Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 03/13/07; Decision Issued: 03/14/07; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8527; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8527

Hearing Date: March 13, 2007
Decision Issued: March 14, 2007

APPEARANCES

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 I Written Notice for unsatisfactory performance.[1] 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

[1] Agency Exhibit 1. Group I Written Notice, issued August 16, 2006.
[2] Agency Exhibit 1. Grievance Form A, filed August 30, 2006.

Corrections (Hereinafter referred to as agency) has employed grievant for 12 years. Grievant has been a corrections lieutenant for three years.

Facility policy provides that the use of force to control inmates should be a last resort.[3] The policy further provides that employees shall utilize alternatives to force if possible. Such alternatives include: 1) verbal and non-verbal de-escalation techniques, 2) waiting for the inmate to "cool down," 3) calling additional staff and, 4) the use of evasive tactics, followed by retreat and the summoning of assistance.[4] The employee should request permission from his supervisor or the watch commander before using force. The policy also requires that an audio-visual recording of the incident shall be made if there is a reasonable opportunity to plan strategy beforehand.[5]

On August 1, 2006, an inmate had become involved in a verbal altercation with his cellmate and threatened to kill his cellmate. Grievant and a corrections officer were assigned to remove the unruly inmate from his housing unit and take him to the segregation housing unit. The inmate was handcuffed behind his back; grievant and the other officer escorted the inmate to the segregation unit. Upon arrival in a holding cell, grievant asked the inmate to step out of his boots. The inmate ignored grievant and grievant asked the inmate a second time. The inmate screamed that he would step out of the boots when someone untied them. Grievant asked the inmate to sit on a stool so that he could untie the boots. The inmate became belligerent and tried to pull away from grievant.[6] Grievant stepped behind the inmate, grasped both arms, put his right foot behind the inmate's left knee and forced him to his knees on the floor. Grievant then laid the inmate in a prone position on the floor, put his weight on the inmate's thighs, and removed his boots. He then pulled the inmate to a standing position and the incident was over. Grievant is taller and significantly larger than the inmate.

Before taking the inmate to the floor, grievant did not request assistance from the other two corrections officers present,[7] did not attempt to verbally persuade the inmate, did not utilize a "cool down" period, and did not contact a supervisor or the watch commander. The inmate was then turned over to the segregation housing unit officers. These officers routinely strip-search all inmates assigned to the unit. There was no immediate need to remove the inmate's boots since he was soon going to be strip-searched. Grievant felt that the boots should be removed so he could take them back to the inmate's housing unit. Grievant acknowledged to the assistant warden that there were other alternatives that could have been used and, that he knew he should have contacted a supervisor or watch commander before using force.[8]

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[3] Agency Exhibit 2. Section 431-4.0, Institutional Operating Procedure 431, *Use of Force*, June 4, 2003.
[4] Agency Exhibit 2. Section 431-7.2, *Id.*
[5] Agency Exhibit 2. Section 431-7.9, *Id.*
[6] Agency Exhibit 5. Grievant's Internal Incident Report, August 1, 2006.
[7] Agency exhibit 4. Two corrections officers' Internal Incident Reports, August 1, 2006.
[8] Agency Exhibit 1. First resolution step response, September 27, 2006.

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 his evidence first and must 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. 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 are the least severe.[10] The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned

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

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

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*.[11] Inadequate or unsatisfactory job performance is a Group I offense.

The details of the event are relatively undisputed. All witnesses agree that the inmate pulled away from grievant after grievant directed him to sit on a stool. Grievant asserts that he reacted without taking time to think, grasped the inmate from behind, and took him to the floor. The issue is whether grievant's actions constituted unsatisfactory job performance. Grievant maintains that he reacted instinctively to the inmate's unruly behavior. In hindsight, grievant acknowledges that other alternatives might have been available to him. However, he felt that he had to act quickly for his own safety and the safety of the other two officers. He maintains that he acted on the basis of "reflex, survival and DOC training."[12]

The agency contends that grievant could have used one of the other alternatives enumerated in the facility's Use of Force policy. The agency also points out that there was no urgency to the situation. There was no need to retrieve the inmate's boots since he was shortly going to be strip-searched by the segregation housing unit staff. The agency also observes that, as a senior supervisor, grievant should be setting an appropriate example for the corrections officers who were present with him in the holding cell. The unnecessary use of force was not something that grievant should be utilizing at any time, but especially not in the presence of corrections officers. Grievant knew that the inmate was already agitated and upset because of the inmate's altercation with his cellmate and his threat to kill his cellmate.

Grievant argues that the facility policy permits the use of reasonable force, depending upon the circumstance. The controlling factors are the degree of force used by the inmate, the employee's reasonable perception of the danger, and any alternatives available to control the situation without the use of force.[13] In this case, the inmate had not used any significant amount of force; the inmate was handcuffed from behind and had only pulled away from grievant. While grievant asserts that he perceived potential danger to himself and the two other officers in the holding cell, the record does not reveal any danger from the inmate merely pulling away from grievant. The inmate had not kicked anyone and had not attempted to head-butt or bite anyone. If the inmate had done so, the danger would have been obvious and grievant's actions would have been justified under those circumstances. Finally, grievant did not take a moment to evaluate the alternatives that could have been used. Accordingly, evaluating the situation pursuant to the controlling factors discussed above, it must be concluded that the use of force was not reasonable in this case.

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[11] Agency Exhibit 3. Operating Procedure 135.1*, Standards of Conduct,* September 1, 2005.
[12] Agency Exhibit 1. Grievance Form A, August 30, 2006.
[13] Agency Exhibit 2. Section 431-7.1, Institutional Operating Procedure 431, *Use of Force*, June 4, 2003.

Mitigation

The normal disciplinary action for a Group I offense is a Written Notice. 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 been satisfactory. However, an aggravating circumstance is the fact that grievant is a senior supervisor who should have set the example by keeping a cool head, evaluating the situation, and then taking one of the alternatives enumerated in the Use of Force policy. Based on the totality of the evidence, the hearing officer concludes that the agency's disciplinary action was within the tolerable limits of reasonableness.[14]

DECISION

The decision of the agency is affirmed.

The Group I Written Notice issued on August 16, 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

[14] *Cf.* Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

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.[15] 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.[16] 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

[15] 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).

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