

Issue: Group II Written Notice with suspension (failure to follow supervisory instructions and kicking an inmate); Hearing Date: 11/29/06; Decision Issued: 11/30/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8457; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8457

Hearing Date: November 29, 2006
Decision Issued: November 30, 2006

PROCEDURAL ISSUES

Grievant requested as part of her relief that all information pertaining to this case be expunged from her personnel file. If a hearing officer rescinds a disciplinary action, the written notice is removed from the personnel file. If the disciplinary action is upheld or modified, the action remains in the file. The Human Resources office is responsible for taking appropriate action based upon the hearing officer's decision. Grievant also requested that she be reimbursed for costs incurred as a result of the disciplinary action. A hearing officer does not have authority to award damages.¹

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
Assistant Warden

¹ § 5.9(b)1. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

Advocate for Agency
Three witnesses for Agency

ISSUES

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 II Written Notice for failure to follow supervisory instructions and for kicking an inmate in the leg.² As part of the disciplinary action, grievant was suspended for eight days. 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.³ The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant as a corrections officer for 13 years.

On August 2, 2006, grievant, an inmate, and another corrections officer were in the visitation room to unload bags out of a cart for the canteen. A third officer was present in the room about 40 feet away from the other three. Grievant and the inmate were joking with each other; at some point, grievant told the inmate she was going to hit him. Grievant told the inmate to help unload the cart. The inmate did not immediately respond and grievant asked him several more times to help unload the cart. When the inmate did come over, grievant kicked at the inmate's right shin and made light contact. The inmate described the contact as a tap and avers that it did not hurt him.⁴ A few moments later, grievant kicked at the inmate again and made contact again. The inmate left the room and returned to his dormitory.

Later that day, the corrections officer who had been assisting grievant and who had seen grievant kicking the inmate, asked the inmate if he was hurt. He responded that he was not hurt and that the incident was "nothing." The officer nevertheless reported the incident to her sergeant. As a result, a nurse examined the inmate but could not find any signs of trauma or bruising on his right shin.⁵

Grievant has received all applicable training, both at the time of hire and thereafter as scheduled. She has also acknowledged reading and understanding

² Agency Exhibit 1. Group II Written Notice, issued August 17, 2006. [NOTE: The date of offense cited on the Written Notice is 8/1/06. The agency asserts that this was a typographical error and that the actual date of offense was 8/2/06. All other documentation in this case corroborates that the date of offense was August 2, 2006; grievant did not disagree with the agency's verbal correction of the date.]

³ Agency Exhibit 2. Grievance Form A, filed September 15, 2006.

⁴ Agency Exhibit 3. Interview of inmate, August 3, 2006.

⁵ Agency Exhibit 3. Inmate accident/injury report form, August 2, 2006.

her post orders.⁶ She is aware of the agency policy that prohibits physical contact with inmates except as needed in an emergency situation (to prevent escape and/or harm to the inmate and others).

The inmate was incarcerated at grievant's facility in 1997-98 and came back to the facility in 2005. Grievant has therefore known this inmate for a total of about four years.

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.⁷

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

⁶ Agency Exhibit 5. Training records.

⁷ § 5.8, 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 II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.⁸ 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 XI of the DOC *Standards of Conduct* addresses Group II offenses, which are defined identically to the DHRM *Standards of Conduct*.⁹ Failure to follow supervisory instructions is a Group II offense. Violation of the agency's fraternization policy is a Group III offense.

The agency has demonstrated by a preponderance of evidence that grievant did kick an inmate at least two or more times. Grievant admits that she "kicked out" at the inmate but denies making any contact with his leg. However, two other corrections officers observed grievant kicking and making contact with the inmate's right shin, thereby corroborating the inmate's allegation.¹⁰

There are some differences in the witness statements. The inmate avers that grievant kicked him twice, the other correctional officer observed three kicks, and the third officer saw only one kick. Since the third officer was 40 feet away, it is entirely possible that she was busy and only happened to see one kick. Nonetheless, the salient point is that all three witnesses are consistent in that they saw grievant kick the inmate. Whether grievant kicked him once, twice, or three times is not as important as the fact that she did kick him because even one kick is prohibited conduct.

Grievant asserts that she and the inmate had been engaged in horseplay and that she only pretended to kick grievant. The agency points out that horseplay with inmates is considered a form of fraternization that is prohibited by agency Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*. Violation of this policy is a Group III offense.

Grievant admitted that she has a "smart mouth." She believes that the other corrections officers may not have liked some things she has said in the past and suggests that they and the inmate fabricated their testimony because they do not like her "smart mouth." However, grievant offered no other reason to support her suggestion that the witnesses were untruthful. The testimony of the witnesses at the hearing was generally consistent with their witness statements and interviews taken shortly after the incident. The hearing officer finds their testimony to be credible and without ulterior motives. Accordingly, the

⁸ Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

⁹ Agency Exhibit 7. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

¹⁰ Agency Exhibit 3. Report of Investigation and attached witness statements and interviews, August 7, 2006.

preponderance of evidence supports a conclusion that grievant did kick the inmate at least twice.

Grievant correctly argued that the agency did not specifically prove the charge of failing to follow a supervisor's instructions. There was no evidence or testimony offered by the agency to show that any supervisor gave grievant instructions related to this incident or that grievant failed to follow such instructions. Nonetheless, the fact that this charge was not proven is not fatal to the agency's case. The description of offense on the Written Notice cites the real reason for the disciplinary action, i.e., that grievant kicked an inmate twice. As previously, stated, the agency has demonstrated that grievant did commit such an offense.

Grievant argues that her offense should not warrant more than a Group I Written Notice. However, this argument is not persuasive. A Group II offense, by definition, is one which warrants removal from state employment if there is a second such occurrence. Grievant argues that she was only engaged in horseplay and that the inmate did not sustain any observable injury. However, given the liability to the agency and state that can result from physical abuse of an inmate, such an offense is sufficiently serious that anyone repeating this offense should be removed from employment. Therefore, a Group II Written Notice is the appropriate disciplinary action in this case.

During the hearing, grievant argued that her suspension exceeded the eight days cited on the Written Notice. However, the agency produced grievant's leave record showing that the eight days of suspension were August 3, 4, 5, 8, 9, 10, 11, & 12, 2006. After examining the leave record, grievant agreed that it was correct.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice or, a Written Notice and up to 10 days suspension. The policy provides for 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 otherwise satisfactory work performance. The agency considered these factors when it mitigated the discipline from a Group III with termination (for fraternization) to a Group II with eight days suspension. Therefore, it is concluded that the agency's decision was within the limits of reasonableness.

DECISION

The decision of the agency is affirmed.

The Group II Written Notice and eight-day suspension issued on August 17, 2006 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 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

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

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

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.