

Issues: Group III Written Notice (inmate abuse) and Demotion; Hearing Date: 06/13/08; Decision Issued: 06/17/08; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 8862; 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 No: 8862

Hearing Date: June 13, 2008
Decision Issued: June 17, 2008

PROCEDURAL HISTORY

The Grievant received a Group III Written Notice on January 30, 2008 for:

Recognized Maltreatment of an Offender. On January 15, 2008, Grievant by his own admission used physical force during an altercation on an offender inside the cell area as witnessed by Officer A. Grievant failed to report the incidence in accordance with policy, he failed to provide the offender with medical access, and he also failed to secure the cell by removing handcuffs left laying on the cell bed during the altercation. The incident required immediate notification to supervision and medical review. The incident was made known to management by the offender.

On February 13, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Second Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 12, 2008, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On June 13, 2008, a hearing was held at the Agency's location.

APPEARANCES

Grievant
Grievant's Representative
Agency Party
Agency Representative
Witnesses

ISSUE

1. Whether the Grievant's actions justified receipt of a Group III Written Notice of disciplinary action for maltreatment of an offender and a subsequent reduction in rank from Sergeant to Corrections Officer with a reduction in pay.

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 Agency provided the Hearing Officer with a notebook containing seven (7) tabbed sections and that notebook was accepted in its entirety, as Agency Exhibit 1. The Grievant provided the Hearing Officer with twelve (12) different documents, which the Hearing Officer put into the notebook that was Agency Exhibit 1, with tabs 1-12 and those were accepted in their entirety and will be designated as Grievant’s Exhibit 1. The Agency, when referring to its Exhibits, will refer to the notebook tabs as Agency Tabs 1-7 and the Grievant will refer to the notebook as Grievant Tabs 1-12.

The facts of this matter were largely undisputed. The Grievant was a Corrections Sergeant for the Agency. On January 15, 2008, the Grievant and Corrections Officer A entered the cell of Inmate W. The Grievant pointed out to the inmate certain infractions that were within his cell and this led to the inmate speaking loudly to the Grievant. At this time, the Grievant said that he was going to handcuff the inmate and removed his handcuffs from their case. The inmate sat up on the bed, threw his pillow and blanket on the floor and then the Grievant placed his hands on the inmate’s clothing and pulled him off the bed and pushed him up against a wall. The inmate raised his hands as if to signal that he was not going to fight and the Grievant and Officer A left the cell. In the process, the Grievant left his handcuffs in the cell.¹

Operating Procedure 420.1 is the Agency’s set of procedures for Use of Force.² Procedure 420.1(IV)(A)(4) states in part as follows:

The use of force is restricted to incidents of justifiable self defense, protection of others, protection of property, prevention of escapes and to maintain or regain control, and then only as a last resort and in accordance with appropriate statutory authority.

Operating Procedure 420.1(IV)(B)(3) states in part as follows:

¹ Agency Exhibit 1, Tab 3, Pages 3 and 4, and 6-11.

² Agency Exhibit 1, Tab 4

Any employee who uses or observes the use of force must report the incident to his/her supervisor immediately.

Operating Procedure 420.1(IV)(B)(4) states in part as follows:

Failure of any employee to accurately and completely report an incident where force was used may result in disciplinary action.

Corrections Officer A testified and her testimony was substantially identical to the written Investigative Interview which she provided.³

The Grievant presented one (1) witness who was Lieutenant T. Lieutenant T did not help the Grievant in his testimony. Lieutenant T testified that, in a situation similar to that with which the Grievant was faced, his first action should have been to remove himself from the inmate's cell and to call for additional assistance. He testified that it is necessary to do everything that can possibly be done to de-escalate the situation. He further testified that all appropriate reports would then need to be filed and that it was completely inexcusable to leave your handcuffs in an inmate's cell.

Accordingly, the Hearing Officer finds that the Agency was correct in determining that the Grievant's actions rose to a Group III offense.

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..."⁴ 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. The Agency considered the Grievant's length of service and his unblemished record to mitigate the Group III offense, which normally would result in termination, to a reduction in rank and a reduction in pay.

DECISION

³ Agency Exhibit 1, Tab 3, Pages 3 and 4

⁴ Va. Code § 2.2-3005

For reasons stated herein, the Hearing Officer finds that the Grievant did violate policy and that a Group III Written Notice was appropriate. The Hearing Officer finds that the Agency properly mitigated the potential termination of the Grievant to a reduction in rank and reduction in pay and that the Agency has properly handled this matter. Accordingly, the Hearing Officer finds that the Agency's actions are appropriate.

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 Street, 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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.⁵

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.⁶

[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]

William S. Davidson
Hearing Officer