

Issue: Group III Written Notice with suspension (failure to follow policy); Hearing Date: 09/24/10; Decision Issued: 09/30/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9404; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9404

Hearing Date: September 24, 2010
Decision Issued: September 30, 2010

PROCEDURAL HISTORY

On May 6, 2010, Grievant was issued a Group III Written Notice of disciplinary action with a 57.5 hour suspension for failing to provide a duty of care and a lacking of due regard for safety.

On May 28, 2010, 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 she requested a hearing. On September 1, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 24, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant Representative
Agency Party Designee
Agency Representative
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 employs Grievant as a Corrections Officer at one of its Facilities. Grievant's Post Order stated, "[e]mployees are permitted to use as much force as they reasonably perceive necessary to perform their duties and to protect themselves and others from harm."¹ Grievant began working for the Agency on February 23, 2007. Her work performance was otherwise satisfactory to the agency. She had not received prior disciplinary action.

On February 19, 2010 at approximately 9:12 p.m., Grievant was working as a floor officer at the Facility. She was standing in the vestibule of a hallway which served to connect three pods. Grievant was standing with her back towards the wall. To her far right was the door to the A1 pod. To her immediate right was the door to the A2 pod. To her far left was the door to the A3 pod. Directly in front of her was the open doorway from the vestibule into the hallway. The doors to the pods were locked and had to be opened by the control room officer who was positioned in a booth above Grievant's location and looking down into the vestibule.

Inmate D and Inmate P leave the A1 pod and enter the vestibule where Grievant and several other inmates are located. While in the vestibule, Inmate D walks away from Inmate P three times in an attempt to get away from Inmate P. Inmate P follows

¹ Agency Exhibit 4.

Inmate D and continues talking into his ear. On the third time, Inmate D stands in front of the secure door for the A2 pod as if waiting for the door to be opened by the control room officer. Inmate P stands directly behind Inmate D. Grievant is within one or two feet of the two inmates. Her right side is towards the inmates' right sides. While Grievant is watching the two inmates, Inmate P punches Inmate D in the back right side of his head. Inmate D turns to his right and falls backwards onto the floor and lies on his back. Inmate D was stunned by the initial blow from Inmate P. As Inmate D falls to the floor, Inmate P jumps on top of Inmate D and straddles Inmate D's chest. Inmate P punches Inmate D 26 times in the face as Inmate D remains helpless to defend himself.

When Inmate P first punches Inmate D, Grievant screams and immediately moves away from them. She takes seven paces from the door at the A2 pod into the open hallway. She grabs her radio and begins calling for emergency assistance on the radio. While Grievant stands approximately 15 to 20 feet away from the inmates and watches, Inmate P continues to beat Inmate D. She does nothing to stop Inmate P.

When Officer A first heard the emergency call, he was working in an office down the hallway from the vestibule. He jumps up from his chair and begins moving quickly towards the vestibule. As he enters the vestibule and approaches Inmate P, Inmate P realizes Officer A is approaching and begins getting off of Inmate D. Officer A moves Inmate P out of the vestibule through the hallway.

As a result of the beating, Inmate D received a small laceration above his left eye, a busted lip, a loose front tooth, and bruising and swelling to both of his cheeks. When questioned about the incident, Inmate D said he could not remember what had occurred, did not know who assaulted him or what pod or cell he was assigned to.

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

Directive 420 governs Incarcerated Offender Control and Use of Force. This policy provides:

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).

Employees have the right to protect themselves and the responsibility to protect offenders, other employees, and members of the community who are threatened by the actions of any incarcerated offender. *** To this end, employees may use all necessary and suitable means to perform these duties, including the use of physical force. *** The DOC restricts the use of physical force to instances of justifiable self-defense, protection of others, protection of property and prevention of escapes, and then only as a last resort and in accordance with the appropriate statutory authority.⁵

Operating Procedure 420.1 governs Use of Force. Section IV(A)(1) provides that, "employees have a responsibility, consistent with their self-protection, to protect offenders, other employees, and members of the community who are threatened by the actions of any incarcerated offender. Facility employees are also required to prevent escapes, maintain order and control within the facility, and protect state property." Section (IV)(A)(6) states, "all employees have a responsibility, consistent with their self-protection, to come to the aid of another employee or an offender who is in danger."

"Failure to ... comply with applicable established written policy" is a Group II offense. Grievant had an obligation to protect Inmate D. She failed to take any action to stop Inmate P from beating Inmate D. By failing to protect Inmate D, Grievant failed to comply with DOC policy thereby justifying the issuance of a Group II Written Notice.

"[I]n certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency." In this case, the Chief of Security at the Facility described the beating as the worst beating without a weapon he had seen in 15 years. The severity of the battery and injury to Inmate D was sufficiently extreme as to justify the elevation of the offense from a Group II to a Group III Written Notice.

Upon the issuance of a Group III Written Notice, an agency may suspend an employee for up to 30 work days. Accordingly, Grievant's 57.5 hour suspension must be upheld.

Grievant argued that she did nothing wrong because she was complying with the training she had received from the Agency. Grievant presented evidence that Agency security staff observing a fight between inmates were supposed to (1) move away from the fight, (2) use the radio to call for backup, and (3) wait until other staff arrived to provide assistance.

Grievant complied with her training. She observed what appeared to be a fight between inmates and moved away from the fight and called for backup. While Grievant was waiting for backup to arrive, however, she failed to recognize that the conflict between the two inmates was not a fight but rather was one inmate beating a helpless inmate. Grievant had adequate time to realize this and make some attempt to rescue

⁵ Agency Exhibit 5.

the helpless inmate. The videotape of the incident showed that Inmate P's first punch was at 09:11:27. Four seconds later, at 09:11:31, Grievant had moved into the hallway, a safe distance from the two inmates and was watching them. Grievant should have recognized at this time that Inmate D was helpless and unable to defend himself and that his life may be in jeopardy. Grievant took no action. Seven seconds later, at 09:11:38, Officer A enters the vestibule. His presence is sufficient to end the beating. If Grievant had acted immediately after it should have been clear that Inmate D was helpless, Inmate D would have been able to avoid several punches to his face.

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..."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. 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 suspension 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:

⁶ Va. Code § 2.2-3005.

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.⁷

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.