

Issues: Group III Written Notice (workplace violence), Demotion and Pay Reduction;
Hearing Date: 01/15/09; Decision Issued: 03/23/09; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 9001; 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: 9001

Hearing Date: January 15, 2009
Decision Issued: March 23, 2009

PROCEDURAL HISTORY

On August 15, 2008, Grievant was issued a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction for workplace violence.

On August 19, 2008, 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 November 24, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 15, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
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 employed Grievant as a Lieutenant at one of its Facilities. The purpose of this position was:

Direct the work of Corrections Sergeants and Corrections Officers on assigned shifts, coordinates work schedules and duty rosters, and inspects facility to maintain security, safety and sanitation.¹

He had been employed by the Agency for approximately 10 years prior to his demotion to Corrections Officer with a disciplinary pay reduction effective August 15, 2008. Grievant had prior active disciplinary action consisting of a Group I Written Notice issued May 5, 2008 for use of obscene or abusive language. Grievant's prior work performance was otherwise satisfactory to the Agency.

The LPN² works at the Facility in the medical unit providing services to inmates. On April 30, 2008, the LPN treated an inmate in the medical unit and released him to return to his housing unit. When the inmate returned to the housing unit, the inmate told Grievant that he had to be placed in a lower bunk on a bottom tier of the housing unit. Grievant decided the inmate should return to the medical unit because Grievant

¹ Agency Exhibit 3.

² The LPN was not a State employee but worked for a private contractor to the Agency.

believed the inmate's needs could not be met in the housing unit. Lieutenant H called the LPN and asked if Grievant could send an inmate back to the medical unit without first contacting the LPN. The LPN told Lieutenant H that Grievant could not do so. The LPN called Grievant and asked what gave him the right to send the inmate back to the medical unit without her permission. Grievant responded that his rank gave him that right. The LPN did not like Grievant's statement so she called the Warden and told the Warden about the incident. The Warden contacted Grievant to discuss the matter. Approximately 20 minutes later, Grievant called the LPN told her she was a "snitch" and hung up on her.

Several hours later in the day, Grievant left his work area and walked to the medical unit where the LPN worked. Grievant entered the building. The LPN was inside the restroom. As she opened the door to exit the restroom, Grievant was standing at the door, looking at her "eye to eye". Grievant said "So now [an abbreviation of the LPN's name]?" While the LPN was standing with her arms to her side, Grievant wrapped his arms around her arms and body at her waist. The LPN moved backwards to get away from Grievant. As she did so, both the LPN and Grievant lost their balance. They fell to the side and the LPN's head and neck hit a desk as the LPN fell down. Grievant picked up the LPN and instructed Ms. A to get a chair. The LPN sat in the chair and rested her head on the desk for approximately two or three minutes. The LPN's head hurt. Grievant said, "I'm sorry. I was over here to tell you I'm sorry." Grievant then left the medical unit.

The LPN continued to experience pain and called her mother to take her to the hospital. Ms. A and a Corrections Officer assisted the LPN into a wheelchair and helped her leave the Facility. The LPN got into a vehicle driven by the LPN's mother and they went to the Emergency Room of a local hospital.

The LPN initiated criminal charges against Grievant for assault and battery pursuant to Virginia Code § 18.2 - 57. Grievant pled not guilty to the charge. On July 17, 2008, the Court tried the case and found "facts sufficient to find guilt but deferred judgment/disposition to July 16, 2009." The Court ordered that, "[c]ontact prohibited between defendant and victim/victim's family or household members". The Court also ordered that Grievant attend courses on anger management.

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."³ 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

³ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

warrant removal.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

Department of Corrections Policy 130.3, Workplace Violence, defines workplace violence 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 natures such as stalking, shouting, or abusive language.

Grievant engaged in battery (a physical assault) by intentionally wrapping his arms around the LPN against her will and with the effect of preventing her from moving away from him. Accordingly, Grievant engaged in workplace violence. Employees engaging in workplace violence “will be subject to disciplinary action under the Department Standards of Conduct, up to and including termination and, based on the situation, may include criminal prosecution.”⁶ A battery of another employee in the workplace is sufficient to rise to the level of the Group III offense. Upon the issuance of a Group III Written Notice, the Agency may demote Grievant and reduce his pay.

Grievant contends that he went to see the LPN in order to apologize to her.⁷ He grabbed her in order to hug her as a gesture of reconciliation and not in order to harm her. In other words, Grievant denies that he battered the LPN. Grievant points out that the Court did not actually convict him of a crime but rather the Court took the matter under advisement until July 16, 2009 at which time the charge would be dismissed if Grievant satisfied the Court’s conditions. Grievant’s argument fails. HR-2006-3 provides:

Charges that result in a court finding that “there is sufficient evidence for a finding of guilt and the imposition of the action is held in abeyance for a period of time”, may be dealt with on an administrative basis, not as a conviction but as contact which has been factually proved.

Although the Court did not convict Grievant, the court found that there were sufficient facts to find Grievant guilty of assault and battery of the LPN. The Agency is entitled to rely on the Court’s findings and take disciplinary action based on those findings. It is

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁶ Department of Corrections Policy 130.3, Workplace Violence.

⁷ The LPN’s written statement reveals that Grievant said to her, “I’m sorry. I was over here to tell you I’m sorry.”

not appropriate for a Hearing Officer to disregard the findings of a Court applying a higher standard of proof than the preponderance of the evidence.

Grievant argued that the Agency initially decided to issue him a Group I Written Notice and that the Agency was prohibited from elevating that Written Notice to a Group III. Doing so constitutes “double jeopardy”, according to Grievant. Double jeopardy is a concept applicable to courts and criminal prosecution. The Agency elevated the level of disciplinary action once it learned of the criminal charges and the Court’s findings and realized that Grievant’s behavior was more serious than it originally believed. Nothing in DHRM policy or DOC policy prohibits the Agency from doing so.

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...”⁸ 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. In light of this standard, 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 III Written Notice of disciplinary action with demotion and disciplinary pay reduction is **upheld**.

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.

⁸ *Va. Code § 2.2-3005.*

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 St., 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
600 East Main St. STE 301
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 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.⁹

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.