

Issue: Group I Written Notice with termination (due to accumulation) (use of obscene or abusive language); Hearing Date: 02/01/07; Decision Issued: 02/06/07; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8499; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8499

Hearing Date: February 1, 2007
Decision Issued: February 6, 2007

APPEARANCES

Grievant
Warden
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 I Written Notice for use of obscene or abusive language.¹ As part of the disciplinary action, grievant was suspended for five days and, following approval from the regional director, his employment with the state was terminated effective October 14, 2006 due to the

¹ Agency Exhibit B. Group I Written Notice, issued October 5, 2006.

accumulation of active disciplinary actions. 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.² The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant as a corrections officer for five years. Grievant has one prior active disciplinary action – a Group III Written Notice for obtaining state funds under false pretenses and for abuse of state time.³

Grievant and a female corrections officer had become friends but had not developed a relationship.⁴ They would converse at work and, on occasion, go to various restaurants for breakfast after working the night shift. On some occasions, the female officer would ask grievant for money to buy gasoline or other small items. Sometimes grievant would share with female officer the lunch he had brought from home. On one occasion, the female officer showed grievant a townhouse she had purchased and lamented that she had no furniture to put in it. She mentioned that she planned to buy an air mattress. The next day, grievant gave her a card and \$100 so that she could purchase the air mattress. When she was able to purchase the mattress for \$80, she offered grievant the change but he told her to keep it.

On September 16, 2006, grievant and the female officer were working together. They had a disagreement about whether grievant would share his lunch with her that night. The female officer went on break and obtained food from another corrections officer. When she returned after a longer than usual break, she continued to ask grievant for part of his lunch; grievant refused to share. The female officer said words to the effect of, "I'll eat your food, drive on your gas, and spend your money." Grievant grabbed his crotch and retorted, "Eat my dick."⁵ She called another officer and related what grievant had said. When she hung up, she continued to argue with grievant and threatened to "get him." Grievant said, "Shut up before I slap you." The female officer subsequently reported to a sergeant what grievant had said, asserting that she felt as though grievant had disrespected her with his vulgar statement. The sergeant talked with grievant and the female officer, and grievant apologized for his remark. Another officer who was in the control booth heard grievant make the vulgar statement.⁶

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

² Agency Exhibit A. Grievance Form A, filed November 3, 2006.

³ Agency Exhibit F. Group III Written Notice, issued March 9, 2005.

⁴ Grievant is married; the female corrections officer has a boyfriend who knew and did not object that she sometimes had breakfast with grievant.

⁵ Agency Exhibit B. Grievant's Incident Report, September 16, 2006.

⁶ Agency Exhibit B. Correctional officer's Incident Report, September 16, 2006.

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.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 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 include acts and behavior are the least severe.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 X of the DOC *Standards of Conduct* addresses Group I offenses, which are defined identically to the DHRM *Standards of Conduct*.⁹ Use of obscene or abusive language is a Group I offense.

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

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

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

The evidence in this case is undisputed. Grievant admits that he made a vulgar comment to a female officer. Two witnesses corroborate that grievant made the statement. During a subsequent heated discussion between grievant and the female officer, both witnesses heard grievant threaten to slap the female. Accordingly, a preponderance of evidence supports the charge that grievant used obscene language in the workplace to a female officer. Such language constitutes a Group I offense. Threatening to hit a coworker is a Group III offense but the agency elected not to charge grievant with that offense.

Mitigation

The normal disciplinary action for a Group I offense is a Written Notice. The normal disciplinary action for the accumulation of an active Group III Written Notice and an active Group I Written Notice is removal from state employment. 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's work performance has generally been satisfactory, however, he has less than five years service. Moreover, there is a significant aggravating circumstance. Grievant has a prior active disciplinary action for two serious offenses – obtaining state funds under false pretenses and abuse of state time. These prior offenses counterbalance the mitigating circumstances. Therefore, it is concluded that the agency's decision to terminate grievant's employment was within the limits of reasonableness.

DECISION

The decision of the agency is affirmed.

The Group I Written Notice and removal from state employment effective October 14, 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.¹⁰ 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.¹¹ 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

¹⁰ 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).

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.