

Issues: Group II Written Notice (failure to follow instructions, profanity), and Suspension; Hearing Date: 03/08/07; Decision Issued: 03/12/07; Agency: Department of Corrections; AHO: David J. Latham, Esq.; Case No. 8528; Outcome: Group II – No relief, agency upheld in full, Suspension – No relief, agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8528

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

APPEARANCES

Grievant
Five Witnesses for Grievant
Assistant Warden
Advocate for Agency
Two 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 using vulgar language when arguing with his supervisor in the presence of coworkers.¹ As part of the disciplinary action, grievant was suspended for five days. The grievance proceeded through the

¹ Agency Exhibit 1. Group II Written Notice, November 6, 2006.

resolution steps. At the expedited second step, the warden offered to reduce the disciplinary action to a Group I Written Notice; grievant rejected the offer.² 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 power plant lead worker for three years. Grievant has one prior active disciplinary action – a Group I Written Notice for using profane language towards a supervisor.⁴

In December 2005, the warden sent a memorandum to all employees in the power plant.⁵ Among the issues discussed, the warden emphasized that the locker room mentality that had prevailed in the power plant was now prohibited. She specifically stated that employees would not be permitted to verbally abuse, curse, or intimidate others. The memorandum further stated that anyone heard using abusive language or being insubordinate to a supervisor would be disciplined pursuant to the Standards of Conduct. Agency policy provides that employees should at all times be respectful, polite, and courteous in their contacts with other employees.⁶

In the late summer of 2006, grievant requested to use a day of earned compensatory time on Thursday, October 26, 2006 in connection with the period of October 27-30, 2006 when he was not scheduled to work; the supervisor approved the time. On the morning of October 19, 2006, grievant's supervisor learned that grievant had not yet attended an annual in-service training⁷ required of all employees. The supervisor entered the power plant control room and told grievant he would have to attend the next training class which was scheduled for October 23-27, 2006. Grievant was very upset and told the supervisor that he had no right to make a schedule change. A heated discussion ensued between grievant and his supervisor. Grievant refused to attend the training class and said, "This shit is going to stop!"⁸ The supervisor left and reported the incident to the assistant warden.

Other employees witnessed the incident; one observed that grievant was "very aggressive" towards the supervisor.⁹ Another coworker stated that he thought grievant might hit the supervisor.¹⁰ Both coworkers left the control room as the discussion became more heated because they did not want to be involved. The assistant warden investigated the incident. After speaking with grievant, his supervisor, and other coworkers who witnessed the incident, it was decided that grievant should be disciplined. The training class issue was

² Agency Exhibit 2. Warden's second step resolution offer, December 21, 2006.

³ Agency Exhibit 2. Grievance Form A, filed November 30, 2006.

⁴ Agency Exhibit 7. Group I Written Notice, issued March 10, 2006.

⁵ Agency Exhibit 10. Memorandum from warden to power plant operators, December 14, 2005.

⁶ Agency Exhibit 5. Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*, February 15, 2004.

⁷ Agency Exhibit 6. Annual In-service training material.

⁸ Agency Exhibit 2. Memorandum from supervisor to grievant, October 19, 2006.

⁹ Agency Exhibit 11. Coworker's witness statement, October 19, 2006.

¹⁰ Agency Exhibit 2. Coworker's witness statement, October 19, 2006.

resolved by allowing grievant to attend another training session in mid-November.¹¹ The supervisor was also disciplined as a result of this incident.

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.¹²

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 II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses

¹¹ Agency Exhibit 3. Plant schedules for October and November 2006.

¹² § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

normally should warrant removal from employment.¹³ 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*.¹⁴ Failure to follow supervisory instructions and, failure to comply with written policy are examples of Group II offenses.

The agency has demonstrated, by a preponderance of evidence, that grievant was insubordinate when he angrily confronted his supervisor, yelled at him, refused to follow instructions, and used vulgar language during a heated argument. Insubordination is a Group II offense, as are failing to follow instructions and failing to comply with written policy. Grievant has acknowledged the heated discussion, his use of vulgar language, and his refusal to follow supervisory instructions. Therefore, the agency has shown that grievant's behavior constituted a Group II offense.

Grievant argues that he should not have been disciplined because he, the supervisor, and the Buildings and Grounds Superintendent had "worked it out." Despite the assurances of these three employees, the assistant warden insisted that discipline was necessary. It is management's prerogative to discipline employees even though one or more subordinates may not agree with management's decision. In this case, the assistant warden concluded that discipline was necessary because of the previous warnings to grievant, viz., the warden's December 2005 memorandum and, the previous discipline for the same type of behavior issued to grievant in March 2006.

Grievant contends that vulgar language has been commonplace among employees working in the power plant. Grievant's witnesses corroborated that such language is used regularly by power plant employees. While there was no evidence to rebut grievant's contention, it is clear that agency management has directed power plant employees to end the "locker room mentality" at the plant. The warden has met with employees and, has directed in writing that employees are to cease using such language. When employees ignore the management directive, they do so at their own peril. Grievant used vulgar language, was reported, and now must pay the consequences that management said it would enforce in the December 2005 memorandum.

Moreover, it is clear that the disciplinary action in this case was necessitated by more than just grievant's use of vulgar language. His hostile argument with the supervisor was such that at least one other employee felt that it might actually become a physical altercation. Grievant's outright refusal to comply with instructions (refusal to go to the training class) when combined with his hostility and raised voice in front of other employees was flagrantly

¹³ Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁴ Agency Exhibit 8. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

insubordinate and disrespectful. Grievant had alternative courses of action that he could have taken: he could have spoken with the supervisor in private; he could have spoken with the Building and Grounds Superintendent; or, he could have gone to Human Resources or the Warden. Instead grievant verbally lashed out at his supervisor in front of several other employees. Such behavior is insubordinate and cannot be tolerated in any organization. For these reasons, the Group II Written Notice was a reasonable disciplinary action.

Mitigation

The normal disciplinary action for a Group II offense is a written notice, or a written notice and up to ten days suspension. 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 does not have long service. Moreover, there is also an aggravating circumstance. Grievant has one prior active disciplinary action for using vulgar language toward a previous (and different) supervisor just eight months earlier. This prior discipline for the same behavior toward a different supervisor weighed significantly in the decision to discipline in this case. Based on the totality of the evidence, the hearing officer concludes that the agency's disciplinary action was within the tolerable limits of reasonableness.¹⁵

DECISION

The decision of the agency is affirmed.

The Group II Written Notice and five-day suspension 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

¹⁵ 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.'"

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.¹⁶ 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.¹⁷ 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

¹⁶ 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).

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer