

Issue: Group II Written Notice with suspension (failure to follow supervisory instructions); Hearing Date: 12/16/05; Decision Issued: 12/20/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8223; Outcome: Agency upheld in full



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8223

Hearing Date: December 16, 2005
Decision Issued: December 20, 2005

APPEARANCES

Grievant
Superintendent
Advocate for Agency
Two witnesses for Agency

ISSUE

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a grievance from a Group II Written Notice for failure to follow supervisory instructions.¹ As part of the disciplinary action, grievant was suspended without pay for three workdays. The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.² The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant as a corrections officer for five years. Grievant has one prior disciplinary action for failure to follow supervisory instructions.³

When grievant was hired, he signed and agreed to abide by certain conditions of employment. One such condition states, "When interacting with internal and external customers, all [name of facility] employees will be courteous, sensitive, and responsive."⁴ Another condition states, "Discrimination and/or harassment in any form will not be tolerated." Grievant also received professionalism training in 2003.⁵ Agency policy specifies that offenders are to be treated humanely and that demeaning language is not permitted.⁶ The superintendent brought this policy to the attention of all employees in 2004.⁷ An interim evaluation in July 2005 rated grievant Below Contributor in his primary core responsibility noting, "Does not control offenders in a professional manner. Sends mixed signals to offenders by joking with some or some of the time and being serious at other times."⁸

On the morning of October 13, 2005, grievant was giving work assignments to a group of divertees. One of the divertees is deaf and his verbal communication is difficult to understand. When grievant called the deaf divertee's name, another divertee got the attention of the deaf divertee and pointed towards grievant so that he would know his name had been called. The deaf divertee took the general orders name tag from the chest pocket of his jumpsuit and handed it to grievant to let him know he was there. Grievant reached to take the card but then let it drop to the ground as the divertee

¹ Agency Exhibit 1. Written Notice, issued October 13, 2005.

² Agency Exhibit 2. Grievance Form A, filed October 22, 2005.

³ Agency Exhibit 9. Group I Written Notice, issued June 11, 2004.

⁴ Agency Exhibit 7. *Conditions of Employment*, signed November 14, 2000.

⁵ Agency Exhibit 6. Community Corrections In-Service training transcript, April 25-May 1, 2003.

⁶ Agency Exhibit 4. Section IV.F, Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*, February 15, 2004.

⁷ Agency Exhibit 4. Memorandum from superintendent to all employees, July 12, 2004.

⁸ Agency Exhibit 5. Interim performance evaluation, July 24, 2005.

released it. The divertees heard grievant say “me-me-me” to the deaf divertee. Grievant did not attempt to pick up the name tag and the divertee then picked up his name tag.

Soon thereafter, the Chief of Security made his rounds through the area. Several of the divertees, looking visibly upset, including the deaf divertee, approached him and complained about grievant’s treatment of the deaf divertee. The Chief of Security then assigned a lieutenant to investigate what had occurred. The lieutenant talked with each of the divertees and obtained notarized written statements from six of them.⁹ The divertees felt that grievant had disrespected and mocked the deaf divertee.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act 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 to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth’s grievance procedure and provides, in pertinent 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 employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions the employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹⁰

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set

⁹ Agency Exhibit 3. Six notarized statements from divertees, October 12, 2005.

¹⁰ § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.

of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section V.B of Policy No. 1.60 provides that 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 from employment.¹¹ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.16 of the DOC *Standards of Conduct* addresses Group II offenses, which are defined identically to the DHRM *Standards of Conduct*.¹² Failure to follow a supervisory instruction is one example of a Group II offense.

The agency has shown by a preponderance of evidence that grievant engaged in behavior that was demeaning and disrespectful to a divertee. In addition to the investigation and corroborative affidavits of witness divertees, grievant acknowledged his behavior. Grievant told the investigating lieutenant that his behavior was intended as a joke. He also asked the investigator to apologize for him to the deaf divertee. Grievant was contrite and remorseful on the day of the incident, as well as during this hearing.

The agency considered grievant's behavior to be a form of horseplay which is part of the definition of hazing. Based on the testimony and evidence, grievant's behavior was demeaning and humiliating. Regardless of the characterization, the behavior is plainly prohibited by Operating Procedure 130.1. While grievant may have intended his behavior to be a joke meant to amuse the group of divertees, it was not amusing to the deaf divertee because he was on the receiving end of the humiliation. Moreover, the fact is that the other divertees were not amused but rather were upset that grievant had disrespected one of their group. The superintendent observed that such behavior can cause distrust among the divertees and may lessen the level of respect they have for the corrections staff.

Of particular concern is the interim performance evaluation that grievant had received three months earlier. In that evaluation, grievant was specifically cautioned against inappropriate joking with divertees. Apparently, that message did not get through to grievant. Moreover, in this instance, grievant's "joke" was at the expense of a divertee with a serious disability. In view of this incident and the previous warnings to grievant, the agency's decision to discipline at the Group II level with a short suspension was measured and reasonable. The agency mitigated the suspension from 10 days to three days because grievant was remorseful and asserted that he did not mean to disrespect the divertee. In

¹¹ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹² Agency Exhibit 8. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

view of grievant's prior disciplinary action and the interim performance evaluation cautioning him about such "joking," no further mitigation is warranted.

DECISION

The decision of the agency is affirmed.

The Group II Written Notice and three-day suspension on October 13, 2005 is hereby AFFIRMED.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
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.

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.¹³ 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.¹⁴

[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/David J. Latham

David J. Latham, Esq.
Hearing Officer

¹³ An 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).

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.