

Issue: Group I Written Notice (insubordination and failure to follow supervisor's instructions); Hearing Date: 08/16/06; Decision Issued: 08/17/06; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 8399; Outcome: Agency upheld in full



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8399

Hearing Date: August 16, 2006
Decision Issued: August 17, 2006

APPEARANCES

Grievant
Representative for Grievant
Superintendent
Three witnesses for Agency
Observer for EDR

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

Grievant filed a timely grievance from a Group I Written Notice for insubordination and failure to follow a supervisor's instructions.¹ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.² The Department of Juvenile Justice (hereinafter referred to as "agency") has employed grievant as a juvenile correctional officer³ for 11 years.

In October 2005, grievant was given a Notice of Improvement Needed because of an incident in September in which grievant acted in an unprofessional and insubordinate manner during a staff debriefing.⁴

On February 18, 2006, grievant, two other correctional officers, and a sergeant were assigned to a housing unit. The sergeant left the unit shortly before 8:00 p.m. to walk to the watch office for a 30-minute break. As she was walking to the other building, grievant called on the radio and asked the security sergeant in the watch office to call him. Grievant's supervising sergeant heard the radio call and when she arrived in the watch office, she called grievant and asked what was happening. Grievant refused to answer her and instead asked to speak with the security sergeant. The sergeant asked grievant a second time to tell her what was happening and, again, grievant refused to answer and asked for the security sergeant. When the sergeant asked grievant a third time, grievant said that a cadet had thrown an object⁵ and hit another correctional officer. The sergeant asked for the cadet's name. Grievant said "I can't tell you what's going on." He explained that the cadet was standing in front of him and that he had to get the cadet under control. He then handed the phone to another correctional officer. The sergeant directed the other officer to put grievant back on the phone and again asked for the cadet's name. Grievant said he couldn't talk with her at that time and hung up.

The sergeant remained in the watch office for the next hour. She took her 30-minute break and then spoke with the lieutenant and researched the Standards of Conduct policy to determine how to discipline grievant. She then prepared an Employee Due Process memorandum recommending grievant be disciplined which she gave to him about two hours after the incident.⁶ While the sergeant was counseling grievant and giving him the due process memorandum,

¹ Exhibit 2. Group I Written Notice, issued March 29, 2006.

² Exhibit 3. *Grievance Form A*, filed May 3, 2006. [NOTE: Grievant filed his grievance more than 30 days after issuance of the disciplinary action. Therefore, grievant was not in compliance with the 30-day filing requirement of the grievance process (see § 2.2 of the *EDR Grievance Procedure Manual*, effective August 30, 2004). However, the agency accepted the grievance, processed it through the resolution steps and qualified it for hearing. Accordingly, the agency has waived its right to deny the grievance as untimely filed.]

³ Exhibit 6. Grievant's *Employee Work Profile Work Description*, October 25, 2004.

⁴ Exhibit 1. *Notice of Improvement Needed/Substandard Performance*, October 3, 2005.

⁵ Later determined to be a plastic bottle of baby powder. Grievant also contends that a second cadet threw a milk carton at the same correctional officer.

⁶ Exhibit 1. Due Process notice, February 18, 2006.

grievant began experiencing the symptoms of high blood pressure (headache, feeling dizzy, chest pain, nausea). When he asked to go home because he was not feeling well, a lieutenant refused to let him leave. Grievant then went to the infirmary where a nurse checked his blood pressure and determined it to be extremely high. On the nurse's instruction, grievant lay down for awhile. When he got up to get a glass of water, he passed out and had seizures.⁷ Grievant has severe hypertension and has been taking prescription medication for this condition for some time. On the day of the incident, grievant took his medication.

The unit logbook for the evening of February 18, 2006 does not include any entry reflecting the alleged bottle-throwing incident, or any entry showing that cadets were "in an uproar and out of control." The officer at whom the bottle was allegedly thrown later denied that the inmate had assaulted him. All correctional officers are required to write reports if they witness unusual incidents involving cadets. Although grievant believes one officer wrote such a report, no report was produced for this hearing by either party. Grievant avers that he wrote an incident report but did not produce a copy at the hearing. One of the officers was not in the room when the cadet allegedly threw the baby powder bottle.

The sergeant asserts that she directed both of the other two officers to write reports about the incident. Only the officer who did not see the incident wrote a report; that report addressed only on his role in the telephone call from the sergeant to grievant.⁸ The sergeant avers that she counseled the officer who did not write a report but he has still not written his report.

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:

⁷ Exhibit 1. Grievant's statement, February 18, 2006.

⁸ Exhibit 1. Report from corrections officer R, February 17, 2006. [The date appears to be a clerical error since the event occurred on February 18, 2006.]

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 grievant must present his evidence first and prove his claim by a preponderance of the evidence.⁹

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 I offenses are the least severe offenses. Insubordination and failure to follow supervisory instructions are examples of Group II offenses.¹⁰

The evidence in this case is muddled. On one hand, grievant contends that two cadets were throwing objects at a correctional officer, and that later the cadets were in an uproar and out of control. However, the logbook contains no entry of any such incidents. Grievant maintains that he wrote an incident report but did not offer a copy of the report at the hearing. He believes that another officer wrote a report about the incident but grievant did not offer a copy of that report at hearing. Grievant did not call either of the other two officers as witnesses in the hearing, and he did not request that the hearing officer issue orders for the witnesses or the incident reports. When a party fails to call witnesses or provide relevant documents, it must be presumed that the testimony and evidence would not be favorable to the party who failed to call the witnesses.

Given the lack of evidence on the alleged bottle-throwing incident, and given grievant's failure to present witnesses and relevant documentation, it must be concluded that the incident was relatively minor and deemed not worthy of reporting. This is corroborated by the fact that: 1) grievant did not mention the incident in the logbook and, 2) neither of the other two officers called on the radio

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

¹⁰ Exhibit 5. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

for assistance. Nonetheless, it is concluded that something, even if minor, did occur because there is no evidence to suggest that grievant would have called the watch office if there had not been some kind of incident.

However, grievant may have exaggerated the seriousness of the situation. He contends that the cadets were in an uproar and out of control but there is no evidence to support this assertion. He maintains he wrote up the cadet but has not produced the report he purportedly wrote. Further, when asked why he did not respond to the sergeant's inquiry during her call to him, grievant contends that he had to first get the cadet under control. However, he has not shown that the other two officers could not have controlled the cadet while grievant was on the telephone. Moreover, it would have taken grievant less time to respond by giving the cadet's name to the sergeant than it did to tell her that he couldn't talk with her at that time.

Notwithstanding the unanswered questions about this case, the agency has demonstrated, by a preponderance of evidence, that grievant failed to follow supervisory instructions. Grievant's immediate supervisor asked him direct, unambiguous questions about the incident. Grievant has not shown that there was any good reason not to answer these questions. He has not shown why he insisted on speaking with the security sergeant when his own supervisor was the first responder to grievant's call. Grievant's contention that he had to get the cadet under control is not supported by the evidence. Moreover, even if the cadet had required control, grievant has not shown why one or both of the other two correctional officers on the scene couldn't have controlled the cadet.

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. In this case, grievant has both long service and an otherwise generally satisfactory performance record. However, counterbalancing these mitigating circumstances is an aggravating circumstance - grievant had been counseled and was given a Notice of Improvement less than six months earlier for the same or similar insubordinate behavior. Further, the agency has followed a progressive disciplinary path in this case. Rather than give grievant a Group II Written Notice (as is normally the case for insubordinate behavior), the agency issued only a Group I Written Notice because that is the next step up from his previous written counseling issued in October 2005. Under these circumstances, the agency's decision to issue a Group I Written Notice is within the limits of reasonableness.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued on March 29, 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 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 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.¹¹ 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 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

¹¹ 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).

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