

Issues: Group III Written Notice (physical abuse of inmate), Suspension and Demotion;
Hearing Date: 04/11/07; Decision Issued: 04/24/07; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 8563; Outcome: Agency upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8563

Hearing Date: April 11, 2007
Decision Issued: April 24, 2007

PROCEDURAL HISTORY

On December 15, 2006, Grievant was issued a Group III Written Notice of disciplinary action with suspension and demotion for physical abuse of an inmate. On January 17, 2007, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On March 14, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 11, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employed Grievant as a Corrections Sergeant at one of its Facilities until his demotion to Corrections Officer. The purpose of his position as a Corrections Sergeant was:

Provides first line supervision to correctional officers and performs supervision of daily activities on assigned shift.¹

Grievant has worked for the Agency for approximately fifteen years. No evidence of prior active disciplinary action was introduced during the hearing.

On December 7, 2006 at approximately 7:30 a.m., Grievant was talking to the Inmate in an open area of the Facility where other inmates were located. The Inmate grabbed Grievant's wrist to see how Grievant would react. Grievant used a defensive technique² to twist the Inmate's hand and wrist and then forced the Inmate down to the

¹ Agency Exhibit 6.

² Grievant used a wristlock to take down the Inmate.

ground. Grievant stood over the Inmate holding the Inmate's arm in a manner preventing the Inmate from moving.

Officer A worked in another Facility and had arrived at Grievant's Facility to transfer inmates. Officer A heard an inmate yelling and he turned to see the Inmate on the ground with Grievant over him. Grievant had twisted the Inmate's hand and wrist so that the Inmate was on his back and side. Officer A believed Grievant was using a defensive technique to keep the Inmate down. Officer A observed other inmates standing around watching the incident. Officer A walked quickly to locate another officer. He called to Officer S and asked Officer S to come to where he could view Grievant using a defensive technique on an inmate. When Officer S arrived, Grievant had the Inmate on the ground with Grievant gripping the Inmate's hand. Officer A told Officer S that it appeared to Officer A that Grievant and the Inmate were engaged in horseplay. Officer A concluded Grievant was engaged in horseplay because of the demeanor of the Inmate. For example, the Inmate did not appear mad at Grievant and did not curse Grievant.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."³ Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

Virginia Department of Corrections Operating Procedure 431 sets forth the Agency's policy governing the use of force by employees. The purpose of this policy is to:

provide guidance in the use of lethal and non-lethal force by employees in the performance of their duties.

Section 431-2.0 defines "Less Than Lethal Force" as "[a]ny use of physical force by the person or weapon/devices which when used according to the manufacturer's design, recommendations and training is likely to produce no injury or only 'less than serious injuries' as defined by DOP #421." Grievant engaged in less than lethal force on the Inmate. The Inmate did not suffer any material injury.

³ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

Section 431-3.2 describes the amount of force employees may use:

Employees are permitted to use as much force as is reasonably necessary to perform their duties and to protect themselves from harm. The amount of force which is reasonable depends upon the circumstance of the particular incident. The controlling factors are:

1. The degree of force threatened or used by the aggressor, including whether he possesses a weapon, which could be used to cause physical injury.
2. The employee's reasonable perception of the danger of death or serious physical injury.
3. Any alternatives available to control the situation without the use of force.

The Inmate should not have grabbed Grievant by the wrist. Grievant was authorized to use only that force necessary to end the contact. Grievant could have removed his arm or stepped back away from the Inmate to end the contact. Instead, Grievant used a defensive technique and forced the Inmate to the ground and then stood over the Inmate. Grievant's action was unnecessary because it resulted from "horseplay" and exceeded the force necessary to respond to the Inmate's action.

Virginia Department of Corrections Operating Procedure 130.1 defines the rules of conduct governing employee relationships with offenders. This policy prohibits abuse of inmates which is defined as:

The improper use or treatment of an individual that directly or indirectly affects an individual negatively. Any intentional act that causes physical, mental, or emotional injury to an individual.

Section IV(F) prohibits hazing. Section III defines hazing to include horseplay. Grievant acted contrary to Virginia Department of Corrections Policy 130.1 because he engaged in horseplay with the Inmate.

Group III offenses include, "violation of DOC Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships with Offenders." Grievant acted contrary to this policy thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may suspend and demote an employee along with reducing that employee's salary.⁶ Accordingly, the Agency's suspension, demotion and adverse salary action must be upheld.

Grievant contends his action was necessary because the Inmate grabbed him without any authorization to do so. The Agency, however, contends Grievant's action was the result of horseplay. The Agency's assertion is supported by several factors.

⁶ Virginia Department of Corrections Operating Procedure 135.1(III).

First, the initial reactions of Officer S and Officer A were that Grievant was engaged in horseplay with the Inmate. Second, although the Inmate yelled as if in pain, he did not appear angry that Grievant had taken him to the floor. Third, Grievant did not call for assistance from other corrections officers. Fourth, Grievant did not place the inmate in the segregation unit. The Agency's customary practice was that when an inmate assaulted a corrections officer, the Inmate would be placed in segregation immediately. Fifth, Grievant did not write an incident report or otherwise inform his supervisor that the Inmate had attacked him. Grievant argued he did not file a report because he was distracted from his duties by concerns about his family. This argument fails because the incident occurred early in Grievant's shift and he had several hours to complete a report or notify his supervisor of the incident. Sixth, Grievant did not seek to discipline the Inmate under the Agency's inmate disciplinary procedure. Seventh, the incident occurred in an area where many inmates were located. The Agency chose five inmates at random to interview. Three of the five described the interaction between Grievant and the Inmate as horseplay. Eight, when the Inmate was interviewed he reported that the incident was horseplay.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."⁷ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because Officer S was slow to report the incident to the Agency.⁸ Based on the evidence presented, it appears Officer S reported the incident within a reasonable time of the first opportunity he had to make a report. Even if Officer S was slow to report the incident, it would not affect the outcome of this case because it would not be a basis for mitigation. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

⁷ *Va. Code § 2.2-3005.*

⁸ Officer S filed an incident report on December 10, 2006. He did not work on December 8 and 9, 2006.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension, demotion and salary reduction is **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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that 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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 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 a copy of all of your appeals to the other party and to the EDR Director. 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. 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.⁹

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer