

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 06/07/06; Decision Issued: 06/12/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8342; Outcome: Agency upheld in full.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8342

Hearing Date: June 7, 2006  
Decision Issued: June 12, 2006

**APPEARANCES**

Grievant  
Two witnesses for Grievant  
Assistant Warden  
Advocate for Agency  
Two witnesses 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 unsatisfactory job performance.<sup>1</sup> The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.<sup>2</sup> The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for 15 years. He is a corrections lieutenant.<sup>3</sup>

Facility policy provides that employees have the right to protect themselves and a duty, consistent with their self protection, to protect inmates and other staff who are threatened by actions of offenders.<sup>4</sup> However, the use of excessive or unreasonable force may lead to disciplinary action against the employee. The reasonable use of less than lethal force may be employed to compel an inmate to comply with direct orders when no quick or immediate alternative method of persuasion is effective and other types of force are deemed not appropriate.<sup>5</sup> The amount of force deemed reasonable is controlled by three factors: a) the degree of force threatened or used by the aggressor, including whether he has a weapon, b) staff's reasonable perception of danger or serious injury and, c) any available alternatives to control the situation without the use of force.<sup>6</sup> Only force which is reasonably necessary to overcome resistance or gain control under the circumstances is permissible.

On January 20, 2006, an inmate in the segregation unit was scheduled to go outside for recreation. Procedure requires that inmates be handcuffed while being taken from their cell to the recreation area. A strap is attached to the handcuffs to facilitate inmate control. Two corrections officers had handcuffed the inmate behind his back and were about to take him out for recreation when he began to act up. The corrections officers used their radios to call both a sergeant and a lieutenant (grievant) for assistance. The sergeant arrived at the cell first and attempted to calm the situation down. Then grievant arrived and told the inmate his recreation was cancelled and put him back into his cell. This upset the inmate and he wanted to fight. Grievant talked with the inmate and initially calmed him down for a short time.

However, the inmate continued to argue and vowed to "get" one of the corrections officers whom he felt had been unnecessarily rough with him. When grievant concluded that the inmate was not going to be compliant, he passed the handcuff strap through the food slot in the cell door to one of the corrections officers. Grievant pulled the inmate's hands up and through the food slot until his forearms were outside the cell door.<sup>7</sup> He twisted the handcuffs and the sergeant

---

<sup>1</sup> Agency Exhibit 1. Group I Written Notice, issued February 9, 2006.

<sup>2</sup> Agency Exhibit 1. Grievance Form A, filed March 9, 2006.

<sup>3</sup> Agency Exhibit 4. Employee Work Profile Work Description, effective February 1, 2005.

<sup>4</sup> Agency Exhibit 3. Section IV.A, *Facility Operating Procedure 431*, March 8, 2004.

<sup>5</sup> Agency Exhibit 3. Section IV.G.4, *Id.*

<sup>6</sup> Agency Exhibit 3. Section IV.B.1, *Id.*

<sup>7</sup> Agency Exhibit 3. Grievant's Internal Incident Report, January 20, 2006.

told grievant, "That's enough." The inmate started to yell and scream "I give up, I give up!"<sup>8</sup> The cell door was closed and a corrections officer was then able to remove the handcuffs from the inmate. It was then observed that the inmate's wrist was bleeding. A nurse was summoned; she cleaned and dressed what she described as superficial abrasions on his wrist and thumb.<sup>9</sup>

### 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 his evidence first and must prove his claim by a preponderance of the evidence.<sup>10</sup>

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

---

<sup>8</sup> Agency Exhibit 3. Corrections Officer's Incident Report, January 20, 2006.

<sup>9</sup> Agency Exhibit 3. RN's statement, January 24, 2006.

<sup>10</sup> § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, Effective August 30, 2004.

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 are the least serious.<sup>11</sup> The Department of Corrections (DOC) has promulgated its own 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*.<sup>12</sup> Unsatisfactory work performance is one example of a Group I offense.

Both grievant and the agency cite the same policy to support their respective positions. Grievant argues that the facility policy permits the reasonable use of force when an inmate is noncompliant with direct orders. However, the agency points out that the policy also establishes a limit as to how much force is considered reasonable (Section IV.B.1), and that grievant used more force than was reasonably necessary under the circumstances.

The undisputed evidence establishes that when grievant pulled the inmate's handcuffed wrists and forearms through the food slot, the inmate was locked in his cell alone. The inmate was therefore unable to threaten anyone and did not possess a weapon. There was no immediate danger of death or serious injury to either the inmate or any staff. Moreover, there were alternatives available. Specifically, grievant could have allowed the inmate to remain cuffed until he became compliant and allowed staff to remove his handcuffs without resistance. Grievant could also have notified the watch commander about the situation so that facility management could determine whether a cell extraction team should be sent in to retrieve the handcuffs.

Grievant argues that if the inmate had retained the handcuffs, it is *possible* that he might have been able to escape from the handcuffs and use the strap to hang himself. While this is theoretically possible, grievant could have assigned a corrections officer to watch the inmate and prevent such an action until the extraction team arrived at the cell.

Grievant argues that he had twice used force to remove handcuffs from other inmates in the past but had not been disciplined for it. However, one incident was not relevant because it involved an inmate who refused to return to his cell; that case presented a much more serious situation because the inmate was out of his cell and could have injured staff when he became combative. In the other incident, the inmate's hands were pulled to the food slot but neither his hands nor his forearms were pulled *through* the food slot. Both of grievant's witnesses testified that when an inmate who is locked in his cell resists removal of handcuffs, they let the inmate go and call the watch commander. In the instant case, grievant's use of force was sufficiently excessive, resulting in injury to the

---

<sup>11</sup> Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>12</sup> Agency Exhibit 6. Operating Procedure Number 135.1, *Standards of Conduct*, September 1, 2005.

inmate, that his sergeant felt compelled to report the incident. After management thoroughly investigated the incident, it concluded that grievant's actions warranted disciplinary action.

### Mitigation

The normal disciplinary action for a Group I offense is a Written Notice. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. Grievant has long service (15 years) and otherwise satisfactory work performance. He argues that counseling, rather than discipline, would be a sufficient corrective action. The agency felt that because grievant is an experienced lieutenant, he should have recognized that his use of force was excessive under the circumstances. Further, grievant's use of unnecessary force in this case sets a poor example for subordinates. Therefore, the agency concluded that counseling would be insufficient to emphasize the seriousness of the offense. The hearing officer cannot conclude that the agency's decision to discipline grievant with the lowest level of discipline (Group I) exceeds the limits of reasonableness. Accordingly, there is no basis to rescind the discipline issued by the agency.

### DECISION

The decision of the agency is affirmed.

The Group I Written Notice for unsatisfactory work performance issued on February 9, 2006 is hereby 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. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.<sup>13</sup> 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.<sup>14</sup> You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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

---

<sup>13</sup> 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).

<sup>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.