

Issues: Group III Written Notice (threatening/coercive behavior) and Suspension;
Hearing Date: 10/14/08; Decision Issued: 10/15/08; Agency: DOC; AHO: Cecil H.
Creasey, Jr., Esq.; Case No. 8943; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 8943

Hearing Date: October 14, 2008
Decision Issued: October 15, 2008

PROCEDURAL HISTORY

On July 17, 2008, Grievant was issued a Group III Written Notice of disciplinary action with ten days suspension. The Grievant was also transferred to another agency location. The offense was threatening or coercing an offender. 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 September 2, 2008, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on September 16, 2008. The hearing was scheduled at the first date available between the parties and the hearing officer, October 14, 2008. The grievance hearing was held on October 14, 2008, at the Agency's regional office.

Both sides submitted exhibit notebooks with numbered exhibits that were, without objection from either side, admitted into the grievance record, and will be referred to as Agency's or Grievant's Exhibits, numbered respectively. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Two Co-advocates for Grievant
Five witness for Grievant (including Grievant)
Advocate for Agency
Representative for Agency
Three witnesses for Agency (including Representative)

ISSUES

Did Grievant's conduct warrant disciplinary action under the Standards of Conduct and Agency policy? If so, what was the appropriate level of disciplinary action for the conduct at issue?

The Grievant requests reduction of the Group III Written Notice, reversal of the ten day suspension, and transfer back to original agency location.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

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

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

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 § 2.2-3001.

The Agency's Operating Procedure No. 135.1, Standards of Conduct, defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. Group III offenses specifically include, "threatening or coercing persons associated with any state agency . . ." Agency Exhibit 5.

The Offense

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant as a correctional officer at one of its Facilities for at least four years prior to the date of the offense, July 5, 2008. The Grievant enjoys a good work history, no active written notices, and positive comments from his supervisors.

On July 4, 2008, after some words were exchanged during breakfast in the mess hall, offender EM said something to the Grievant to the effect of suggesting that he (the Grievant) get a gun and kill himself like his (the Grievant's) brother did a couple of years prior. The Grievant took great umbrage to this remark from an offender about his family's tragedy. The Grievant pursued some administrative discipline against the offender, but understood that there was nothing the Agency administration planned to do with the offender in response to the remarks made to the Grievant. The Grievant wanted the offender to be "locked up" in a more secure capacity and to lose his privilege of staying in an honor dorm. The captain on duty, while investigating the incident, heard the Grievant, in the presence of the offender, state that if the offender mentioned the Grievant's family again he (the Grievant) would not be responsible for his actions. Grievant's superior officers considered that comment to be inappropriate and potentially a threat. The Grievant denied he was threatening the offender. The Grievant's commanding officers did not want the Grievant returning to work unless he was capable of putting the incident to rest. The Grievant wrote and signed a statement on July 4, 2008, at 9:10 a.m., saying that the incident was behind him, that he held no ill feelings, and that he will continue to deal with the offender in a professional manner at all times. Agency Exh. 4.

On July 5, 2008, at morning muster, the Grievant raised the issue by questioning the administration's response to this kind of situation. The captain responded by stating that he would only discuss the issue with the Grievant privately. Following morning muster and briefing, the Grievant immediately went to the offender's dorm room and challenged the offender to state his offensive remark again. Two other correctional officers physically took hold of the Grievant to remove him from the confrontation with the offender. The Grievant physically resisted the other correctional officers' restraint of him, with one of the officers being slightly injured.

On July 8, 2008, the offender made a written informal complaint about the Grievant's conduct, describing a rather colorful tirade from the Grievant on the morning of July 5, 2008, but the Grievant denies the account provided by the offender. Agency Exh. 3. The Grievant testified that he went to the offender's room the morning of July 5, 2008, out of frustration over the administrations lack of discipline for the offender. The Grievant planned for his confrontation of the offender to result in the offender being locked up for his disrespectful and disturbing comment about his brother's suicide. The Grievant testified that he did not sincerely believe the statement he wrote the morning of July 4, 2008; he wrote it so that he could return to his livelihood.

The warden testified that he issued the Group III written notice because he considered the Grievant's conduct following muster on July 5, 2008, to be threatening and coercive to the offender. The warden testified that he elected not to impose the normal consequence of termination for a Group III offense. The warden considered mitigating circumstances, including the nature and circumstances of the offense and the Grievant's good work history and tenure. The Grievant submits that his conduct was not threatening and coercive, but, rather, merely disruptive. Disruptive behavior, suggests the Grievant, is only a Group I offense. However, all disruptive behavior is not threatening and coercive. However, threats and coercion, by definition, are disruptive.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the termination of the Grievant's employment was warranted and appropriate under the circumstances.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293,299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

I find that the Grievant's admitted conduct in confronting the offender the morning of July 5, 2008, was clearly threatening and coercive. This occurred just one day after the Grievant said that if the offender made another comment about the Grievant's family, he would not be responsible for his actions. The Grievant's confrontation with the offender was specifically a dare to repeat the offending remark. A corrections officer and an incarcerated offender are not on equal footing. Corrections officers necessarily have control over those incarcerated under them. The role of a corrections officer requires tolerance of provocative and insulting statements, language, and actions. The conduct to which the Grievant admits was designed to create an incident with a negative impact on the offender. This conduct was threatening and coercive, thus more than merely disruptive behavior. Because the Grievant's admitted conduct rose to the level of threatening and coercive, I find that the Agency properly issued a Group III Written Notice.

Mitigation

The agency has proved (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* (“Hearing Rules”) § VI.B.1.

Termination is the normal disciplinary action for Group III Written Notices unless mitigation weighs in favor of a reduction of discipline. Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution.” Va. Code § 2.2-3005(C)(6). 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.

Since the agency has already mitigated the discipline to a sanction less than termination, the agency has already exhibited a measured disciplinary response. With the agency already having mitigated the discipline, it would take extenuating circumstances to show mitigation sufficient to reduce the level of discipline further. Under the *Rules for Conducting Grievance Hearings*, an employee’s length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action.

Under the EDR’s Hearing Rules, the hearing officer is not a “super-personnel officer.” Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In this case, the Agency’s action of imposing discipline less than termination is within the limits of reasonableness. While the hearing officer finds that this Grievant has a good record overall of being a sincere contributor to the agency, in light of the applicable standards, the Hearing Officer finds no evidence that warrants any further mitigation to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, I uphold the Agency’s Group III Written Notice with ten days’ suspension.

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 Street, Suite 400, Richmond, VA 23219 or faxed 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer