

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice (workplace violence), and Termination; Hearing Date: 01/08/09; Decision Issued: 03/30/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9002; Outcome: Partial Relief; **Administrative Review**: **AHO Reconsideration Request received 04/08/09; Reconsideration Decision issued 04/13/09; Outcome: Original decision affirmed;** **Administrative Review**: **DHRM Ruling Request received 04/08/09; DHRM Ruling issued 05/13/09; Outcome: AHO's decision affirmed;** **Administrative Review**: **EDR Ruling Request received 04/08/09; EDR Ruling #2009-2277 issued 05/28/09; Outcome: Remanded to AHO; Remanded Decision issued 06/01/09; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9002

Hearing Date: January 8, 2009
Decision Issued: March 30, 2009

PROCEDURAL HISTORY

On August 13, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for threatening and abusive behavior. On August 13, 2008, Grievant was issued a Group II Written Notice for failure to follow a supervisor's instructions.

On August 25, 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 8, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
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 Corrections Officer at one of its Facilities. The purpose of his position was:

Maintains security, custody, and control over inmates at the Institution and while in transport, by observing and initiating corrective and/or disciplinary action for inappropriate behavior. Supervises inmates' daily activities and observes and records their behavior and movement to ensure their safe and secure confinement.¹

Grievant had prior active disciplinary action consisting of a Group II Written Notice issued on August 13, 2007, and a Group I Written Notice issued on January 4, 2008.

On June 4, 2008, Grievant was assisting Corrections Officer B to conduct frisk searches of inmates prior to their passing through a gate. The purpose of the "shakedown" was to identify any contraband on the inmate's body that the inmate might be trying to take with him inside the gate. Approximately 30 inmates were in the area in line to pass through the gate. As part of the search, Grievant was standing behind the Inmate and moving his hands across the Inmate to determine if the Inmate had any

¹ Agency Exhibit 4.

objects or items under his clothing. The Inmate was wearing loose fitting pants and as Grievant brushed his hands on the Inmate's legs, the Inmate's pants fell to his ankles. Grievant immediately attempted to pull up the Inmate's pants. The Inmate asked Grievant what he was doing and pushed Grievant's left hand away. Grievant then balled his hands into fists approached the Inmate. Grievant told the inmate "I will bust you in the head." Corrections Officer B quickly stepped in between Grievant and the Inmate. She put her right hand on the Inmate's shoulder and told him several times that it was not worth it and that he should go through the shakedown booth. The Inmate proceeded through the shakedown booth and left the area.

Grievant worked in the strike force unit at his prior Facility. As part of his duties, he wore pants referred to as tactical pants. When Grievant transferred to his current Facility, he began wearing a different shirt but continued to wear the tactical pants because he had a limited supply of pants. He no longer performed duties at his current Facility that would justify wearing tactical pants. He noticed that other employees at the Facility mixed and matched their uniforms so he did not consider wearing tactical pants to be problematic. On August 4, 2008, Grievant wore tactical pants to work.

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."² 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 warrant removal."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

Group II Written Notice

"[F]ailure to follow a supervisor's instructions" is a Group II offense.⁵ The Agency contends the Lieutenant told Grievant not to wear tactical pants. The Lieutenant was unable to identify the date⁶ on which he told Grievant not to wear the pants. He testified

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

⁵ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

⁶ The Written Notice states that the date was June 4, 2008. Lieutenant S had no recollection of this date. The Written Notice says it occurred during muster. Muster occurs at the beginning of each shift when employees gather in front of a supervisor for briefings, etc. To establish that an employee failed to follow a supervisor's instruction, the Agency must show that the instruction was directed at the specific employee and that the employee knew or should have known of the instruction. An instruction made to a group of employees may meet this test but it also may mean that the instruction was a general

he told Grievant several times not to wear tactical pants, but could not remember how many times. Details regarding the circumstance in which Grievant was told by the Lieutenant not to wear tactical pants were not presented. For example, where in the facility Grievant and the Lieutenant met, who else was present during the meeting(s), whether Grievant acknowledged the instruction(s) are questions not resolved by the Agency. There is insufficient detail for the Hearing Officer to conclude that (1) a supervisor gave Grievant an instruction not to wear the tactical pants, (2) Grievant understood the instruction and (3) Grievant knowingly acted contrary to the supervisor's instructions.

Group III Written Notice

Workplace violence is defined 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 nature such as stalking, shouting, or abusive language.⁷

"Threatening to injure an individual" is workplace violence. Grievant engaged in workplace violence because he threatened the Inmate by saying he would bust the Inmate in the head. Grievant's fists were balled at the time he made his threat. His demeanor reflected a present intent to engage in a physical response if Grievant wished to do so.

"Employees violating these procedures will be subject to disciplinary action under Department *Standards of Conduct*, up to and including termination"⁸ Based on the evidence presented, there exists a sufficient basis to uphold the Agency's conclusion that Grievant should be removed from employment.

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...."⁹ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

admonition regarding work expectations to all employees rather than a specific detailed instruction to one employee.

⁷ DOC Operating Procedure Number 130.2(III).

⁸ DOC Operating Procedure Number 130.2

⁹ *Va. Code § 2.2-3005.*

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.

Grievant contends he was simply preparing to defend himself against the Inmate who was considering hitting him.¹⁰ Although the Inmate had pushed Grievant's hand away, the evidence is insufficient to conclude that the Inmate had a present intent to harm Grievant. If the Inmate actually intended to harm Grievant, the Inmate would have continued a physical interaction with Grievant after having pushed Grievant's hand away.¹¹ In other words, once the Inmate initiated physical contact with Grievant by pushing Grievant's hand away, there would be little reason for the Inmate to stop his physical interaction with Grievant if the Inmate actually intended to harm Grievant. Instead, the Inmate stopped and began cursing at Grievant rather than hitting Grievant. Grievant's response was based on Grievant being angry with the Inmate for having pushed Grievant's hand away.¹²

If the Hearing Officer assumes for the sake of argument that Grievant was justified in exercising self defense against the Inmate by threatening to harm the Inmate, there are aggravating circumstances to counter the mitigating circumstances. Grievant and the Inmate were surrounded by approximately 30 inmates. If a fight had occurred between Grievant and the Inmate, the other inmates could have joined in the fight against Grievant or against Corrections Officer B. A small mostly verbal conflict could have expanded into a large physical altercation with risk of significant injury to two out-numbered corrections officers.

Grievant argues that he asked the Agency to look at and preserve the video tape generated by a camera overlooking the shakedown area. The Agency should have complied with Grievant's request if the tape existed at the time of the request. Grievant asked that the tape be preserved on July 31, 2008, but the Agency reuses its tapes every 30 days and the tape may no longer have existed on that date. In this case, however, the absence of a video does not materially affect the outcome of this case. Grievant did not recall what statement he made to the Inmate. Corrections Officer B

¹⁰ The use of force by a corrections officer "is restricted to instances of justifiable self-defense, protection of others, protection of property, prevention of escapes, and to maintain or regain control, then only as a last resort and in accordance with appropriate statutory authority." DOC Operating Procedure 420.1(IV).

¹¹ The Inmate did not ball his hands into fists; only Grievant did so.

¹² "At all times, employees should be respectful, polite, and courteous in their contact with offenders" DOC Operating Procedure 130.1.

recalled that Grievant said he would bust the inmate in his head. A video tape of the incident would not likely have captured Grievant's statements to the Inmate. Corrections Officer B's testimony was the most reliable evidence regarding what Grievant said to the Inmate. Grievant's statement to the Inmate is the basis for the Agency's claim that Grievant threatened the Inmate.

In light of the standard set forth in the *Rules*, 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 II Written Notice of disciplinary action for failure to follow a supervisor's instruction is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for workplace violence 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.
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.¹³

[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

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9002-R

Reconsideration Decision Issued: April 13, 2009

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material;
- and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant restates his objection to the Agency's failure to provide a copy of the videotape from a camera located in the area where the incident occurred. This concern was fully addressed in the Original Hearing Decision. There is nothing more to add. The fact remains that there is no videotape of the incident for the Hearing Officer to view.

Grievant disputes the Hearing Officer's findings. Officer B's testimony was the most credible evidence of what happened on the day of the incident. There is no basis for the Hearing Officer change the findings of fact.

Grievant contends he did nothing wrong. The Hearing Officer is not a "super personnel officer". Although the Hearing Officer may have issued different disciplinary action, if the Agency can meet its burden of proof, the disciplinary action must be upheld in the absence of mitigating circumstances.

Grievant points out that he is a highly decorated soldier and that he has suffered significant financial loss. The *Rules for Conducting Grievance Hearings* do not authorize Hearing Officers to consider military service as a mitigating factor. Although Grievant's personal financial hardships are real and unfortunate, these difficulties do not form a basis to alter disciplinary action.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

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.

Carl Wilson Schmidt, Esq.
Hearing Officer

May 13, 2009

RE: **Grievance of v. Department of Corrections**
Case No. 9002

Dear :

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, your request does not identify any such policy. Rather, it appears that you are disagreeing with evidence the hearing officer considered and how he assessed that evidence. Therefore, so we must respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9002-R2

Reconsideration Decision Issued: June 1, 2009

RECONSIDERATION DECISION

In Ruling 2009-2277, the EDR Director returned this matter to the Hearing Officer for consideration of the issue of retaliation.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹⁴ (2) suffered a materially adverse action¹⁵; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.¹⁶

¹⁴ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹⁵ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

¹⁶ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

Grievant asserts that he went “above the head” of the Warden. Doing so would constitute a protected activity. Grievant suffered a materially adverse action because he received disciplinary action. The risk of being disciplined would likely dissuade a person from engaging in protected activity. Grievant has not established a causal link between his protected activity and the materially adverse action. The Agency’s evidence shows that it took disciplinary action because it believed Grievant engaged in behavior contrary to the Agency’s Standards of Conduct. The Agency did not issue disciplinary action as a pretext for retaliation against Grievant. Grievant has not met his burden of proof to show retaliation. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer’s original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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.

Carl Wilson Schmidt, Esq.
Hearing Officer