

Issues: Group II Written Notice (creating an aggressive environment) and Suspension;
Hearing Date: 07/20/09; Decision Issued: 07/30/09; Agency: DOC; AHO: Lorin A.
Costanzo, Esq.; Case No. 9130; Outcome: No Relief – Agency Upheld in Full.

Commonwealth of Virginia
Department of Corrections

DECISION OF HEARING OFFICER

In the matter of: Case No: 9130

Hearing Date: July 20, 2009

Decision Issued: July 30, 2009

PROCEDURAL HISTORY

On February 23, 2009, Grievant was issued a Group II Written Notice with disciplinary action of a three day suspension (suspension from 2/24/09 through 3/3/09; 34½ hours) for "creating an aggressive environment". The Nature of Offense and Evidence indicate:

"Creating an aggressive environment: On February 4, 2009, Grievant {*Grievant's name set forth in written notice but redacted herein*} approached an inmate in an aggressive manner where as he later had to use force by shoving the inmate to create distance between him and the inmate. The use of force could have been avoided."¹

On March 23, 2009, Grievant timely filed a grievance to challenge the Written Notice and suspension. The grievance proceeded through the resolution steps and when the parties failed to resolve the grievance the agency head qualified the grievance for a hearing.² On June 25, 2009, the Department of Employment Dispute Resolution assigned this matter to the Hearing Officer. On July 20, 2009 a hearing was conducted at Facility and Grievant was present at hearing.

APPEARANCES

Grievant (who also testified as witness)
Grievant's Presenter/Assistant
Agency Presenter
Warden (Agency Party Representative and witness)
Correctional Officer
Major

ISSUES

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of

¹ Agency Exhibit Tab 1: Written Notice.

² Agency Exhibit Tab1: Grievance Form A.

Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

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.³ A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.⁴

FINDINGS OF FACT

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

Grievant is employed by the Virginia Department of Corrections ("D.O.C.") as a Correctional Officer (Role Title: Security Officer III) at Facility. Grievant was hired as a Correctional Officer January 9, 2006.⁵

Facility is a level 2-3 correctional facility. Facility is described as a medium or little less than medium security correctional facility.⁶

On 2/23/09 Grievant received a Group II Written Notice and 3 day suspension for "Creating an aggressive environment". The Written Notice further provided that on February 4, 2009, Grievant approached an inmate in an aggressive manner where as he later had to use force by shoving the inmate to create distance between him and the inmate and that the use of force could have been avoided.⁷

At the time Grievant was issued the Group II Written Notice Grievant had one active Group I Written Notice. This Group I was issued on 4/23/07 (Offense Date: 4/4/07) and had an inactive date of 4/23/09. The Group I was issued for "Unsatisfactory Job Performance". Under "Nature of Offense and Evidence" it was indicated that Grievant stated he had been dozing while on post.⁸

The incident of 2/24/09 which led to a Group II Written Notice being issued involved Grievant and an inmate and occurred in a Facility Housing Unit to which Grievant was assigned. An inmate and Grievant were face to face, almost touching, and during the incident Grievant and inmate exchanged words. Grievant pushed/shoved the inmate.

³ Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8.

⁴ Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 9.

⁵ Agency Exhibit Tab 4 and Tab 10.

⁶ Testimony of Warden.

⁷ Agency Exhibit Tab 1: Written Notice.

⁸ Agency Exhibit Tab 8: Group I Written Notice issued April 23, 2007.

Prior to the incident Grievant was notified not to allow the inmate to leave the building and go to commissary.⁹

Three security cameras recorded views of the incident of 2/4/09 involving Grievant and the inmate.¹⁰

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 employment within the Commonwealth of Virginia. This legislation includes provisions for a grievance procedure and 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 pursue legitimate grievances. Code Section 2.2-3000(A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

The Department of Corrections ("D.O.C."), pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department.

The *Standards of Conduct* divide unacceptable behavior into three groups, according to the severity of the behavior, with *Group I* being the least severe. 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. 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. Group III offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal.¹¹

Section IV. (C.) of the *Standards of Conduct* states, "The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."¹²

VDOC Operating Procedure, *Rules of Conduct Governing Employee Relationships with*

⁹ Testimony.

¹⁰ Agency Exhibit: Compact Disk.

¹¹ Agency Exhibit Tab 9. VDOC Operating Procedure, "Standards of Conduct". Effective Date 9/1/05, update 8/29/06.

¹² Agency Exhibit Tab 9. VDOC Operating Procedure, "Standards of Conduct". Effective Date 9/1/05, update 8/29/06

Offenders, Effective Date December 15, 2006 provides at Section VI (D.) that, "Staff should not have physical contact with offenders housed in any facility, with the exception of using the minimum amount of force necessary to provide appropriate apprehension, intervention and control as needed to protect the offender, staff and the general public, and to maintain a safe, and secure environment."¹³

VDOC Operating Procedure, No. 420.1, *Use of Force* provides in Section IV.(A).(4.) that, "The use of force is restricted to instances of justifiable self-defense, protection of others, protection of property, prevention of escapes, and to maintain or regain control, and then only as a last resort and in accordance with appropriate statutory authority." Furthermore, VDOC Operating Procedure, No. 420.1, *Use of Force* at Section IV.(C).(1.) provides, "Force shall be used only as a method of control. Non-force methods of control should be used whenever possible and the minimum necessary force should be used to gain control only when non-force methods have failed or are not appropriate."¹⁴

The Written Notice in this cause was given Grievant not for excessive use of force but for creating an aggressive environment which led to a use of force by shoving inmate when Agency felt the use of force could have been avoided. Consistently expressed in the testimony in this cause is the Agency's concern that Grievant's actions created the situation wherein he had to shove the inmate and that this situation could have affected the safety of staff, including Grievant, and inmates.

On February 4, 2009, an incident occurred between Grievant and an inmate in which an inmate was shoved by Grievant. The incident was recorded by 3 security cameras. Evidence was admitted and viewed at hearing of the security camera recordings.

This incident was brought to the attention of Warden who initiated an investigation of matters. During his investigation Warden interviewed Grievant, a second correctional officer who was present, and he reviewed security camera coverage of the incident. Additionally, the security tape was reviewed by other Agency staff.

Correctional Officer, who was in the area when the incident occurred, indicated in an Internal Incident Report, dated 2/4/09, she observed pushing by Grievant and the inmate but could not tell who put their hands on the other first.¹⁵

On February 6, 2009 Warden interviewed Correctional Officer (with Major present) and had her review the tape of the incident. Correctional Officer opined Grievant did not have to act the way he did and it did not have to go to that length. Correctional Officer indicated concern with Grievant playing with inmates all the time and a belief the inmates do not know when Grievant is playing and when he's not. Correctional Officer could not see who touched who first but expressed concern that Grievant was inappropriate in his actions.¹⁶

¹³ Agency Exhibit Tab 7.

¹⁴ Agency Exhibit Tab 6.

¹⁵ Agency Tab 3. Internal Incident Report.

¹⁶ Agency Tab 2. Notes.

On February 6, 2009, Warden, Major, and Grievant met and reviewed the tape of the incident. Grievant stated he was having problems with inmate all day and approached the inmate pointing his finger telling him to get back in the pod. Grievant said the inmate came upon him and he said when the inmate tried to move away he checked his shoulder and that's when he tried to push the inmate away. They verbally told each other not to push one another.

Warden told Grievant they were not looking at an excessive force case, at that time, the concern was over creating a hostile environment with actions that could be perceived as aggressive. Warden expressed to Grievant that the goal is to keep inmates and staff safe, Grievant's actions could have created an unsafe environment, and if Grievant had acted the way he did with the wrong inmate he could have been severely hurt.¹⁷

Warden gave consideration to charging Grievant with use of excessive force. However, he determined that Grievant did not use excessive force. He believed what Grievant did was to unnecessarily create an aggressive environment where he had to use force. However, force might not have had to be used at all if Grievant had acted differently.

Major viewed the three security cameras' coverage of the incident and testified as to his concerns over the incident. He believed Grievant was overly aggressive and his actions could have led to something assaultive. He concluded that training is to defuse and de-escalate but Grievant's actions were overly aggressive. He felt Grievant was right in confronting the inmate coming out of a pod without authority. But was very concerned with the way the confrontation was done. He further noted that "little things could have turned into big things" and the way Grievant acted could have led to a much more dangerous situation. He opined that if the inmate had been a more violent or a more volatile type someone could have been hurt or the situation could have gotten out of hand.

Major testified as to concerns over this incident. Grievant approaches inmate with finger waiving and this is considered an aggressive gesture. Grievant gets into a face to face situation with the inmate and literally was within a foot or less of the inmate. While this was going on other inmates were watching the incident. And, while this was going on, an entry door was open where approximately 80 inmates could be present. Major opines that, "If this were a training video you would use it to show what not to do when approaching an inmate."¹⁸

Confronting the inmate for going where he was not supposed to go was considered by Agency to be what was supposed to be done but it was the way it was done that was considered to be really dangerous. Grievant's being up in the inmate's face was an unnecessary escalating of the situation. Major indicated that this was not how Grievant was trained to act.

The security cameras do show Grievant waiving his finger at the inmate, approaching the inmate, and standing very close in a face to face confrontation. Inmate steps to get around and Grievant took a small step in that direction and shoulders appear to touch and that was when Grievant pushed inmate away with his hand.

¹⁷ Agency Tab 2. Notes.

¹⁸ Testimony of Major.

Agency was concerned that Grievant created an aggressive environment in the way he approached and handled matters and that this led to a use of force that could have been avoided. Agency was concerned that the shoving incident was avoidable and that this incident could well have expanded to a much more serious incident involving safety and security of both staff and inmates.

Agency acknowledges that pushing/shoving an inmate away may be an appropriate use of force in certain situations. However, Agency believed, in this situation, Grievant created an aggressive environment which was, at least in part, responsible for the shove having to occur. There were multiple things Grievant had opportunity to do, and should have done in this situation other than waiving his finger at inmate and going into a face to face, almost touching, posture with the inmate. Furthermore, Grievant's choice of actions was considered to be endangering.

When this incident occurred two other inmates were observed on the security camera tape watching the incident and taking an interest in matters. When this incident occurred there was also a door open to an area that held up to 80 inmates. The Agency was concerned that an incident like this could have expanded into a larger security/safety matter very fast.

Grievant admitted in meeting of 2/13/09 that his actions could have been perceived as aggressive.¹⁹ During conversation between Warden and Grievant following the issuance of the Written Notice, Grievant made a statement that if he had reacted the way he wanted to the inmate would not have left the hospital.²⁰

Conclusion:

This case is not a case of excessive use of force but a case wherein the Agency charged Grievant with creating an aggressive environment wherein force had to be used to create distance between Grievant and inmate. However, that use of force could have been avoided.

Grievant was shaking his finger at an inmate, and moved into a face to face confrontation with the inmate in which he was almost touching the inmate. It is not contested that Grievant shoved the inmate away with his hand.

Agency has the duty to protect the safety of staff and the safety of inmates at Facility. After investigation the Agency issued a Group II offense for creating an aggressive environment further indicating in the Written Notice that the use of force could have been avoided in this situation.

The evidence indicates, by a preponderance, that Grievant was responsible for creating an aggressive environment. He moved into a face to face, almost touching, posture with the inmate. The evidence indicates that words were exchanged and there was a finger waiving at inmate.

¹⁹ Agency Tab 2.

²⁰ Agency Tab 3. Memo.

Grievant did make choices and took actions which created the situation and environment wherein he subsequently had to shove the inmate to create distance between him and the inmate. The evidence further indicates the use of force could have been avoided.

Under the *Rules for Conducting Grievance Hearings*, Section VI, B, 1, 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. The Agency's discipline is not found to exceed the limits of reasonableness. It is further noted that mitigating circumstances were taken into consideration by Agency. The Section XI C.1. of the *Standards of Conduct* provide that, "Discipline shall normally take the form of the notice and up to 10 workdays maximum suspension without pay." A three day suspension was utilized when Agency could have issued a ten day suspension.

The Agency has proven by a preponderance of the evidence that (i) Grievant engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the Agency's discipline was consistent with law and policy. The disciplinary action of issuing a Group II Written Notice with three day suspension was warranted and appropriate under the circumstances.

DECISION

For the reasons stated above, the Agency's issuance of a Group II Written Notice to Grievant with 3 day suspension on February 23, 2009, is hereby **UPHELD**.

APPEAL RIGHTS

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

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 are 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: Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219.

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: Director, Department of Employment Dispute Resolution, Main Street Centre, 600 East Main, Suite 301, Richmond, VA 23219.

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 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. You must give a copy of your notice of appeal the Director of the Department of Employment Dispute Resolution.

Lorin A. Costanzo, Hearing Officer