

Issues: Group II Written Notice (failure to follow policy), Group III Written Notice (use of force) and Termination; Hearing Date: 07/29/08; Decision Issued: 08/04/08; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 8906; Outcome: No Relief – Agency Upheld in Full; **Judicial Review: Appealed to Circuit Court in Wise County; Outcome pending.**

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 8906

Hearing Date: July 29, 2008
Decision Issued: August 4, 2008

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
3 Witnesses for Agency
4 Witnesses for Grievant

ISSUES

"Was a Group II written notice proper for Grievant's actions on January 30, 2008, in an incident with an inmate involving a violation of supervisor's instructions resulting in the use of unauthorized force and failure to report this use of unauthorized force?"; and

"Did Grievant violate Standards of Conduct by failing to notify his supervisor about disruptive conduct by an inmate in a shower and further violate Standards of Conduct by opening the shower door without properly restraining the inmate and using unauthorized force on the inmate and was a Group III written notice with termination proper for this infraction?"

FINDINGS OF FACTS

On January 30, 2008, Grievant, a Corrections Officer, with Corrections Officer B escorted an inmate from his cell in the Segregation Pod to the shower rooms. The inmate was in leg restraints and his hands were handcuffed behind his back. As they arrived at the shower room, the hot cart with breakfast trays for the inmates in the Segregation Pod arrived.

The inmate asked that his tray remain on the heated cart while he was in the shower. The other Corrections Officer agreed but Grievant as the Senior of the two Corrections Officers said no. The inmate complained with vulgarity and profanity.

The inmate was taken into the shower, the door was left open while the Grievant removed the inmate's leg restraints. One of the inmates' handcuffs was released. The other remained on with a lanyard attached which was held by Corrections Officer B.

The shower door was closed and locked. The inmate became disruptive.

Due to the verbal disruption from the inmate, the Grievant told the inmate his shower was cancelled and to cuff up. The inmate complied and his free arm was cuffed.

When the door was unlocked for the inmate's leg restraints to be put back on, the inmate, in handcuffs, shouldered the door and tried to come out.

The Grievant, reacting in fear of the inmate, pushed the inmate toward the back wall of the shower room where the inmate hit his head on a steel plate on the wall, cutting himself above the left eye.

The Grievant then put the inmate on the floor, where the inmate hit his head on a cement water stop cutting his lip and cheek, inside and out.

The inmate required stitches for the cut above his eye, inside his lip and cheek.

During the incident Grievant called for his Supervisor.

The subdued inmate was checked for injuries in the pod and taken to the medical facility for treatment and stitches.

While in the medical facility, the inmate told another Corrections Officer who asked what happened, that he had "set up the Grievant".

Although the inmate alleged Grievant had "punched" him in the head, this allegation was neither substantiated, nor believed by subsequent investigators.

From the testimony, there was no written policy on applying leg restraints at the time of the incident. Some Correction Officers testified to being trained on when to apply and remove leg restraints. Other Corrections Officers testified that they did not remember training on this procedure. If there was instruction, the testimony was that it frequently was not followed at the shower due to having to kneel in contaminated water from previous showers to get the leg restraints removed. The policy was not written until after the incident in question, and if verbally communicated, inconsistently applied.

There was a wide difference in the understanding of the restraint removal policy. New hires at this facility acknowledged such training. Corrections Officers who transferred from other facilities did not recall such training.

The video tape for the segregation pod at the time of the incident was inconclusive.

The incident occurred in a very short time and the Grievant reacted to aggression with fear.

The Agency did not prove that Grievant had been instructed on how or when to remove restraints through door openings.

The Grievant had excellent evaluations of his job performance.

At the time of the incident, Grievant logged in the incident and elaborated on it on two other occasions. A Sergeant responded to the scene, as well as medical personnel. The Grievant did not consider the force used unauthorized.

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.

Department of Corrections Operating Procedures 420.1 IV B.4 and 5 requires written reports on incidents where force was used.

Department of Corrections Operating Procedure 420.1 IV, 2.c. and 2.d., lists as a "controlling factor" for the use of force "Any alternative available to control the situation without the use of force."

DECISION

Virginia Department of Corrections Operating Procedure 420.1, IV B.4. "Failure of any employee to accurately and completely report any incident where force was used may result in disciplinary action." The Agency proved conclusively and by a preponderance of the evidence that Grievant did not comply with this policy. For this failure alone, the Group II notice is sustained. For the above reasons the failure to follow restraint procedure is not sustained.

The Agency proved conclusively and by a preponderance of the evidence that when the inmate became disruptive, as an alternative to the use of force (Operating Procedure 420.1 IV c.2.d). Grievant and his fellow officer should have left the inmate locked in the shower and called for assistance instead of unlocking the door to deal with the inmate. Since the inmate was confined, all the Grievant had to do was leave the inmate locked in the shower room and call for assistance. Instead, he unlocked the shower room door and engaged the inmate and by so doing, he jeopardized himself, and possibly other agency employees. 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. 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., Esquire
Hearing Officer