

Issues: Group II Written Notice (conduct unbecoming) and Misapplication of Leave Policy; Hearing Date: 11/19/10; Decision Issued: 11/23/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9435; Outcome: Partial Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9435**

Hearing Date: November 19, 2010  
Decision Issued: November 23, 2010

**PROCEDURAL HISTORY**

On June 23, 2010, Grievant was issued a Group II Written Notice of disciplinary action for conduct unbecoming a corrections officer.

On July 15, 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 he requested a hearing. On October 19, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 19, 2010, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant 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?
5. Whether the Agency suspended Grievant in accordance with policy?

### **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. The purpose of this position is, "provides security over inmates at the institution and while in transport; supervises their daily activities and observes and records their behavior and movement to ensure their safe and secure confinement."<sup>1</sup> Grievant has been employed by the Agency for approximately 15 years. No evidence of prior act of disciplinary action was introduced during the hearing.

On March 18, 2010, Grievant was in his home with his wife, two teenage daughters and a step-grandson. Grievant's wife called Mr. T to come and get the step-grandson. Mr. T, age 33, was the Wife's son and Grievant's stepson. Grievant was in his bedroom sitting on his bed having a conversation with his eldest daughter. Mr. T and the Wife's brother, Mr. F, came to the home. They had been drinking alcohol. Mr. T kicked open the bedroom door and began beating Grievant. The eldest daughter attempted to stop the men from beating her father. Mr. T and Mr. F pushed her away and continued to beat Grievant. Grievant was beaten so badly that he fell down and was semiconscious. His right shoulder was dislocated. One of Grievant's daughters dialed 911. The two men left the bedroom and went into the living room where they argued. As Grievant began to return to consciousness, he heard yelling by the two men

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<sup>1</sup> Agency Exhibit 4.

but did not know whether his two daughters and wife were safe. He unlocked the safe and removed a handgun. He walked out of the bedroom and into the living room. The two men had moved outside. Grievant did not know where his wife and youngest daughter were. He remained concerned for their safety. He walked outside of the house where he observed the two men in his front yard. The Wife was also outside. Grievant yelled for the men to leave immediately. Mr. T turned towards Grievant and "rushed" Grievant. Grievant feared for his life and believed that Mr. T intended to beat him again. As Mr. T approached Grievant, Grievant shot the handgun into the air and used his left arm to block Mr. T's blow. Upon seeing Grievant fire the handgun, Mr. T stopped his attack on Grievant and the left Grievant's property.

Local law enforcement officers arrived at the property. One of them asked Grievant to find the rounds to his weapon. He was unable to do so.

Grievant was arrested and charged with four misdemeanors: (1) assault and battery of Mr. T; (2) discharge of a firearm, crossbow, or bow and arrow in or across a road, within the right of way of the road, or in a street of a city or town; (3) recklessly handling a firearm so as to endanger life, limb, or property; and (4) point, hold, or brandish a firearm, or air or gas operated weapon or an object similar in appearance in such a manner so as to reasonably induce fear in the mind of another, or holding a firearm or air or gas operated weapon in a public place in such a manner as to reasonably induce fear in the mind of his stepson of being shot or injured.

Grievant met with the Warden and informed him of the charges against him. The Warden advised Grievant that because of the seriousness of the charges that Grievant was suspended until the charges were resolved by the court. The Warden told Grievant that he could use his annual or compensatory leave while on suspension. Grievant chose to use his leave during the period of suspension.

The Facility is located in a small community. News of Grievant's arrest spread within the community. At least two individuals who are not employees of the Agency approached the Warden and attempted to discuss rumors about Grievant's arrest.

On May 7, 2010, Grievant and his attorney appeared in court. With respect to the charge of assault and battery of Mr. T, Grievant and Mr. T signed an accord and satisfaction. The three remaining charges were nolle prosequi. After court, Grievant advised the Warden of the outcome of the four charges. The Warden advised Grievant that because the three charges were nolle prosequi they could be brought again and that Grievant would be unable to work at the Facility. Grievant contacted his attorney who contacted the Commonwealth's Attorney who agreed to dismiss all three of the firearm charges with prejudice.

## **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.”<sup>2</sup> 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.”<sup>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</sup>

Section IX(C) of the Agency's Standards of Conduct, Operating Procedure 135.1, provides:

Appropriate disciplinary action for employees who are facing criminal charges or convictions (both felonies and misdemeanors) must be assessed as to the employee's position, level of responsibility and ability to perform the functions of the position including the ability to carry out all duty requirements, the nature of the conviction, the impact the conviction has on the Department and its employees, the public and its perception of the Department and other mitigating factors including prior discipline, links of service and performance.

1. Charges or situations that involve crimes against persons are subject to disciplinary charge that could include termination.
2. A conviction is not necessary to proceed with a disciplinary action. The Unit Head must determine whether the evidence is sufficient to have an impact on the Department, its employees, the public and its perception of the Department.

The Agency's Standards of Conduct authorizes the Agency to take disciplinary action against an employee for events arising outside of work hours and away from the Facility. In this case, the Agency has met its prima facie case to show the Grievant engaged in conduct unbecoming a Corrections Officer. By discharging a weapon into the air, Grievant endangered other people living in the neighborhood who could have been hit when the bullet fell to the ground. Grievant's behavior impacted the Agency because several residents in the community knew of Grievant's actions and knew that he worked for the Agency. Several individuals approached the Warden to discuss Grievant's behavior. The Agency considered mitigating circumstances under its Standards of Conduct. The question remains whether there are mitigating circumstances under the authority granted to Hearing Officers.

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

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....”<sup>5</sup> 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.

Several mitigating circumstances exist to show that the disciplinary action exceeds the limits of reasonableness and must be reversed. First, Grievant was the victim of a battery. He did not initiate the altercation with Mr. T. Grievant was in his home and Mr. T began beating him. Second, Grievant was in a state of disorientation after having been beaten. His left shoulder had been dislocated and he was in pain. His ability to exercise lucid thinking was limited. Third, Grievant was in fear for his life. His concern for his personal safety affected his ability to exercise judgment. Fourth, Grievant feared for the safety of his two children. His obligation to protect his children heightened his sensitivity to having Mr. T remain on his property. Fifth, when Grievant instructed Mr. T to leave his property, Mr. T responded by moving towards Grievant with the objective of harming Grievant. Grievant had a choice. He could have done nothing, which likely would have resulted in being beaten again and possibly killed. He could have shot Mr. T which would have resulted in Mr. T’s injury or death. Or he could have fired the gun into the air to scare Mr. T but place neighbors at risk of being injured or killed if the bullet landed on one of them. The consequence of doing nothing or shooting Mr. T would be certain injury to Grievant or Mr. T. The consequence of firing the gun in the air was much less certain. Although a bullet could have landed on a neighbor, the possibility of that was significantly less than the certainty of doing nothing or shooting Mr. T. Grievant chose the least harmful action among three bad options. Grievant’s limited ability to control the circumstances in which he faced and the uncertainty of how to respond to those circumstances shows that the Agency’s disciplinary action against him exceeds the limits of reasonableness.

Grievant seeks the reimbursement of the annual and compensatory leave he was required to take while on suspension pending criminal proceedings. Grievant’s request for relief is denied. Section XVII(C) authorizes the Agency’s action. This provision states:

Any employee who is formally charged with a criminal offense (that is related to the nature of his or her job or to the Department’s mission) by

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<sup>5</sup> Va. Code § 2.2-3005.

outside authorities shall be immediately suspended without pay for a period not to exceed 90 calendar days. The Department has the option to allow an employee to charge accrued annual, over time, compensatory, or family personal leave to this period of suspension provided the employee has sufficient balances.

In order to work as a Corrections Officer, Grievant must be able to carry a firearm while working. If he was convicted of the weapons charges, he would be unable to carry a firearm at the Facility. The Agency was authorized to suspend Grievant while the criminal weapons charges were pending. Grievant's period of suspension did not exceed 90 days. The Agency was authorized to allow Grievant to use his annual or compensatory leave during the period of suspension.

### **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. Grievant's request for relief regarding his suspension is **denied**.

### **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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>6</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.