Issue: Group III Written Notice with suspension (sexual misconduct with staff); Hearing Date: 02/08/07; Decision Issued: 02/12/07; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8506; Outcome: Employee granted partial relief.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8506

Hearing Date: February 8, 2007
Decision Issued: February 12, 2007

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
Warden
Advocate for Agency
One witness 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 III Written Notice for sexual misconduct with staff.[1] As part of the disciplinary action, grievant was suspended

[1] Agency Exhibit 1. Group I Written Notice, issued August 28, 2006.

for 30 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.[2] The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant as a corrections officer for 18 years. Grievant has one prior active disciplinary action – a Group III Written Notice for actions unbecoming a corrections officer.[3]

During morning muster on August 20, 2006, a captain advised the corrections staff that inmates were complaining because some officers had been too aggressive in checking inmates' genitals during body searches. One of the female officers piped up with an unsolicited comment saying, "Yeah, inmates complain that we're making their dicks hard." Sergeant C did not react to the language used and did not report the officer who made the comment.[4]

Later that morning, grievant and two other corrections officers were working in the inmate search room getting ready for the day's visitation of inmates. Another corrections officer was in the adjoining visiting room. Sergeant C entered the visiting room. She asked the corrections officer to check the search room to determine if any inmates were there. The officer complied by opening the door to the search room and looking in. As he did so, grievant spoke loudly to an inmate who had exited the back door and was simulating masturbation, saying, "[name], put your dick up boy."[5] As grievant made this remark, the other two officers in the visiting room began laughing. Meanwhile, in the adjoining visiting room, the visiting room officer told the sergeant there were no inmates inside the search room.

The sergeant then entered the search room and said, "What did you say?"[6] As grievant heard the door to the visiting room close, he turned around and saw the sergeant. He immediately apologized to her for his remark. He apologized a second time but the sergeant said she would not accept his apology. She obtained signatures for her post check sheet and left. She then went to the watch office and reported the incident to a major.

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

[2] Agency Exhibit 1. Grievance Form A, filed September 22, 2006.
[3] Agency Exhibit 4. Group III Written Notice, issued December 13, 2004.
[4] The following day (August 21, 2006) in muster, the Captain warned staff not to use such language in the muster. The officer who made the remark had previously applied for transfer to another facility and was transferred about one week after this incident. The Warden took action against the Captain for not immediately cautioning staff against the use of obscene language during muster.
[5] See Agency Exhibit 2. Incident Reports of corrections officers J & H, August 20, 2006. These two officers corroborate grievant's version of the remark. The sergeant asserts that grievant said, "[name], put your dick in your pants."
[6] Agency Exhibit 2. Incident Report of corrections officer J, August 20, 2006.

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.[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 III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from state 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 XII of the DOC *Standards of Conduct* addresses Group III offenses, which are defined identically to the DHRM *Standards of Conduct*.[9] The agency includes sexual misconduct with offenders

---

[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 5. Operating Procedure 135.1*, Standards of Conduct,* September 1, 2005.

or staff as an example of a Group III offense. The use of obscene language is a Group I offense.

It is undisputed that grievant used obscene language when he made the remark on August 20, 2006. Since such language is at a minimum a Group I offense, the remaining issue is whether grievant's conduct rose to the level of a Group III offense.

The agency's Standards of Conduct policy cites, *inter alia*, sexual obscenity as one example of the Group III offense of sexual misconduct with offenders or staff. However, the full text of the offense makes clear that an essential element necessary to constitute this offense is intent.[10] Each of the cited examples of the offense involve deliberate and knowing actions that are intended either to result in sexual gratification to the offender, or to communicate the offender's sexual interest in the victim. In the instant case, the agency has failed to demonstrate, by a preponderance of evidence, that grievant made his remark with the intent either of obtaining sexual gratification or of communicating sexual interest. He made the comment to an inmate who had been acting inappropriately using the vulgar vernacular used regularly by inmates of correctional institutions. Grievant did not know that a female was in the area when he made the remark.

The female sergeant alleges that grievant made the remark while facing her. However, the preponderance of evidence supports grievant's contention that he was talking loudly to an inmate through a door at the opposite end of the room from where the sergeant entered. One of the two corrections officers in the room corroborates grievant's statement. The agency did not offer the testimony of the other corrections officer to rebut grievant's contention.

Grievant maintains that the inmate to whom he was directing the statement has the same last name as one of the two officers in the room. The sergeant assumed that grievant was speaking to that corrections officer. However, both grievant and one of the corrections officers affirm that grievant was speaking to an inmate. Moreover, the hearing officer takes administrative notice that the last name of the corrections officer and the inmate is one of the most common surnames in the United States. Although the agency finds it a surprising coincidence that both had the same last name, the surname is sufficiently common that it is not surprising.

In reviewing all the testimony and evidence, the agency has not shown by a preponderance of evidence that grievant was aware of the female's presence in the area. Further, the agency has not demonstrated that grievant intended his

[10] Agency Exhibit 5. Section XII.B.22, Operating Procedure 135.1*, Standards of Conduct,* September 1, 2005, states: "Sexual misconduct with offenders or staff. Any behavior of a sexual nature between employees and offenders under the Department of Corrections supervision is prohibited. This includes behavior of a sexual nature such as, but not limited to, sexual abuse, sexual assault, sexual harassment, physical conduct of a sexual nature, sexual obscenity, and conversations or correspondence of an emotional, romantic or intimate nature."

remark to constitute sexual misconduct as that term is defined in Operating Procedure 135.1. At most, the evidence shows that grievant attempted to get an inmate to cease his vulgar display of simulated masturbation by using street terminology that he believed the inmate would understand.

However, it is undisputed that grievant's statement to the inmate was unacceptable because it falls within the definition of obscene language. Grievant should not have made such a statement to an inmate regardless of whether females were within hearing range. The grievant could have given the inmate the same verbal direction by using much more acceptable language. His use of obscene language is, therefore, a Group I 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; in lieu of termination, the agency may demote grievant, reduce his salary, transfer him, and/or suspend him up to 30 days. 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 long state service and his work performance has generally been satisfactory. However, grievant has a prior active disciplinary action for actions unbecoming a corrections officer. This prior offense counterbalances the mitigating circumstances. Therefore, it is concluded that no further reduction of discipline is warranted.

DECISION

The decision of the agency is modified.

The Group III Written Notice is reduced to a Group I Written Notice. The 30-day suspension 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]

[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.

S/David J. Latham

_____

David J. Latham, Esq.
Hearing Officer