Issue: Group III Written Notice with termination (fraternization with an inmate); Hearing Date: September 24, 2001; Decision Date: September 25, 2001; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5289

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 5289

Hearing Date: September 24, 2001
Decision Issued: September 25, 2001

APPEARANCES

Grievant
Two witnesses for Grievant
Warden
Legal Representative for Agency
Two witnesses for Agency

ISSUES

Did the grievant receive a tattoo from an inmate in May 2001 in violation of the prohibition against fraternization? If so, what is the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed an appeal from a Group III Written Notice issued on July 23, 2001 because he allegedly received a tattoo from an inmate. The grievant was also discharged from employment on July 23, 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 1997. He was a correctional officer senior at the time of discharge. The grievant has one active disciplinary action – a Group III Written Notice issued on October 13, 1999.

Grievant received a copy of the agency's Standards of Conduct policy when hired.[1] The rules applicable to employee relationships are found in Procedure Number 5-22 and state, 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 (procedure 5-10).[2]

During an unrelated investigation in July 2001 into allegations by one inmate against another inmate, it was alleged that inmate O had tattooed an unknown correctional officer. Inmate O had been known to be tattooing inmates with a tattoo gun fabricated from stolen items. During muster meetings, correctional officers had been advised that inmate O had tattooed inmates and that they should watch him carefully in order to locate his tattooing equipment. Inmate O was to be transferred to another correctional facility on July 17, 2001. On that date, the investigator interviewed inmate O, who volunteered the location of the tattoo gun. Inmate O was asked if he had ever tattooed a correctional officer; he said he had tattooed the grievant.[3] The investigator (who is authorized to investigate only inmate matters) reported this information to Internal Affairs, the unit responsible for investigating allegations against correctional officers.

The investigator interviewed the control officer on duty the night when inmate O allegedly tattooed grievant. That correctional officer initially denied any knowledge that grievant had been tattooed by an inmate. He stated that grievant

---

[1] Exhibit 1.
[2] Exhibit 2. Section 5-22.7A, Procedure No. 5-22, *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees,* June 1, 1999.
[3] Exhibit 3. Investigative Report regarding *inmate O*, July 19, 2001.

had been talking about getting a tattoo but believed he intended to have it done outside the correctional facility. The investigator then told the control officer that he was going to turn the matter over to Internal Affairs because inmate O claimed he had tattooed grievant. The control officer then changed his story and said that grievant had told him he was going to have inmate O give him a tattoo. He also stated that grievant had showed him his tattoo but that it was dark and hard to see. The investigator did not interview grievant.

During the period in late July when this investigation was conducted, grievant had been suspended from work due to investigation of a totally unrelated matter (alleged domestic violence) for which he might face disciplinary action. The disciplinary action herein was issued on July 23, 2001. During a second resolution meeting with the warden on July 26, 2001, grievant promised to provide a written statement from the person who tattooed him. Grievant submitted the statement from his witness but the warden received it after the deadline he had imposed.

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.[4]

[4] § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*.

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 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 Procedures Manual* provides that, "Fraternizing 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," constitutes a Group III offense.[5]

There is no doubt that the offense alleged in this case constitutes either fraternizing or a non-professional relationship with an inmate. If a correctional officer receives a tattoo from an inmate, he becomes indebted to the inmate – a situation which correctional officers must avoid. If a correctional officer is indebted to an inmate for any reason, the inmate acquires leverage over the correctional officer, which could potentially jeopardize the security of the facility.

However, the issue in this case is whether the agency has borne the burden of proof to demonstrate that the grievant received a tattoo from an inmate. It is concluded that the burden has not been met for the following reasons. First, inmate O, who allegedly administered the tattoo, did not testify during the hearing. It is recognized that the inmate is now at a different facility, however, the agency offered no evidence to show that his testimony could not have been presented by telephone. Thus, the only evidence from this witness is hearsay proffered by the investigator. While hearsay evidence is admissible in an administrative hearing, it must be assigned less evidentiary weight than the sworn testimony of in-person witnesses.

Second, and in contrast, grievant denied under oath that inmate O had tattooed him. Moreover, the grievant also offered the sworn testimony of both the person who had tattooed him and a friend who had witnessed the entire tattoo procedure. The testimony of all three people was consistent, credible and unshakable notwithstanding thorough cross-examination by both the agency's legal representative and the hearing officer. All three witnesses agreed on the details regarding how, when and where grievant was tattooed. The only minor difference in testimony among the three witnesses involved the tattooer's admission that he has never tattooed anyone other than grievant. Prior to applying the tattoo, he told grievant that he had tattooed "a couple others."

[5] Exhibit 1. Section 5-10.17B.18, Procedure 5-10, *Standards of Conduct*, June 1, 1999.

However, it is more likely than not that the tattooer claimed prior experience at the time in order to put grievant more at ease.

Third, the control room officer who testified against grievant was less credible than grievant and grievant's witnesses. The control room officer admitted that he had lied during the investigation.[6] At first he denied knowledge and then later changed his story when he learned that the matter was going to be investigated more thoroughly. Moreover, his demeanor during the hearing was reluctant, subdued, and less than convincing. Because of this witness' willingness to lie during the investigation, one cannot be assured which of his stories is the accurate one. Moreover, on direct examination, he admitted that the grievant did not tell him who had actually applied the tattoo. Further, he also acknowledged that grievant had told him prior to receiving the tattoo that he was going to obtain the tattoo professionally outside the facility.

Fourth, the investigator testified that another inmate was in the cell on the night that inmate O allegedly tattooed grievant. However, the agency did not produce that inmate to testify. That inmate could have provided direct corroborative testimony. When a party fails to produce testimony or evidence within its control, it must be presumed that such testimony or evidence does not exist. Therefore, it is concluded that the agency has not demonstrated, by a preponderance of the evidence, that grievant fraternized or had a non-professional relationship with an inmate.

DECISION

The disciplinary action of the agency is hereby reversed.

The Group III Written Notice issued on July 23, 2001 for fraternization with an inmate is VACATED. The grievant is reinstated to his position with full back pay and benefits. The Written Notice shall be removed from the grievant's personnel file and retained by the agency pursuant to Section 5-10.19.B of the DOC Standards of Conduct.

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.

[6] This correctional officer was given a Group II Written Notice and suspended from work for lying during an official investigation.

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** 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.

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.

_____
David J. Latham, Esq.
Hearing Officer