

Issues: Group III Written Notice with suspension (aiding & abetting an act of physical violence against another employee); Hearing Date: 03/27/07; Decision Issued: 03/28/07; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8537; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8537

Hearing Date: March 27, 2007
Decision Issued: March 28, 2007

APPEARANCES

Grievant
One witness for Grievant
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 III Written Notice for aiding or abetting an act of physical violence against a fellow correctional officer.¹ As

¹ Agency Exhibit 1. Group III Written Notice, issued December 14, 2006.

part of the disciplinary action, grievant was suspended for seven workdays (each workday is 11.5 hours). 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 for three years as a corrections officer.³

In the afternoon of December 5, 2006, about 14 officers and supervisors from one shift gathered at a bowling alley for camaraderie and bowling. The gathering occurred while the shift was on a rest day. The gathering was not sponsored by the agency. However, one officer had made a reservation for lanes in the name of the correctional facility. Grievant and three or four other officers were sitting at one table when another officer arrived at the bowling alley with two young children (ages 3 & 4).⁴ The officer with children (Hereinafter referred to as Officer A) sat at a table some distance from grievant's table. At grievant's table, Officer B said she couldn't stand Officer A and had heard that Officer A said uncomplimentary things about her. She also said she intended to confront Officer A before she left the bowling alley, stating, *inter alia*, "Let's go kick that bitch's ass."⁵ A second officer also made negative comments about Officer A. Grievant did not say she would participate but was "instigating and boosting the other girls to fight."⁶ As these comments were made, grievant and the others at her table were looking at Officer A. Officer A noticed that this group kept looking at her and making comments to each other.

About an hour later, grievant went to the lady's restroom. Officer A then took the two children to the restroom. Grievant was in a stall when Officer A came in to the restroom. When she left her stall, grievant washed her hands. By then, three officers who had been sitting with grievant had entered the restroom. One of the officers had her two-year-old child with her. Officer B and the two other officers walked up to Officer A and verbally confronted her asking why she had been talking to inmates and other officers about her. Officer A denied making statements. Officer B then grabbed Officer A around her neck and a fight ensued. At one point Officer B knocked Officer A to the ground whereupon one officer kicked her. When the fight started, grievant grabbed the three children and took them out of the restroom. Supervisors were told of the fight and went into the restroom to break it up. When Officer B and the others came out of the restroom, they went outside the building to the parking lot; grievant joined them. By that time, police had been called; grievant and the others waited until the police arrived and interviewed people.⁷ Grievant had to wait for Officer B because Officer B had given her a ride to the bowling alley and was her transportation home.

² Agency Exhibit 2. Grievance Form A, filed January 5, 2006.

³ Agency Exhibit 4. Grievant's Employee Work Profile Work Description, November 8, 2006.

⁴ On December 5, 2006, Officer A was babysitting two young children of a friend.

⁵ Agency Exhibit 3. Witness statement, December 6, 2006.

⁶ Agency Exhibit 3. *Id.*

⁷ Agency Exhibit 3. Police Department offense report, December 5, 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 her evidence first and must prove her claim by a preponderance of the evidence.⁸

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 employment.⁹ The Department of Corrections (DOC) has promulgated its own

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

⁹ Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

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*.¹⁰ Acts of physical violence or fighting is one example of a Group III offense.

The agency has demonstrated that grievant knew that Officer B was going to confront Officer A on December 5, 2006. While sitting with Officer B and two others, the discussion about Officer A was entirely negative. During the discussion, Officer B threatened physical violence against Officer A. Grievant did nothing to discourage such talk and did not report to supervisors that there may be physical violence. Moreover, Officer A had observed grievant and the others at grievant's table repeatedly looking toward her and making comments that she assumed were about her. When the verbal confrontation occurred in the restroom, grievant was with the group of officers facing off against Officer A. This resulted in what the warden aptly characterized as a gang-like intimidation factor against officer A.

It is commendable that grievant did not participate in the physical fight. It is also commendable that grievant removed three young children from the restroom when the fight began. However, the fact is that *before* the physical fight began, grievant encouraged others in the group to confront Officer A. She did this with full knowledge that at least one of the group had expressed a desire to initiate a physical altercation. Grievant argues that she is not responsible for others and that she could not have broken up the fight. While that may or may not be true, grievant could have discouraged the talk of fighting, or could have alerted supervisors that a physical confrontation appeared to be imminent. Instead, rather than discourage, grievant encouraged the others thereby making them more emboldened and likely to go forward with their determination to provoke trouble.

Mitigation

The normal disciplinary action for a Group III offense is a Written Notice and 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 does not have long state service but her work performance has been satisfactory. Grievant also took appropriate action to remove small children from the area when physical violence occurred. Because of these factors, the agency reduced the disciplinary action from termination of employment to a seven-day suspension. Based on the totality of

¹⁰ Agency Exhibit 5. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

the evidence, the hearing officer concludes that the agency's disciplinary action was within the tolerable limits of reasonableness.¹¹

DECISION

The decision of the agency is affirmed.

The Group III Written Notice and seven-day suspension issued on December 14, 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
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

¹¹ 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.'"

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.¹² 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.¹³ 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

¹² 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).

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.