when

¹ Agency Exhibit 1. Written Notice, issued August 10, 2005.

the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.² The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for 23 years. She is a corrections lieutenant.

In the past, the associate warden to whom grievant reports has repeatedly counseled her about interpersonal relationships with subordinates. He has told grievant that she should not develop too close a relationship with subordinates and should not frequently joke with them because there is a danger of blurring the supervisor/subordinate relationship. He also cautioned grievant that she was not writing up or counseling subordinates when it appeared appropriate to do so.

Prior to June 2005, grievant had become particularly friendly with a particular corrections officer (Officer L). The corrections officer spent much of her free time (lunch, breaks) in grievant's office and the two would joke and discuss personal business. Grievant acknowledges that she was less professional in her interactions with Officer L than with other corrections officers. In late May or early June 2005, an inmate had made disrespectful, obscene comments to the Officer L, accusing her and another officer of performing illegal sexual acts and insulting their reputations. At the time, neither corrections officer immediately reported the incident. When their sergeant returned from leave, they reported the incident to him. Grievant learned about the incident from an inmate. She asked the two corrections officers about what happened and then verbally counseled them because they had failed either to immediately report the incident or to write up the inmate. Grievant told the corrections officers that she was particularly upset with their failure to report the incident. From that point forward, the relationship between grievant and officer L cooled. Officer L felt that grievant was displaying "negative vibes" toward her.

Officer L went on "stress" leave because she was upset about the entire incident and its aftermath. When officer L returned to work a few weeks later, on June 30, 2005, she had occasion to go to grievant's office to request a cleaning supply item for inmate use. While there, she asked grievant why she was now acting like she didn't like Officer L. Grievant told Officer L that she didn't like people who play with their job and explained that she was referring to the fact that Officer L had taken some leave time due to stress.³ Grievant then told Officer L to leave her office and return to work. A few minutes later, Officer L and a new trainee officer were passing grievant's office as grievant exited the office. Officer L asked grievant if she wanted Officer L out of her building. Grievant said, "I want you dead."⁴ Officer L began crying and walked away.

² Agency Exhibit 1. Grievance Form A, filed September 6, 2005.

³ Agency Exhibit 2. Officer L's *Internal Incident Report*, June 30, 2005.

⁴ Grievant avers that she said, "I want you to stop breathing." The trainee, in her incident report (Agency Exhibit 2), corroborated Officer L's version. Since both expressions have the same end result, the exact wording is not critical to the decision.

Officer L reported this incident and said she no longer wanted to work with grievant. Management transferred Officer L to another housing unit that grievant does not supervise.

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 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.⁵

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 of Policy No. 1.60 provides that Group I offenses include acts and behavior that are the least serious.⁶ The Department of Corrections (DOC) has promulgated its own

⁵ § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.

⁶ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.15 of the DOC *Standards of Conduct* addresses Group I offenses, which are defined identically to the DHRM *Standards of Conduct*.⁷ Use of obscene or abusive language is one example of a Group I offense.

It is undisputed that grievant told a corrections officer either that she wanted her dead or that she should stop breathing. Both statements have the same end result but the preponderance of witness testimony establishes that grievant said she wanted Officer L dead. While grievant asserts that she was only joking, the two other people who heard the statement did not believe grievant was joking. Officer L, at whom grievant directed the statement, began to cry, turned in her equipment, and left the floor;⁸ these are not the actions of someone who thought the statement was a joke. Accordingly, the agency has proven that grievant made a statement that both witnesses perceived as being made seriously.

The *Standards of Conduct* do not define “abusive” and therefore the commonly accepted definition applies. In this context, the relevant dictionary definition of “abusive” is “using harsh insulting language.”⁹ Telling someone that you want them dead is both harsh and insulting, implying as it does that the person is of no value while alive. Even if one does not consider grievant’s statement to be abusive, it was disruptive because it upset Officer L and thereby precipitated an investigation and management involvement. Further, the statement was unsatisfactory work performance because supervisors should not make such statements to subordinates. Thus, for multiple reasons, grievant’s conduct was a Group I offense.

When such a statement is made in an *obvious* joking manner among two peers, and both perceive it to be a joke, the statement might not be abusive. However, in the instant case, the situation was quite different, for four reasons. First, grievant did not make the statement in a joking manner but with a serious demeanor. Second, grievant and Officer L are not peers. Grievant is a lieutenant while Officer L, a corrections officer, is two ranks below grievant at the bottom of the paramilitary hierarchy. Third, Officer L did not perceive the statement to be a joke.

Fourth, grievant made the statement in the presence of a new trainee whom grievant had only met on two or three previous occasions. Grievant claimed that Officer L should have known she was joking because of their years of working and joking together. However, the newly hired trainee could not have known of grievant’s prior relationship with Officer L. Therefore, her perception could only be based on what she observed and heard at that time. Hearing a lieutenant with serious demeanor make such a statement to a corrections officer

⁷ Agency Exhibit 3. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

⁸ Agency Exhibit 2. Trainee’s *Internal Incident Report*, June 30, 2005.

⁹ *Merriam-Webster’s Collegiate Dictionary*, Tenth Edition.

could only have left the new employee with a negative impression of grievant. Moreover, if agency management were to condone grievant's behavior by not taking corrective action, the new employee might also have a negative view of facility management.

Grievant believes that this incident could have been resolved without disciplinary action if management had required Officer L to meet with her and "talk it out." However, Officer L stated that she did not want to meet with grievant and did not want the issue mediated; she simply wanted to work under someone else's supervision. In order to be effective, mediation between two people must always be voluntary. Management cannot force an unwilling party to be part of a mediation.

Grievant believes that management blew this incident out of proportion and that counseling would have been more appropriate than disciplinary action. However, the evidence established that grievant has previously been counseled about her inappropriate interactions with subordinates. Apparently previous counseling did not have the desired effect and therefore, it was reasonable for the agency to apply a more serious corrective action in this case. Thus, even though grievant's length of service and otherwise good performance are mitigating circumstances, the previous counseling is an aggravating circumstance that justifies issuance of a Group I Written Notice.

DECISION

The decision of the agency is affirmed.

The Group I Written Notice issued on August 10, 2005 is hereby **AFFIRMED**.

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.¹⁰ 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.¹¹

[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]

S/David J. Latham

David J. Latham, Esq.
Hearing Officer

¹⁰ 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).

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.