

Issue: Group II Written Notice (failure to follow policy) and Suspension; Hearing Date: 01/23/08; Decision Issued: 02/20/08; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq; Case No. 8637; Outcome: Partial Relief.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 8637

Hearing Date: January 23, 2008
Decision Issued: February 20, 2008

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
4 Witnesses for Agency
1 Witness for Grievant

ISSUES

The parties, by counsel and representative agreed in the pre-hearing conference on January 15, 2008, that the issues for this hearing are: "Was the Group II Written Notice issued 2/1/07 to the Grievant for failure to follow policy and training by using excessive force on an inmate in full restraints and after the incident failing to complete an incident report as required by policy proper; and Was the suspension, which was reduced from 40 hours to 24 hours, proper?"

FINDINGS OF FACTS

On December 1, 2006, Grievant was a Corrections Officer assigned to transport inmates to their assigned correctional institutions from other institutions. At an intermediate stop, inmates were separated into three groups - one group to remain at the intermediate stop, one group to be placed on a van for transport to another corrections center and one group to be placed on a van to be transported to Grievant's assigned correctional center. The two ongoing vans were placed in the sally port of the intermediate correctional center and the shackled inmates were unloaded into the sally port where shackles were to be exchanged and the inmates were separated into groups of those staying at the intermediate correctional center and those to be loaded onto vans for their correctional center destinations.

An inmate demanded to use the bathroom facilities. His request was denied by the Grievant. The inmate continued his demands with profane and abusive language.

Grievant told the inmate to calm down. Inmate did not. He threatened to urinate on the Corrections Officers and according to Grievant moved towards the back of a Corrections Officer who was exchanging another inmate's shackles. Grievant placed the shackled inmate face first against the sally port chain link fence and asked for a supervisor from the intermediate correctional center. The inmate continued to loudly curse and swear. When the supervisor from the intermediate facility arrived, he told Grievant to place the inmate on the van going to his final destination and charge him. The inmate lied about his name and number.

Grievant wrote the charge for the offending inmate before leaving the intermediate correctional center.

Upon reaching the correctional center where the inmate was to be housed, the inmate complained of being assaulted and saw the facility nurse for abrasions to his forehead.

The Captain at the transfer site did not order Grievant to do an incident report but to charge the inmate, "... he did not feel excessive force was used ...".

The incident occurred on Friday, December 1, 2006. Grievant was not on duty after Friday, December 1, 2006, until Monday, December 4, 2006.

The Watch Commander at Grievant's assigned facility had left the facility when Grievant returned.

The next day the Watch Commander at Grievant's facility was called by the Captain at the transfer correctional facility to say he had failed to get Grievant to write an incident report on the use of force. The Grievant was called, and he e-mailed an incident report on the use of force to his institution which was sent to the Captain at the transfer point. Two days later, a formal incident report was delivered upon Grievant's return to work.

The inmate had five disciplinary actions from December, 2005, to August, 2006 - three resulting in 15 days isolation.

Grievant received a Group II Written Notice for use of excessive force and failing to complete an incident report on the use of force as required by policy, with disciplinary action reduced from 40 hours suspension to 24 hours suspension, taking into account his years of service as mitigation.

The inmate was charged under Department of Corrections Policy 861.

APPLICABLE LAW, POLICY AND PROCEDURES

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.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

The following policies were admitted and considered as an exhibit:

- VDOC Operating Procedure No. 135.1, Standards of Conduct, Section XI, B.1.
- VDOC WRSP Operating Procedure 431, IV A, and K 1 & 2.

CONCLUSIONS OF LAW

The evidence indicated an inmate who was denied the use of bathroom facilities while being transferred from one van to another in the sally port of a correctional facility became disruptive, vulgarly profane and while shackled threateningly approached the back of a Corrections Officer. Grievant acting on his perception of danger to another Corrections Officer placed the inmate face first into the sally port's chain link fence.

From the evidence the Captain at the transfer corrections facility who was called to the scene of the incident "... did not feel excessive force was used ..." and did not have his staff write incident reports on this incident.

Department of Corrections WRSP Operating Procedure 431, Use of Force, dated January 1, 2006, provides "Employees may use all necessary and suitable means to (protect other staff members) to perform these duties, including the use of physical force." The same IOP requires, "Any employee who uses or observes the use of force must report the incident to his/her supervisor immediately."

The Grievant was on the road transporting inmates. The incident was reported to the Captain at the intermediate corrections facility. Grievant's Watch Commander had finished his shift and left the facility before Grievant's return to his assigned facility. From the evidence, Grievant left his facility feeling his charging the inmate was all the action required. Grievant was not readily reachable at his home by the subsequent Watch Commander. When he was reached he faxed an informal report to his assigned facility. Upon his return to work he filed a formal incident report.

Grievant charged the inmate as directed, he filed an informal incident report by fax the next day and a formal one as directed when he returned to duty.

DECISION

From the evidence a Corrections Officer Captain who was on the scene did not feel excessive force was used; the fact that the Grievant was transporting inmates for a considerable time period after the incident; that Grievant immediately complied when ordered to file an incident report and filed a formal incident report upon return to duty; I find that there was a technical violation by the Grievant in not "immediately" reporting the incident to his Supervisor by the end of his duty period. The ordered report was informally filed the next day and the formal report was filed upon Grievant's return to duty as instructed. The report was not filed before the conclusion of Grievant's tour of duty.

Based on the circumstances testified to, the use of excessive physical force is not found. A technical violation of policy is found. Discipline of 40 hours of suspension, mitigated to 24 hours based on years of service, equaling three days suspension considering the circumstances was excessive and is hereby ordered reduced and modified to 8 hours of suspension. Due to Grievant being away from his assigned facility and the fact that his supervisor was not on duty when Grievant returned to his assigned facility further modification of discipline is proper. The Group II for policy violation is sustained with discipline as reduced and modified.

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. 14th Street, 12th 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.

Thomas J. McCarthy, Jr.
Hearing Officer