

Issues: Group II Written Notice with suspension (failure to follow supervisory instructions), and Group II Written Notice with suspension (workplace violence); Hearing Date: 05/09/06; Decision Issued: 05/31/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8326/8327; Outcome: Employee granted partial relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8326 / 8327

Hearing Date: May 9, 2006
Decision Issued: May 31, 2006

PROCEDURAL HISTORY

On January 5, 2006, Grievant was issued a Group II Written Notice of disciplinary action with suspension from January 6 to January 10, 2006 for failure to follow a supervisor's instructions. On January 6, 2006, Grievant was issued a Group II Written Notice of disciplinary action with suspension from January 11 to February 11, 2006.

On February 2, 2006, Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On April 18, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 9, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 Power Plant Lead Worker at one of its Facilities. The purpose of his position is to:

[Oversees] the operation of boilers and auxiliary equipment in the power plant of an adult institution on an eight hour shift. [Ensures] that power generation is sufficient for the facility operations.¹

He received a "Contributor" rating on his most recent evaluation.² He received a Group II Written Notice on October 25, 2005 for failure to comply with established written policy.³

¹ Agency Exhibit 4.

² Agency Exhibit 4.

³ Agency Exhibit 8.

On November 7, 2005, the Warden met with Grievant and other employees in Grievant's unit to discuss how the employees interacted. She admonished them that the "bar room mentality" of the past should cease and that staff should not verbally abuse, curse, intimidate or violate others rights in the workplace.

Employees working at the Facility sometimes have to work on holidays. Grievant was originally scheduled not to work on Christmas 2005. The likelihood that another employee who was scheduled to work on Christmas would actually be able to work became questionable. The Supervisor drafted a revised schedule that showed Grievant working on Christmas. The Supervisor did not distribute the schedule because he was not sure whether the original schedule would need to be changed. He left the draft schedule on his desk. Grievant noticed the draft schedule on the Supervisor's desktop. Grievant realized that he might have to work on Christmas if that schedule was implemented.

On December 9, 2005, Grievant and the Supervisor walked to the Supervisor's office. Grievant approached the Supervisor and stated he was going to "crawl all over" the Supervisor if Grievant had to work on Christmas. Grievant's demeanor expressed anger. The Supervisor felt threatened by Grievant's comments. For a moment, he felt as though Grievant might attack him. The Supervisor told Grievant that the schedule was "back the way it was." Grievant responded, "that's good because if I do not get off for Christmas there was going to be a serious problem."

On December 13, 2005, the Supervisor drafted a "due process" memorandum to Grievant advising Grievant of the charge against Grievant for his behavior on December 9, 2005 and asking Grievant to provide him with a letter of mitigating circumstances. Grievant had three days to respond. The Supervisor placed the memorandum inside an envelope.

On December 13, 2005, the Supervisor handed Grievant an envelope containing the due process memorandum. Grievant opened the envelope and read the memorandum. He asked two other employees nearby to leave. After they left, Grievant asked the Supervisor why Grievant was being disciplined. The Supervisor responded that he felt threatened on December 9, 2005. Grievant told the Supervisor that "no such thing happened." Grievant then said, "that's it, that is it!" Grievant reached for the door handle and exited the room. Grievant did not raise his voice or curse during the conversation.

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.

DOC Operating Procedure 130.3, *Workplace Violence*, defines workplace violence as “[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties.” Prohibited conduct includes “[e]ngaging in behavior that creates a reasonable fear of injury to another person” and “[t]hreatening to injure an individual or to damage property.”⁴

Written Notice Issued January 5, 2006. Grievant threatened to “crawl all over” the Supervisor thereby creating a reasonable fear of injury to the Supervisor. “Crawl all over” is a phrase describing unwanted and unwelcome physical contact. Grievant expressed this phrase while his physical demeanor displayed anger. The Supervisor had a reasonable fear of injury resulting from Grievant’s behavior. Accordingly, Grievant acted contrary to DOC Operating Procedure 130.3. “Failure to ... otherwise comply with established written policy” is a Group II offense. DOCPM § 5-10.16(B)(1). The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice on January 5, 2006. A suspension of up to ten workdays is permissible upon the issuance of a Group II Written Notice. The Agency’s suspension of Grievant must be upheld.⁵

Grievant denies saying he would “crawl all over” the Supervisor. He contends he already knew he did not have to work on Christmas and, thus, would have no reason to make a threat to the Supervisor.⁶ It is not necessary for the Agency to prove its case beyond any reasonable doubt. It is only necessary for the Agency to prove its case by a preponderance of the evidence. The Supervisor’s testimony was credible. Other than use of the phrase “crawl all over” much of Grievant’s evidence regarding the time, place, and general framework of the interaction between Grievant and the Supervisor was similar to the Agency’s evidence.

⁴ Although it is unclear to what extent the Agency relied specifically on the *Workplace Violence* policy, the Hearing Officer finds that the Grievant had adequate notice of the facts underlying the Agency’s claim of misbehavior. The attachment to the January 5, 2006 Written Notice refers to “verbal intimidation”. The attachment to the January 6, 2006 Written Notice mentions the *Workplace Violence* policy. To the extent the January 5, 2006 Written Notice fails to specifically mention the *Workplace Violence* policy, that failure is harmless error.

⁵ The Hearing Officer considered Grievant’s arguments regarding mitigating circumstances. The Hearing Officer finds no mitigating circumstances that would warrant a reduction of the January 5, 2006 Group II Written Notice.

⁶ Grievant argued another individual was near both Grievant and the Supervisor and did not observe any conflict between them on December 9, 2005. The evidence showed that the individual did not observe any conflict because that person was not in the Supervisor’s office when the conflict occurred.

*Written Notice Issued January 6, 2006.*⁷ The Agency's assertion that Grievant engaged in workplace violence on December 13, 2005 is not supported by the evidence. Grievant's statement, "that's it, that is it" was not a threat against the Supervisor. Grievant did not intend to threaten the Supervisor. Grievant reacted the way he did because he was surprised that he was receiving the due process memorandum and because of the tension he felt in the workplace. The Agency contends Grievant pointed at the Supervisor. Grievant responded that one of his mannerisms is that "he talks with his hands." He adds he was holding an envelope when pointing at the Supervisor.

When an employee unexpectedly receives notice that an agency will take disciplinary action, the employee is likely to have some adverse reaction and express tension or frustration. An expression of being angry or upset is not the same as making a threat. Even though the Supervisor may have felt threatened, there is no reason to believe Grievant intended to threaten the Supervisor. Grievant intended to express his frustration. For an agency to expect an employee receiving notice of disciplinary action to remain stoic is unreasonable. Grievant's behavior was not sufficiently threatening to justify disciplinary action.

Agency's Arguments. The Agency contends Grievant failed to follow the Warden's instruction to avoid the "bar room mentality." In order for an employee to be disciplined for failing to follow a supervisor's instruction, the instruction must be sufficiently specific to enable the employee to know what behavior he or she should perform or avoid. A general admonishment to behave better or behavior more civilly toward others, lacks the necessary specificity to be enforced. Accordingly, the Agency's contention that Grievant failed to comply with the Warden's instruction fails. The Agency's must rely on Grievant's failure to comply with *Workplace Violence* policy in order to present sufficient evidence to support issuance of a Group II Written Notice.

The Agency contends Grievant acted contrary to DOC Operating Procedure 130.1 which states, "[a]t all times, employees should be respectful, polite, and courteous in their contact with offenders, as well as with citizens and other employees." Although Grievant may have violated the specific wording of this provision, the Hearing Officer finds mitigating circumstances to deny enforcement of the provision against Grievant. DOC Operating Procedure 130.1 is entitled "Rules of Conduct Government Employees Relationships with Offenders." The policy defines abuse, fraternization, and hazing in the context of employee treatment of offenders. It prohibits improprieties and non-professional associations in the context of employee interaction with offenders. In short, the focus of DOC Operating Procedure 130.1 is to govern how employees relate to offenders.⁸ The focus is not how employees relate to each other. There is no reason to

⁷ The date of issuance is typed on the Written Notice as January 11, 2006, but it is marked through and the number 06 is written above the number eleven.

⁸ DOC Operating Procedure 130.1 states its purpose as, "This procedure establishes rules of conduct that will be observed by employees when interacting with offenders under the direct supervision of the Virginia Department of Corrections. This procedure also provides guidance to prevent the corporal abuse of offenders at all DOC facilities."

believe Grievant knew or should have known that DOC Operating Procedure 130.1 would govern his interaction with the Supervisor. Accordingly, the Hearing Officer finds Grievant did not have sufficient notice of DOC Operating Procedure 130.1(IV)(E) to form a basis to take disciplinary action against him.

Retaliation. An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual 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 (e.g. ‘whistleblowing’).” To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁹ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant’s evidence raises a sufficient question as to whether the Agency’s stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency’s explanation was pretextual.

Grievant contends the Supervisor retaliated against him because on September 1, 2005 he submitted a letter to the Warden setting forth several complaints about the Supervisor.¹⁰ The complaints included an allegation that the Supervisor acted contrary to State policy.¹¹ Grievant’s argument fails because the Supervisor did not learn Grievant made any complaint against him until after the Written Notices were issued. Thus, Grievant has not established a connection between his protected activity and the issuance of the Written Notices.

DECISION

For the reasons stated herein, the Agency’s issuance on January 5, 2006 to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**. The Agency’s issuance on January 6, 2006 to the Grievant of a Group II Written Notice of disciplinary action with suspension is **rescinded**. The Agency is directed to provide

⁹ See Va. Code § 2.2-3004(A)(v). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹⁰ Grievant Exhibit 1.

¹¹ Grievant presented evidence of other reasons (not mentioned in the September 1, 2005 letter) why he believed the Supervisor intended to take action against him, but those reasons were not protected activities.

the Grievant with **back pay** for the period of suspension, January 11, 2006 through February 11, 2006 less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3).

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 all of your appeals to the other party and to the EDR Director. 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.¹²

[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/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.