

Issues: Group III Written Notice (excessive use of force) and Termination; Hearing Date: 05/10/07; Decision Issued: 05/23/07; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 8585; Outcome: Agency upheld in full.

# DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

## DECISION OF HEARING OFFICER

In re: Case Number 8585

Hearing Date: May 10, 2007

Decision Issued: May 23, 2007

### APPEARANCES

Grievant  
Grievant's Counsel  
Agency Representative  
6 Witnesses for Agency

### ISSUE

1. "Was the issuance to Grievant of a Group III notice for the use of excessive force, and termination proper?"

### FINDINGS OF FACTS

The Grievant filed a timely appeal from a Group III Written Notice with Termination issued on December 6, 2006, because Grievant allegedly violated Operating Procedure 135.1 - Standards of Conduct - Use of Excessive Force. Following a denial of relief at the third resolution step in the grievance process, the agency qualified the grievance for a hearing.

At all times relevant on November 29, 2006, Grievant was a Corrections Officer Senior serving in D Building as a Floor Officer at the facility. Grievant was working on this date by himself.

On November 29, 2006, Grievant serving by himself was delivering lunch meals to inmates in the Segregation Unit of D Building. The segregation pod houses security risk inmates in individual cells. When food trays are being delivered, the inmates are supposed to be across the cell, away from the door and tray slot and seated on the bunk. Officers serving meals are required by Post Order 84 to wear hats or hairnets. Grievant wore neither hat nor hairnet while serving meals at the time in question. When the tray slot was opened, the inmate complained about Grievant's no hat or no hairnet, was not seated across the cell as required and thrust his arm out of the tray slot. The incident was recorded on video tape. The time line from the tape shows Grievant in front of the cell, partially obscured by an open door, for over 90 seconds. At one point, Grievant is shown on the tape to be leaning toward the tray slot while bracing his foot behind him. Grievant did not immediately call for help. A control room officer saw Grievant struggling at the cell door and called the watch office for assistance.

One of the officers responding was a Corrections Officer Sergeant who testified that inmate said the Grievant assaulted him. In an interview with Grievant immediately after the incident, the Grievant told the Sergeant, "I tried to break his 'f\_\_\_\_\_' arm, "and laughed, a

comment denied by Grievant. A Senior Corrections Officer, a Corrections Officer Captain, testified that in response to the inmate putting his arm through the tray slot, the Grievant should have stepped back. He testified no physical contact was necessary and the inmate, being confined, could not get to the Grievant. When interviewed, Grievant did not say the inmate tried to grab him.

The Warden testified that Grievant's physical acts against the inmate were unnecessary and the physical force was excessive. He testified that after reviewing all reports, Grievant should have stepped back from the cell door and called for assistance.

When asked why he did not follow his training about disengaging and calling for assistance, Grievant told the Assistant Warden, "I just didn't do it."

Grievant maintained that his being the only Corrections Officer assigned to the Segregation Unit violated the Security Post Orders.

Grievant's Employee Work Profile, which allowed the Grievant to be rated either as "Extraordinary Contributor", "Exceeds Contributor", "Contributor", or "Below Contributor", rated him on 11-9-04 as "Contributor", on 11-26-05 as "Contributor" and on 10-2-06 as "Contributor".

Testimony indicated that Grievant's failure to "step back" or disengage with the inmate jeopardized Grievant, the inmate and possibly other Department of Corrections employees.

Under Institutional Operating Procedure 431.IV.A., "The use of physical force is restricted to instances of justifiable self-defense, protection of others, protection of property, and prevention of escapes and then only as a last resort and in accordance with the appropriate statutory authority. In no event is physical force justifiable as punishment".

### **APPLICABLE LAW AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to the 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 the workplace." Murray v. Stokes, 237 Va. 653, 656 (1989).

Code Section 2.2-3000 et seq. sets forth the Commonwealth's grievance procedure and provides, in 2.2-3000A:

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 Section 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.

The agency proved conclusively and by a preponderance of the evidence that when the incident with the inmate occurred, Grievant should have stepped back out of reach of the inmate and called for assistance as he had been trained to do. He did not. He grabbed the inmate's arm and tried to close the tray slot. In an interview immediately after the incident, he told a Corrections Sergeant that "I tried to break his f\_\_\_\_\_ arm". He did not tell the Assistant Warden that the inmate had tried to grab him or assault him. He did not call for assistance and when asked why he didn't follow his training, he responded, "I just didn't do it".

Since the inmate was confined, all Grievant had to do was step back and call for assistance. Instead, he engaged the inmate and by so doing, he jeopardized himself, the inmate and possible other agency employees.

The Virginia Department of Corrections Operating Procedure, No. 135.1, "Standards of Conduct". Grievant was issued a Group III Written Notice and terminated. Section XII of the Agency's Standards of Conduct provides that Group III offenses "... include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."

### DECISION

The Agency has shown by a preponderance of the evidence presented that the Group III Written Notice and termination of Grievant was warranted and appropriate in this matter.

From the Grievant's own statements shortly after the incident, which he later recanted, he tried to break an inmate's arm. He further admitted that he didn't follow training by not disengaging with the inmate.

The Group III notice and termination of the Grievant was proper from the evidence presented. The issuance of the Group III Written Notice with termination is sustained.

### APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

#### Administrative Review

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia, 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia, 23219 or faxes to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and **received** by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

### **Judicial Review of Final Hearing Decision**

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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**Thomas J. McCarthy, Jr., Esquire**  
**Hearing Officer**