Issue: Group II Written Notice with suspension (failure to follow established written policy); Hearing Date: 12/05/06; Decision 12/06/06; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 8468; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8468

Hearing Date: December 5, 2006
Decision Issued: December 6, 2006

APPEARANCES

Grievant
Superintendent
Representative for Agency
One witness for Agency

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 II Written Notice for failing to comply with established policy when he directed obscene language at a ward.[1] As part of the disciplinary action, grievant was suspended for five days.

[1] Exhibit 1. Group II Written Notice, issued July 6, 2006.

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 officer for six years.

The state Standards of Conduct prohibits the use of obscene or abusive language in the workplace.[3] The agency has promulgated its own Code of Conduct which specifically prohibits engaging in sexual obscenity.[4] The agency's policy on radio communications states that employees must never use over the radio language or terms that would not be acceptable for public broadcasting, and that profane language is not permitted on the radio system.[5]

While in his first year of employment in 2000, grievant was suspended without pay for two days because he cursed a ward under his supervision.[6] In 2004, grievant was given a Notice of Improvement Needed/Substandard Performance because he used inappropriate language towards a ward.[7] In 2005, grievant was given another Notice of Improvement Needed because he used obscene language toward a ward.[8] Grievant also has one prior active disciplinary action – a Group I Written Notice for failing to comply with established written policy because he used profane language toward wards.[9]

On June 27, 2006, grievant told a ward to "Stop playing and get in your fucking bed."[10] Grievant's radio communication device was on and his statement was heard by about 12 corrections staff and any inmates who were close enough to hear the radio.

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

[2] Exhibit 2. *Grievance Form A*, filed August 4, 2006.
[3] Exhibit 5. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, September 16, 1993.
[4] Exhibit 5. Administrative Directive 05-009.2, *Staff Code of Conduct*, November 29, 2004.
[5] Exhibit 2. Sections 214-4.5.6 & 7, Institutional Operating Procedure 214, *Radio Communications*.
[6] Exhibit 4. Memorandum from superintendent to grievant, April 19, 2001.
[7] Exhibit 4. Notice of Improvement Needed/Substandard Performance, August 19, 2004.
[8] Exhibit 4. Notice of Improvement Needed/Substandard Performance, September 29, 2005.
[9] Exhibit 4. Group I Written Notice, issued February 3, 2006.
[10] Exhibit 3. Lieutenant's Incident Report, June 27, 2006. [NOTE: Grievant avers that he did not use the f-word; he claims he told the ward to "Get your ass in bed" but acknowledges that even this statement was inappropriate.]

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 grievant must present his evidence first and prove his claim by a preponderance of the evidence.[11]

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 policy provides 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 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 state employment. Failure to follow established written policy is an example of a Group II offense.[12] Use of obscene or abusive language is a Group I offense.

The agency has shown, and grievant acknowledges, that he violated established written policy by using obscene language directed toward a ward. The use of obscene language is prohibited not only by state policy applicable to all state employees but also by two separate agency policies – its own Code of Conduct and, the Radio Communications policy.

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[11] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[12] Exhibit 5. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

Grievant believes the chain of command was not used in issuing his discipline. In fact, unrebutted testimony established that the lieutenant who reported the incident reported it to his captain, who in turn reported it to the Superintendent. Although the lieutenant recommended that a Group I Written Notice be issued, the Superintendent did not agree with this recommendation because of grievant's long history of committing the same offense. The superintendent of the institution has the authority to accept or reject the recommendations of subordinate staff. In this case, the superintendent decided not to accept the recommendation and issued a Group II Written Notice with suspension.

Grievant acknowledged that he has had a problem using vulgar and obscene language and that he had been taking prescription medication to control his behavior. However, he stopped taking his medicine in April because he thought he no longer needed it.[13]

Grievant asserts that he is aware of two other incidents in which other officers used inappropriate language but were not disciplined. Grievant declined to provide any specifics about one of the incidents. Therefore, the hearing officer can give no evidentiary weight to this vague hearsay allegation. In the second incident, a shift commander told his officers, over the radio, "Thanks for a hell of a damn good job!"[14] Grievant said he asked his lieutenant if he had heard the comment, however, grievant acknowledges that he did not file a written report about this incident. If agency management is not made aware of such incidents, it cannot take corrective action.

Grievant feels that his disciplinary action is too harsh for the offense because the Standards of Conduct categorizes the use of obscene or abusive language as a Group I offense. The Standards of Conduct provide that, in general, disciplinary action should be progressive. That means that in a case where an employee repeats the same offense, each corrective action should be more severe until the employee *learns* that he must stop committing the offensive action. The agency has correctly applied that procedure in grievant's case. Although grievant could have been removed from employment during his probationary period, the agency only reprimanded him and suspended him for two days. Subsequently, when he committed the same offense in 2004 and 2005, the agency only gave him a Notice of Improvement Needed/Substandard Improvement; the agency could have issued a Group I Written Notice in either of those instances. When grievant repeated the offensive behavior in January 2006, the agency decided that disciplinary action should be taken and grievant received a Group I Written Notice.

In June 2006, grievant committed the same offense of using obscene language for the fifth time. Because grievant had still not learned to correct his

[13] Exhibit 2. Grievant's written statement, June 28, 2006.
[14] Exhibit 2. Attachment # 3 to grievance form A.

behavior, it was entirely reasonable that the agency further escalate the discipline by issuing a Group II Notice with suspension. The *Standards of Conduct* provides that management must consider the specifics of each individual case when determining what corrective action is appropriate.[15] Moreover, the *Standards of Conduct* provides that the **normal** disciplinary action for obscene language is a Group I Written Notice. The instant case, however, is not **normal**. Grievant has violated policy not just once or twice but a total of five times, the last three times occurring in a period of just ten months (September 2005, January 2006, and June 2006). It appears that grievant's behavior is getting worse instead of better. Therefore, in such a case, where the frequency of commission of the offense is increasing, the disciplinary action cannot be what it normally would be. Under the circumstances of this case, the agency's decision to escalate from Group I to Group II with suspension is reasonable and appropriate.[16]

Furthermore, because of grievant's prior corrective actions and discipline, he is well aware that the use of obscene language is prohibited by established written policy. Since grievant is fully aware of this, it must be concluded that his continued use of obscene language is a knowing and willing violation of the written policies. Such deliberate violation of the written policy constitutes a Group II offense.

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 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 a moderate length of service. His work performance was not addressed in this hearing, however, grievant has one prior active disciplinary action and he has been counseled and disciplined a total of five times during the past six years. Under these circumstances, the agency's decision to issue a Group II Written Notice with only five days' suspension is within the limits of reasonableness.

DECISION

The disciplinary action of the agency is affirmed.

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[15] Agency Exhibit 5. Section VI.C, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

[16] Grievant should be aware that any further repetition of the offensive behavior could result in the agency deciding to take even more serious disciplinary action up to and including termination of employment. [Whether a hearing officer would uphold such action would depend upon all relevant circumstances at that time.]

The Group II Written Notice and five-day suspension issued on July 6, 2006 are 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.[17] 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.[18] 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

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David J. Latham, Esq.
Hearing Officer

[17] 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).

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