

Issue: Group II Written Notice (failure to follow policy - Workplace Violence); Hearing Date: 05/25/07; Decision Issued: 07/18/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8601; Outcome: No Relief – Agency Upheld In Full.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8601**

Hearing Date: May 25, 2007  
Decision Issued: July 18, 2007

**PROCEDURAL HISTORY**

On November 14, 2006, Grievant was issued a Group II Written Notice of disciplinary action for workplace violence. On December 6, 2006, 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 April 30, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 25, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

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 employs Grievant as a Corrections Officer at one of its Facilities. He has been employed by the Agency for approximately 18 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant was dating a woman and considered her to be his girlfriend. Mr. C was also interested in the woman and she ultimately decided to date Mr. C instead of Grievant. Although Grievant considered his relationship with the woman to have ended and he no longer wished to have contact with the woman or Mr. C, Mr. C wanted to continue having conflict with Grievant. In May 2006, Grievant received a telephone call informing him that someone had broken a window at his home. Grievant blamed Mr. C and called the police. A week later, Mr. C made an offensive hand gesture towards Grievant and Grievant "let it go".

On May 26, 2006, Grievant was in a small town near the Facility where he worked. He was not in uniform. A car passed him and a passenger in the car yelled at Grievant calling Grievant a "mother f--king faggot." Grievant recognized the passenger's voice as the voice of Mr. C. Grievant perceived Mr. C's behavior as harassing. Grievant wanted it stopped. He decided to confront Mr. C. Mr. C went to a local convenience store and entered the store. Grievant found Mr. C's vehicle, parked his vehicle in the parking lot, and began walking towards the entrance of the

convenience store. As Grievant open the door to the convenience store and began to step inside, Mr. C observed Grievant and a heated conversation began. Grievant said, "you called me a mother f--king faggot!" Mr. C was standing at the counter. He clenched his fists and moved towards Grievant. Mr. C had his arms out and "got in the face" of Grievant. Grievant believed to Mr. C was going to hit him. Instead of being hit, Grievant decided to hit Mr. C first. Grievant repeatedly punched Mr. C until he heard Mr. C's mother yelling at Grievant to stop. Mr. C's mother had also been inside the convenience store with Mr. C. Grievant stopped hitting Mr. C once he believed Mr. C would not hurt him. Mr. C's face was bleeding as a result of Grievant's punches.

Grievant left the convenience store. Mr. C left the convenience store and notified the police.

At approximately 12:30 p.m. on May 26, 2006, Mr. C called the Assistant Warden and said that Grievant "beat the sh-t out of" him. Mr. C told the Assistant Warden of the conflict.

At approximately 1:30 p.m. on May 26, 2006, Grievant called the Assistant Warden and said that he had "beat the sh-t out of" some guy at a convenience store and expected that he would be arrested. Grievant was arrested later in the day and charged with a misdemeanor assault.

On June 6, 2006, the Major received a telephone call from Mr. C's mother. She said she wished to file a complaint against Grievant.

On June 28, 2006, Grievant appeared in the local General District Court. After Grievant's attorney and the Commonwealth's Attorney spoke, Grievant agreed to pay court costs, pay Mr. C approximately \$150 in restitution, and have no further contact with Mr. C. The Court continued the hearing until June 26, 2007 for final disposition.

## **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."<sup>1</sup> 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."<sup>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

## Workplace Violence

Virginia Department of Corrections Operating Procedure 130.3 establishes rule of conduct prohibiting violence in the workplace. Workplace violence is defined as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to beating, stabbing, suicide, shooting, rape, attempted suicide, attempted rape, psychological trauma such as threats, obscene phone calls, and/or electronic communications, an intimidating presence, and harassment of any nature such as stalking, shouting or abusive language.

“Injuring another person physically” is prohibited conduct under the Workplace Violence policy. Grievant punched and beat Mr. C causing him physical injury.

Although DOC Operating Procedure 130.3 is entitled "Workplace Violence", it is not limited to violence occurring on the Agency's property. Section V (B) provides:

Violent or inappropriate acts of employees occurring outside the workplace may be grounds for disciplinary action, up to and including dismissal. Circumstances must reflect that the violent or inappropriate conduct committed adversely impacts the employee's ability to perform his/her assigned duties and responsibilities, or that the conduct undermines the effectiveness of the Department's activities.

The mission of the Department of Corrections is to enhance “public safety by providing effective programming and supervising sentenced offenders”. On a daily basis Grievant was responsible for supervising inmates who had been arrested, appeared in court, and sentenced. In many cases, inmates were sentenced for violent behavior. There is some similarity between Grievant's behavior and the behavior of many inmates he supervised. Grievant engaged in violence, he was arrested, he appeared in court, he paid fines and costs, and his case was taken under advisement by the court. Grievant lives in a community where his status as a corrections officer is known by many members of the community including Mr. C who contacted Grievant's Facility. The Agency has established that Grievant's conduct undermined the effectiveness of the Department. Accordingly, Grievant acted contrary to the Workplace Violence policy thereby justifying the issuance of a Group II Written Notice.

Grievant argues that he did not intend to flight Mr. C but rather intended to confront Mr. C so that Mr. C would stop his offensive behavior. It was not necessary for Grievant to confront Mr. C. Grievant could have utilized local authorities to assist in stopping Mr. C's offensive behavior. Instead Grievant chose to confront Mr. C. When Grievant chose to confront Mr. C, he assumed the risk that Mr. C would engage in a physical confrontation instead of a verbal one. Grievant should have known that Mr. C might not behave rationally when confronted. Mr. C had demonstrated unusual behavior towards Grievant by breaking a window at Grievant's home, making an

obscene hand gesture towards Grievant, and yelling out a car window that Grievant was a “mother f--king faggot.” These are not the actions of a rational and mature man.

### Mitigation

*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...”<sup>4</sup> 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 of the delay between the date of the event giving rise to the disciplinary action, May 26, 2006, and the date the Written Notice was issued, November 14, 2006.<sup>5</sup> The Agency explained that some of the delay resulted from either Grievant or the Warden being on leave from the Facility. The Hearing Officer finds that the approximately six-month delay was an insufficient length of time to justify mitigating the disciplinary action.

Grievant contends the disciplinary action should be mitigated because the Agency has inconsistently applied disciplinary action. Grievant presented evidence of Mr. S who was an employee at the Facility. In May 2005, Mr. S was arrested for assaulting his wife in their home. The charges were dropped in court because the wife refused to testify against Mr. S. Mr. S reported his arrest to the Facility but no disciplinary action was taken against him.

The Agency did not inconsistently apply disciplinary action. The charges against Mr. S were dismissed altogether, whereas the charges against Grievant were continued for year on the court's docket. Mr. S assaulted his wife in their home, a private place, whereas Grievant assaulted Mr. C in a convenience store, a public place. No member of the public called the Facility to complain about Mr. S's behavior. Mr. C and his mother called the institution to complain about Grievant's behavior. The facts of Grievant's case are sufficiently different from the facts of Mr. S's case so as to refute the allegation that the Agency inconsistently applied disciplinary action. In light of the

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<sup>4</sup> *Va. Code § 2.2-3005.*

<sup>5</sup> An Agency investigator concluded there were a total of 23 working days between the period of June 8, 2006 and November 14, 2006 during which Grievant and the Warden were at the Facility.

standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.<sup>6</sup>

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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

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<sup>6</sup> Grievant was ordered to attend anger management counseling. Although this is mentioned in the Written Notice under the section for circumstances considered, it does not appear from the Written Notice that attending counseling was part of the discipline Grievant received. An agency may not order an employee to attend counseling if that order is contained in the Written Notice. An agency may order an employee to attend counseling so long as attending counseling is not a form of punishment under the disciplinary action.

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.<sup>7</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.