

Issues: Group III Written Notice (verbal abuse of inmate) and Suspension; Hearing Date: 05/14/09; Decision Issued: 05/18/09; Agency: DOC; AHO: William S. Davison, Esq.; Case No. 9067; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9067

Hearing Date: May 14, 2009
Decision Issued: May 18, 2009

PROCEDURAL HISTORY

The Grievant received a Group III Written Notice on March 11, 2008 for:

Officer A's self-report of the incident states the "joke" as "Do You Know How To Make A 5 Year Old Cry Twice, Wipe Your Bloody Dick On Her Teddy Bear." The "joke" was made in front of 3 fellow Corrections Officers (whose reports are attached) and 1 Offender.¹

Pursuant to the Group III Written Notice, the Grievant was suspended without pay for three (3) days. On April 2, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. On April 13, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On May 14, 2009, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Advocate for Agency
Grievant
Witnesses

ISSUE

1. Did the Grievant, by telling the joke in an area where an offender could possibly hear the joke and in fact did hear the joke, verbally abuse the offender such that a Group III Written Notice with subsequent suspension was justified.

¹ Agency Exhibit 1, Tab 1, Page 1

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 eight (8) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing seven (7) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

Prior to the commencement of the hearing, the Hearing Officer, Grievant and Agency Representative discussed the factual issues in this case and it was agreed that the Grievant would

stipulate that he did in fact tell the joke in the presence of two (2) Correctional Officers. His statement and the basis for this stipulation is set forth at Agency Exhibit 1, Tab 1, Page 3.

The Agency called as witnesses the two (2) Correctional Officers to whom the Grievant told the joke. The first of those Officers testified that they were in an area that was approximately 8 x 10 feet and that he believed that the offender was within 3 to 5 feet of the three (3) Correctional Officers. However, he was unsure as to who the offender was and he was uncertain as to exactly where the offender was in the room. This Correctional Officer stated that he could not see the offender when the joke was told.

The second Correctional Officer testified that there was an offender in the room, but he did not know where he was. This Correctional Officer testified that he told the Grievant that he did not like the joke but, "would let it go."

Captain B investigated this matter for the Agency and he also testified at the hearing in this matter. During his testimony he stated that he believed that the joke was told directly to the offender. This statement was contradicted by the two (2) Officers to whom the joke was in fact told, as they both indicated that they thought an offender was in the room, but that the offender was not a party to the conversation wherein the joke was told.

The Group III Written Notice was issued by the then serving Warden for this institution. Shortly thereafter, he left and Warden B took over the institution. Warden B testified that he never talked to the offender in question. He did talk to the Warden who wrote the charge and he felt that it did rise to the level of Inmate Verbal Abuse and that it justified a Group III Written Notice. However, he testified that because of the Grievant's unblemished prior work record, it was mitigated to a three (3) day suspension. The Hearing Officer notes that in his testimony, the Warden indicated that he thought a Group III Written Notice with no suspension was adequate. Only, upon prompting from the Agency Representative, did he correct himself, when he realized that the Grievant received a three (3) day suspension.

The Grievant called two (2) witnesses. The first was an Officer at a different correctional institution who had also made a joke that offended an offender. His joke said something to the order of, "My tax dollars pay for welfare." The offender felt that the Officer was demeaning him by saying that he was on welfare. This Officer received no Group Notice and merely a verbal warning.

The second witness for the Grievant was the offender in question. The offender testified that he did have small children and that he felt "disrespected" by the joke. When the Hearing Officer asked him if he felt that he had been verbally abused, **the offender indicated that he did not feel that he had been verbally abused**, but he was simply embarrassed. He stated that he had heard equal or worse language in the time that he has been incarcerated. (Emphasis added)

The Agency has directed the Hearing Officer to several policies that it feels were violated. The first is Correctional Center Local Operating Procedure 867.2, Environmental and Programmatic Rights of Inmates. This policy at IV(D) states in part as follows:

The right to a safe environment extends to all inmates. The enforcement of rules and regulations assists in the control of inmate behavior to ensure a safe environment. Inmates will not be subjected to any of the following: (2) Personal injury or abuse, either verbal or mental, which constitutes recognized maltreatment of inmates...²

The next policy that the Hearing Officer was directed to is Virginia Department of Corrections Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships with Offenders. This policy states in part as follows:

This procedure establishes rules of conduct that will be observed by employees when interacting with offenders under the direct supervision of the Virginia Department of Corrections. The procedure also provides guidance to prevent the corporal abuse of offenders at all DOC facilities.³

Policy 130.1 defines abuse as follows:

The improper use or treatment of an individual that directly or indirectly affects an individual negatively. Any intentional act that causes physical, mental, or emotional injury to an individual.⁴

Policy 130.1 (IV)(E) and (F) state as follows:

Courtesy and Respect. At all times, employees should be respectful, polite, and courteous in their contact with offenders, as well as with citizens and other employees. Such behavior is a primary factor in maintaining order, control and good discipline, and in effectively and efficiently carrying out the mission of the Department.

Humane Treatment. Offenders shall be treated humanely. Abuse or any form of corporal punishment or hazing is prohibited. No profane, demeaning, indecent, or insulting language, or words with racial or ethnic connotations, shall be directed toward such persons.⁵

Policy 130.1 (VI)(B) states as follows:

² Agency Exhibit 1, Tab 4, Page 4

³ Agency Exhibit 1, Tab 5, Page 1

⁴ Agency Exhibit 1, Tab 5, Page 1

⁵ Agency Exhibit 1, Tab 5, Page 2

The use of vulgar, obscene, humiliating, racially or ethnically degrading language in the presence of, or toward, an offender either directly or indirectly is prohibited. This includes staff interaction with other staff in the presence of offenders. Staff members will address an offender in an appropriate manner.⁶

Policy 135.1, sets forth the Standards of Conduct for this Agency. Policy 135.1(II) sets forth several illustrations of potential Group III offenses. At that paragraph, it sets forth as a potential Group III offense, “violation of DOC Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships With Offenders.”⁷

The same policy also sets forth that a Group III Written Notice is justified for a violation of DHRM Policy 2.30, Workplace Harassment, which is considered a Group III offense depending upon the nature of the violation.⁸

DHRM Policy 2.30 defines Workplace Harassment as follows:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) effects an employee's employment opportunities or compensation.⁹

DHRM Policy 2.30 further states:

The commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation or disability.

The Hearing Officer looked at DHRM Policy 1.80-Workplace Violence. That policy set forth a definition of workplace violence which was as follows:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to,

⁶ Agency Exhibit 1, Tab 5, Page 3

⁷ Agency Exhibit 1, Tab 6, Page 9

⁸ Agency Exhibit 1, Tab 6, Page 9

⁹ Agency Exhibit 1, Tab 6, Page 9

beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

With that definition, Policy 1.80 sets forth the following as prohibited conduct:

Engaging in the behavior that creates a reasonable fear of injury to another person.

Engaging in behavior that subjects another individual to extreme emotional distress.

The definition of abuse as set forth in Policy 130.1 does not apply to the facts of this matter. The Grievant and the two (2) Correctional Officers to whom the Grievant was telling the joke all testified that the offender involved was not a party to the conversation. He was not being used nor was he being treated in any manner. Inasmuch as the Grievant was unaware that an offender was present, it is clear that he committed no intentional act that would cause physical, mental, or emotional injury to the offender. Webster's New College Dictionary defines "abuse: in several ways. The most pertinent is: to injure by maltreatment or to assail with abusive words. The offender testified that he was not abused and that he had not sought counseling pursuant to this issue. He testified that he was embarrassed and disrespected. Webster's New College Dictionary defines "disrespect" as: a lack of respect or courteous regard. It defines "embarrassed" as: to cause to feel self-consciously distressed. Neither "disrespected" nor "embarrassed" remotely rise to the level of "abuse."

Perhaps Policy 130.1(VI)(B) comes the closest to fitting the fact pattern of this matter. The issue here is whether or not the language used by the Grievant was vulgar, obscene, humiliating, or racially or ethnically degrading to the offender. Webster's New College Dictionary defines "obscene" as: offensive to modesty or decency, causing or intending to cause sexual excitement or lust, or abominable or disgusting; repulsive. The word "vulgar" is defined as: characterized by ignorance of or lack of good breeding or taste or indecent, obscene or lewd. It is clear to the Hearing Officer that the joke told was both vulgar and obscene. It might have been humiliating for the character of the joke but was not racially or ethnically degrading. The issue then becomes; Can a vulgar or obscene statement made to another Correctional Officer, without knowledge that an offender is present, be deemed to fall within the general meaning of Policy 130.1(VI)(B)? This particular policy includes staff interactions with other staff in the presence of an offender. The problem here is the Grievant has testified that he was unaware of the presence of an offender and the other 2 Correctional Officers think that there was an offender present but they did not know where the offender was. The vulgar and obscene joke was not told about the offender nor was it told toward the offender. The clear intent of Policy 130.1(VI)(B) is to prevent vulgar and obscene language from being used toward an offender or about an offender in his presence.

After listening to all of the witnesses for the Agency, the Hearing Officer finds that the driving force behind this Group III Written Notice was that the Agency was offended by the joke. The Hearing Officer freely concedes that the joke was totally lacking in taste and was crude. However, the fact that Agency personnel were offended does not justify a Group III Written Notice based on verbal abuse of an offender. The Agency produced no evidence that the offender suffered any physical, mental, or emotional injury from this incident and, indeed, the

offender testified that he did not suffer any physical, mental, or emotional injury from this incident.

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...”¹⁰ 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

DECISION

For reasons stated herein, the Agency's actions were unjustified. The Group III Written Notice and three (3) day suspension issued on March 11, 2008 are hereby rescinded. The Agency shall remove this disciplinary action from the Grievant's personnel file and shall reimburse him for the three (3) days of suspension.

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

¹⁰Va. Code § 2.2-3005

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 Street, Suite 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 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.¹¹ 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.¹²

[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

¹¹An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹²Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.