Issue: Group III Written Notice and termination (fraternizing with and selling controlled substances to an inmate); Hearing Date: August 2, 2001; Decision Date: August 3, 2001; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5253

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Department of Corrections Case Number 5253

Hearing Date: August 2, 2001
Decision Issued: August 3, 2001

PROCEDURAL ISSUE

Prior to the hearing, grievant requested witness orders for 16 witnesses. The agency thereafter requested a postponement of the hearing because it believed grievant intended to use this hearing as a discovery mechanism to defend against a potential future criminal indictment. The hearing officer informed counsel for both parties that a proffer of testimony would be required prior to each witness' testimony to assure that each would be testifying only to the issue before the hearing officer. Therefore, the hearing officer concluded that *just cause*[1] for a postponement had not been demonstrated.

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Court Reporter for Grievant
Two Attorneys for Agency
Warden
One witness for Agency

ISSUES

Did the grievant's actions on March 26, 2001 warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

[1] § 5.1, *Grievance Procedure Manual*, effective July 1, 2000.

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on May 14, 2001 for fraternizing with an inmate by selling controlled substances to the inmate. Grievant was discharged effective May 14, 2001. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of Corrections (DOC) (hereinafter referred to as agency) has employed the grievant as a correctional officer since 1998. He held the rank of corrections officer senior at the time of discharge. He was considered a good officer by fellow officers. His most recent performance evaluation reflects that his overall performance met expectations.

DOC has a zero-tolerance policy with regard to illegal controlled substances. However, agency management is well aware that drug trafficking occurs in its facilities. It employs a variety of tools to prevent the introduction of drugs into the facility but such efforts are not totally effective in preventing some illegal drugs from entering the facility.

On or about March 20, 2001, the Warden received an anonymous tip that the sister of inmate A would be delivering controlled substances to him during her visit on March 24, 2001. The Warden authorized a strip search of the inmate's sister before she was permitted to see the inmate. When she arrived at the correctional facility, she refused to consent to the strip search and left the facility without seeing the inmate. On March 26, 2001, the Warden received another anonymous tip that many of the inmates in pod D were using controlled substances. The Warden directed that all inmates in pod D be tested for controlled substances. A drug screen was administered and 11 inmates tested positive for morphine (a derivative of opium), including inmate A.

Inmate A's cell was searched but no drugs were found. He was subsequently moved to the segregation area to minimize his contact with other inmates. He was also searched when moved to segregation; the search was again negative. During his confinement in the segregation area, a third search revealed drugs that the inmate had hidden inside a cosmetic item. Inmate A has recently been transferred to another correctional facility.

The Warden then directed Internal Affairs (IA) to investigate this situation and attempt to ascertain the source of the drugs. When interviewed by IA, inmate A named the grievant as his source. He alleged that, on March 25, 2001, he had approached grievant and asked him to contact inmate A's sister, obtain two 8-balls[2] and deliver them to the inmate. He further alleged that grievant asked for $200 as a delivery fee and the inmate agreed. He contended that grievant had delivered the 8-balls inside a newspaper to the inmate in his cell early on March 26, 2001 prior to the morning inmate count.

The grievant was working day shift on March 26, 2001; this shift begins at 8:00 a.m. The morning inmate count is conducted at the end of the night shift before 8:00 a.m. The

[2] An 8-ball consists of 3.5 grams of a controlled substance. In this case, one of the 8-balls was heroin (a derivative of opium); the second 8-ball was cocaine.

agency did not search the grievant or his vehicle for drugs or traces of drugs. The agency did not use trained canines to determine whether any trace of drugs remained on the grievant. The grievant was not asked to submit to a test to determine whether he was using controlled substances. Inmate A has been incarcerated for the past 13 years for armed robbery.

When confronted about the inmate's allegations, grievant denied ever having met the inmate's sister, and denied delivering illegal drugs to inmate A. However, because of the allegations, the Warden reassigned grievant from his post at the correctional facility to a different post at the work center (a small, lower-security facility, outside the correctional center but on the same grounds) until IA could finish its investigation. Since March, there has been an on-going investigation of 19 correctional officers and their possible involvement in drug trafficking at the correctional center. The Warden had been told that criminal indictments might be issued in May. He delayed taking disciplinary action because the criminal indictments were of more import and might have precluded the necessity for disciplinary action. However, in early May, the criminal investigation was far from completion (and is still in progress as of this date). Therefore, the Warden decided he could no longer delay the disciplinary action. The grievant was disciplined and discharged from employment on May 14, 2001.

On April 30, 2001, grievant was given a Group II Written Notice with five-day suspension because he had lied about the reason for his failure to report for work on April 25, 2001. Grievant subsequently wrote a letter of apology for what he had done. This disciplinary action was not appealed by grievant.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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 § 2.1-116.05(A) 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 § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[3]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to §§ 2.1-114.5 and 53.1-10 of the Code of Virginia, the Department of Personnel and Training[4] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set 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.

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 5-10.17 of the DOC Standards of Conduct addresses those offenses that include acts and behavior of such a serious nature that a first occurrence should normally warrant removal. One such Group III offense is fraternizing with inmates. The agency has also promulgated a specific procedure that addresses improprieties and states, in pertinent part:

> Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and inmates, probationers, or parolees or families of inmates, probationers, or parolees is prohibited. Associations between staff and inmates, probationers, or parolees which may compromise security or which undermine the employee's effectiveness to carry out his responsibilities may be treated as a Group III offense under the Standards of Conduct and Performance.[5]

The agency's zero tolerance policy for illegal controlled substances is undisputed by grievant. The need for such a policy is self-evident. Given the unpredictable effects of controlled substances, their use by inmates in a correctional facility dramatically increases the potential for power struggles, injury and even death. Therefore, it is understandable that agency management must take decisive action to prevent the introduction of controlled substances into the correctional facility and firmly punish those involved in such trafficking.

The evidence in this case pits the sworn denial of any involvement by the grievant against the testimony of a convicted felon who claims grievant was the delivery man. One is generally inclined to automatically find the testimony of a convicted felon less credible than that of a correctional officer. However, in evaluating this case, the hearing officer set aside that potential bias and considered merits of the testimony of each person. Grievant's testimony was credible and consistent; he was not evasive and his demeanor during testimony revealed nothing that would cause his testimony to be viewed suspiciously. Inmate A testified by telephone and therefore, his testimony was evaluated primarily on its

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[3] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*.
[4] Now known as the Department of Human Resource Management (DHRM).
[5] Exhibit 2. § 5-22.7.A, Department of Corrections Procedure Number 5-22, *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*. March 3, 1998.

own internal consistency. He stated that grievant had delivered the drugs to him prior to the morning count conducted by the night shift prior to 8:00 a.m.; however, grievant's unrebutted testimony established that grievant did not start his work shift until 8:00 a.m. Therefore, it is concluded that the inmate's testimony is less credible than that of the grievant.

The agency alleged that there had been a telephone call from inside the facility to inmate A's sister to make the arrangement for grievant to pick up the drugs from the sister. Grievant's unrebutted testimony was that the agency records all telephone calls. However, the agency did not produce this vital piece of corroborative evidence. A general evidentiary principle, and certainly one followed in grievance hearings, is that if the agency withholds evidence that could resolve a disputed material fact, the hearing officer will resolve that factual dispute in the grievant's favor.

In this case, it is recognized that the agency was hamstrung in presenting all available evidence because of the ongoing criminal investigation. It became apparent that the agency had additional evidence that it elected not to present during the grievance hearing because doing so might jeopardize the forthcoming criminal indictments. However, a hearing officer can not base his decision on veiled allegations, innuendo, or hints about non-proffered evidence and alleged witnesses who were not presented. The hearing officer has no choice but to make a decision based on the evidence presented during the hearing.

Based on the available evidence, the agency has not carried the burden of proof. As noted above, the hearing officer finds the grievant's testimony more credible than that of his sole accuser. However, even if one were to view the testimony of the grievant and inmate A to be equally credible, the agency has not presented any additional corroborative evidence to demonstrate that it is more likely than not that grievant delivered drugs to inmate A.

DECISION

The disciplinary action of the agency is reversed.

The Group III Written Notice issued to the grievant on May 14, 2001 and the discharge from employment are REVERSED. The grievant should be reinstated as soon as possible with full back pay retroactive to the date of separation.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set 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 four 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** 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.
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.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

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 **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-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 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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 HRM, 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.

David J. Latham, Esq., Hearing Officer