

Issues: Group II Written Notice with Suspension (abusive language and conduct unbecoming), and Group III Written Notice with Termination (gross negligence);  
Hearing Date: 09/12/12; Decision Issued: 09/18/12; Agency: DOC; AHO:  
Thomas P. Walk, Esq.; Case No. 9859; Outcome: No Relief – Agency Upheld.

VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,  
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

CASE NO.: 9859

### **DECISION OF HEARING OFFICER**

HEARING DATE: SEPTEMBER 12, 2012

DECISION ISSUED: SEPTEMBER 18, 2012

#### **I. PROCEDURAL MATTERS**

The grievant commenced these matters by filing his grievances on May 17, 2012. I was appointed as hearing officer on July 10, 2012. After being unable to coordinate the scheduling of a prehearing conference, I set the matter for hearing on September 12, 2012. The hearing took place on that date and lasted approximately two hours.

#### **II. APPEARANCES**

The agency was represented by a lay advocate. The superintendent of the facility attended the hearing as the agency representative and also testified as a witness. Three additional witnesses testified on behalf of the agency. The grievant presented no evidence.

#### **III. ISSUES**

A. Whether the agency acted appropriately in issuing to the grievant a Group II Written Notice on May 8, 2012 for an incident occurring on April 3, 2012 and in suspending him for five days?

B. Whether the agency acted appropriately in issuing to the grievant a Group III Written Notice and terminating him from employment for an incident occurring on April 19, 2012?

#### **IV. FINDINGS OF FACT**

The agency involved in this grievance is the Department of Corrections. The grievant was employed by the agency for several years prior to 2012. He also had work experience with the Federal Bureau of Prisons.

On April 3, 2012 the grievant became involved in a verbal altercation with an inmate under his supervision. The inmate refused to perform a work assignment given him by the grievant. The inmate has a reputation of being argumentative and difficult. A sergeant overheard the confrontation from some distance away and went to investigate. He spoke with the grievant who advised him that the inmate was only a “god-damn inmate and will do what I fucking tell him to do.” The grievant then returned to the altercation with the inmate and continued to yell at him. Metal bars separated the two at their closest point, which was approximately two feet. This confrontation took place in the immediate presence of other inmates who were not in their cells. The grievant was heard by another staff member to state to the grievant “come on mother-fucker, you are a bad ass, try me!” The altercation ended without any physical violence.

On April 19, approximately two week subsequent to the shouting incident with the inmate, the grievant was part of a crew involved in shaking down inmates as they returned from an outside work detail. The grievant had carried a shotgun while overseeing the work gangs. At the conclusion of the shakedown process, the grievant walked away from the immediate area and set his shotgun down in a corner of a room.

At that time, the room was secure and no inmates were present. The grievant then left that area, leaving behind his shotgun. Approximately 15 minutes to 20 minutes later another officer entered the room and discovered the shotgun where it had been left by the grievant. He demanded to know whose gun it was and the grievant responded that it was his. The gun was left in an area in which inmates are present on a regular, but not necessarily frequent, basis.

The superintendent of the facility, based on the investigation of these two incidents, issued to the grievant separate disciplinary actions. For the April 3 event he issued a Group II Written Notice and suspended the grievant from employment for five days. For the April 19 incident, he issued a Group III Written Notice and terminated the grievant from employment.

## **V. APPLICABLE LAW AND ANALYSIS**

The Virginia Personnel Act, Virginia Code Section 2.2-2900, *et seq.*, establishes the procedures and policies governing employment by the Commonwealth of Virginia. The Act also provides for a Grievance Procedure. The Department of Employment Dispute Resolution (hereafter “the DEDR”) has promulgated a *Grievance Procedure Manual* (hereafter “the GPM”) and *Rules for Conducting Grievance Hearings* (hereafter “the Rules”). These documents govern this proceeding. Section 5.8 of the GPM places the burden of going forward with the evidence and the burden of proof on the agency in disciplinary actions. The standard of proof is by a preponderance of the evidence.

This case involves the disciplinary actions taken by the agency against the grievant, namely the issuance of the Group II and Group III Written Notices (hereafter

“the Notice”). Section VI (B) of the Rules charges a hearing officer, in reviewing disciplinary actions, with making four determinations. Those issues are:

- I. Whether the employee engaged in the described behavior;
- II. Whether the behavior constituted misconduct;
- III. Whether the agency’s discipline was consistent with law and policy; and
- IV. Whether there were any mitigating circumstances to justify a reduction or removal of the disciplinary action and, whether those mitigating circumstances were offset by any aggravating circumstances.

The Notice for the April 3 incident charges the grievant with violations of Department of Human Resource Management Policy 1.60 and Department of Corrections Operating Procedure 35.1. In particular, the notice charged the grievant with using obscene and abusive language and conduct unbecoming of a corrections officer which undermined his ability to effectively supervise offenders. The grievant presented no evidence to rebut the evidence of the witnesses for the agency as to the loud and confrontational nature of the exchange with the inmate. The only evidence to the contrary was a written statement given by the grievant on May 29 in which he states that he did not respond to a comment made by the inmate. That statement was included by the agency as part of its exhibits. I find the oral testimony of the witnesses for the agency to be credible. Accordingly, I find that the grievant did engage in the described actions on April 3. Those actions clearly constitute misconduct.

I also find that the issuance of the Group II Written Notice was consistent with law and policy. The offense by the grievant falls within the category of Group II offenses

under DHRM policy 1.60 and the grievant has made no argument that the grievant was the victim of any distribution or retaliatory action. Section VI of the *Rules for Conducting Grievance Hearings* promulgated by the Department of Employment Resolution (now the Office of Employment Dispute Resolution within the Department of Human Resource Management) directs that the decisions of the agency management is entitled to due deference unless arbitrary and capricious. I find nothing arbitrary in the issuance of the Group II Written Notice. I find nothing in the record sufficient to serve as mitigation for the actions by the grievant. A written statement was submitted that he suffered from anxiety and depression as a result of job stress. I do not believe that to be a sufficient mitigating circumstance.

As with the April 3 incident, the grievant presented no proof to rebut the evidence of the agency with regard to the April 19 shotgun incident. The grievant argues that the leaving of the shotgun unattended was inadvertent. Nevertheless, he admitted to a sergeant (after the fact) that he was aware that it could have been a serious situation.

Leaving an unattended shotgun with shells in its sidesaddle in an area in which inmates could have been present was undoubtedly misconduct. The fact that no inmates were present is of no consequence in assessing the negligence of the grievant. I disagree with the argument of counsel for the grievant that another corrections officer would have necessarily taken control the shotgun prior to it being seen by an inmate.

Operating Procedure 135.1 of the agency tracks the Standards of Conduct promulgated by the Department of Human Resource Management. Section V of that policy sets forth the three classifications of offenses. Group III offenses are defined as “offenses... of such a serious nature that a first occurrence should warrant removal.” A

number of specific offenses are listed. In this case, the agency relies on the allegation that the grievant violated a safety rule with a possibility of a threat of physical harm. Corrections officers, including the grievant, receive training on firearms safety. As part of this training the agency stresses the concept of firearms retention or maintaining control of a weapon so that it does not become accessible to an inmate. Although reasonable minds can differ on whether the negligence of the grievant in this case was of such a nature as to necessarily qualify as a Group III offense, I will again give due deference to the prerogative of the agency. The issuance of the Group III Written Notice was not inconsistent with law and policy. As stated above, no mitigating evidence has been presented by the grievant sufficient to cause me to find that the level of discipline and the termination to be inappropriate. The agency arguably could have given the grievant a Group III Written Notice for the April 3 event. In the alternative it could have given him Group II Written Notices for each event and still terminated him from employment. Termination of the grievant for April 19 incident was within the range of appropriate punishments.

## **VI. DECISION**

For the reasons stated above, I uphold the issuance of the Group II and the Group III Written Notices and the associated punishments.

## **VII. APPEAL RIGHTS**

As the Grievant 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 is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director's authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14<sup>th</sup> St., 12<sup>th</sup> Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

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 the Acting Director of the Office of Employment Dispute Resolution, 101 N. 14<sup>th</sup> St., 12<sup>th</sup> Floor, Richmond, VA 23219 or faxed to (804) 786-1606.

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**. 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 DEDR 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 court shall award reasonable attorney's fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code §17.1-405.

RENDERED this September 19, 2012.

/s/ Thomas P. Walk

Thomas P. Walk, Hearing Officer