

Issue: Three Group III Written Notices with termination (fraternization with inmates, or non-professional relationships with inmates); Hearing Date: September 11, 2001; Decision Date: October 3, 2001; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5272



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5272

Hearing Date: September 11, 2001
Decision Issued: October 3, 2001

PROCEDURAL HISTORY

On June 6, 2001, Grievant was issued three Group III Written Notices of disciplinary action with removal for:

Fraternization with inmates, or non-professional relationships with inmates, probationers, or parolees, which pose a threat to the security of an institution, an employee, an inmate, or a citizen of the Commonwealth.

On June 27, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 13, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 11, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Legal Assistant Advocate
Assistant Chief for Internal Affairs

ISSUE

Whether Grievant should receive three Group III Written Notices of disciplinary action with removal.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 employed Grievant as a Corrections Officer Senior for five years until his removal.

Grievant told Inmate R he wanted to purchase a luxury Lexus and a Mazda Millennium automobile. Inmate R is one of many inmates Grievant regularly supervised. Inmate R told Grievant that his brother worked as a Finance Manager in a Jeep dealership in a city located approximately 100 miles from the Facility and that Inmate R would call the Finance Manager and advise him to give Grievant an especially good deal. Inmate R wanted to do Grievant a big favor so that Grievant would then owe him a favor. Grievant obtained the telephone number from Inmate R and then called the dealership asking for Inmate R's brother.

When Grievant spoke with the Finance Manager, Grievant identified himself and asked if he was speaking to Inmate R's brother. The Finance Manager had a brief discussion with Grievant and began feeling uncomfortable about transacting business with Grievant. The Finance Manager did not want to reject Grievant because he feared Grievant may take adverse action against Inmate R. The Finance Manager politely transferred the call to a salesman. Grievant identified himself by name to the salesman and asked about Lexus and Mazda vehicles. The salesman said his dealership did not sell the type of vehicles Grievant was seeking. Grievant abruptly hung up the telephone.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which

require correction in the interest of maintaining a productive and well-managed work force.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

Agency employees are prohibited from using “their official status as employees of the Department as a means to establish social interactions or business relationships not directly related to Department business.” DOCPM § 5-22.6. “Improprieties or the appearance of improprieties, fraternization, or other non-professional associations by and between employees and inmates ... is prohibited. Associations between staff and inmates ... which may compromise security or which undermines the employee’s effectiveness to carry out his responsibilities may be treated as a Group III offense under the Standards of Conduct and Performance (Procedure 5-10)”¹ DOCPM § 5-22.7.

Grievant sought to use his position supervising Inmate R to receive a personal benefit or profit. He had developed a close relationship with Inmate R such that Inmate R felt comfortable offering the Finance Manager as a contact and Grievant trusted Inmate R sufficiently to rely on the information and to exploit it. Grievant’s actions were improper. Furthermore, Grievant’s relationship with Inmate R posed a threat to the security of the institution because owing a favor to an inmate could cause Grievant to treat the inmate differently from other inmates. In addition, Inmate R’s ability to threaten Grievant with disclosure of the transaction may have given the inmate control over Grievant that the inmate would not otherwise have had. Grievant’s effectiveness was undermined by his relationship with Inmate R.

The Agency has established that Grievant should receive a Group III Written Notice. No evidence was presented sufficient to mitigate the discipline; thus, removal is appropriate.

The Agency contends Grievant should receive (1) a Group III Written Notice for fraternization with Inmate R by escorting Inmate R to the Dispensary to engage in sexual activity with a nurse, and (2) a Group III Written Notice for fraternization with Inmate C by providing the inmate with drugs. The Hearing Officer concludes that the Agency has not established these allegations by a preponderance of the evidence because they are based on the statements of inmates who did not testify at the hearing.

The Hearing Officer cannot rely solely on written hearsay statements of inmates because inmates (1) are typically convicted felons unworthy of trust, (2) have substantial free time to develop and coordinate rumors, and (3) often have reason to

¹ “Fraternalizing with inmates or non-professional relationships with inmates ... which pose a threat to the security of an institution, an employee, an inmate, or a citizen of the Commonwealth” constitutes a Group III offense. DOCPM § 5-10.17(B)(18).

harm those who control them.² With respect to the Group III regarding Grievant's contacts with the Finance Manger, the Agency presented evidence of interviews with the Finance Manager and other auto dealer staff who confirmed that Grievant contacted them and indicated that his call was prompted by Inmate R. The Agency did not present corroborating evidence to support the other two Group III Written Notices.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for offenses occurring December 1999 through January 2000 is **upheld**. The remaining two Group III Written Notices are **rescinded**.

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**

² The Agency contends Grievant admitted to investigators that Inmate R asked him to coordinate sex between Inmate R and the nurse, and that Inmate C had approached Grievant and offered Grievant money to bring illegal drugs into the institution. Grievant denies these allegations and none of his statements reflect such an admission.

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.

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.

Carl Wilson Schmidt, Esq.
Hearing Officer