

Issue: Two Group III Written Notices with termination (fraternization and accessory to fraternization); Hearing Date: September 28, 2001; Decision Date: October 9, 2001; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5298/5313



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Numbers: 5298, 5313

Hearing Date: September 28, 2001
Decision Issued: October 9, 2001

PROCEDURAL HISTORY

On August 3, 2001, Grievant was issued two Group III Written Notices of disciplinary action with removal for:

Accessory to fraternization, Internal Affairs investigation supported by the signed statement of [Grievant] concludes that [Grievant] was informed by [Corrections Officer S] and [Corrections Officer E] that they had received tattoos from an inmate, which constituted fraternization. [Grievant] failed to report this information to supervision.

Fraternization with Inmates. Internal Affairs investigation, supported by the signed statement of [Grievant] concludes that [Grievant] fraternized with [Inmate CM] by passing information from [Inmate CM] to [Corrections Officer S] and Corrections Officer E] that they needed to see [Inmate CM] regarding the tattoos they had received. [Grievant] admitted passing the non-professional information from the inmate to the officers.

Grievant timely filed grievances to challenge the disciplinary actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. The Department of Employment Dispute Resolution assigned these appeals to the Hearing Officer. On September 27, 2001, the Director of the

Department of Employment Dispute Resolution issued a Compliance Ruling granting consolidation of Case Numbers 5298 and 5313. On September 28, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Legal Assistant Advocate
Special Agent
Assistant Warden Operations

ISSUES

1. Whether Grievant should receive a Group III Written Notice of disciplinary action with removal as an accessory to fraternization.
2. Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for fraternizing with inmates.

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 until his removal effective September 14, 2001.

Grievant was interviewed as party of a separate investigation into matters at the Facility. Grievant made a statement to the Special Agent as follows:

Sometime during the early months of 2000 while in the staff parking lot after work [Officer S] showed me a tattoo on his right upper arm of a crown. When he showed me the tattoo he said "look [Grievant] what I got"

as he flipped up his shirt [sleeve] or “see [Grievant] what I got”. I don’t recall saying anything to him in response, if I said anything.

About three weeks later while walking on the sidewalk between the Treatment building and R-3 behind [Officer S] and [Officer E], [Officer E] told [Officer S] “man let me show you how this guy hooked me up”, referring to an inmate, as he flipped up his left shirt [sleeve] and showed [Officer S] his tattoo of a red rose with a ribbon running through it and a name engraved in the ribbon. [Officer S] turned around and showed [Officer E] his tattoo [with] the crown as they proceeded down the sidewalk. Both of them turned around, looked at me and said “man you ought to go ahead and get you one”. I told them they were crazy, that they should go ahead and turn in their two week notice. Nothing further was said about the tattoos at that point nor did I report this matter to my supervisor or the Administrator. I figured after I told them they needed to turn in their notice they would see what they had done and do the right thing and resign. I could have told [Officer S] during our conversation something to the effect “you really got it done.”

Nothing further was said until the latter part of January 2001, or the first of February 2001, when Inmate [CM] approached me in R-1. He said you know your boys are in trouble. I asked him who he was talking about. He said [Officer S] and [Officer E] and their tattoos they got from the inmates. He asked how dumb could they be to let a white boy put tattoos on them. He said [Inmate M] was the inmate who tattooed [Officer S]. He didn’t tell me however, who tattooed [Officer E]. He said [Officer S] and [Officer E] were trying to avoid him. He never said why. I told him when I saw them I would tell them they needed to see him. Our conversation ended at that point. I learned later through rumors that Inmate [C] tattooed [Officer E]. The following day I saw [Officer S] in the parking lot. I told him it would catch up to him and said the best thing he could do now was turn in his two week notice. He had a shocked/scared look on his face as he told me he would deal with it, then drove off. During the same week I saw [Officer E] in the staff parking lot. I told him the same thing I told [Officer S]. He said he wasn’t worried, but he looked like he was seriously concerned. I told him the only way I saw him out of this situation was for him to turn in his two week notice. He just drove off at that point. It was no doubt in my mind during my conversations with [Officer S] and [Officer E] that they got their tattoos from inmates.

The allegation that I watched out for [Officer S] while he was getting a tattoo in an inmate’s cell, or that [Officer S] asked me to watch out for him is totally false. I have identified [Officers S/E’s] tattoos in photographs provided by [Special Agent] during this interview.

*I know what I did by not reporting [Officer S] and [Officer E] was wrong, but I was just trying to get the two officers to turn themselves in or resign rather than me report them. I just wanted them to do the right thing.*¹

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.

When the Hearing Officer is faced with credible testimony from a corrections officer and written hearsay statements from inmates or officers who are not before the Hearing Officer, the Hearing Officer must give greater weight to the testimony of the corrections officer who appeared at the hearing.

Accessory to Fraternization

The Agency contends Grievant was an accessory to fraternization because Officers S and E told him they had received tattoos from inmates and Grievant failed to report this information. This argument is untenable.

Policy 5-10.17 lists 25 examples of Group III offenses. Although accessory to fraternization is not listed as an offense, this is not fatal to the Agency’s claim. Listed offenses are intended to be illustrative and are not all-inclusive. Being an accessory to fraternization may certainly constitute a Group III offense when status as an accessory is established.

Policy 5-10 does not define “accessory.” *Black’s Law Dictionary (6th Ed.)* defines² “Accessory” under criminal law as, “Contributing to or aiding in the commission of a crime.” Grievant did not contribute to or aid in the commission of fraternization. Grievant knew that Officers S and E said they had received tattoos but Grievant did not

¹ Agency Exhibit 8. Grievant contends the statement presented is not accurate and that the Special Agent re-wrote the language after telling Grievant the statement said something else. Based on the credibility of the witnesses, the Hearing Officer concludes that the statement shown in Agency Exhibit 8 is an accurate representation of what Grievant stated to the Special Agent.

² Virginia case law defines accessory after the fact as, “a person who knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon.” *Wren v. Commonwealth*, 67 Va. 952, 955 (1875).

report this information. Merely knowing of fraternization and failing to disclose it does not make one an accessory to fraternization.³

“Failure to follow ... established written policy” is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant’s Security Post Order #9 requires Grievant to “[r]eport any and all suspicious activity or irregularities at once to supervisor.”⁴ In addition, Internal Operating Procedure 421.1 states, “Any staff member who witnesses or is otherwise aware of a serious or unusual incident which occurs at the institution must report this incident to the Shift Commander immediately.”⁵

When Grievant learned that Officers S and E received tattoos from an inmate, Grievant learned of a serious incident and irregularity. Grievant should have reported this information. He admits he should have reported the information. Grievant’s behavior rises to the level of a Group II offense. Given the seriousness of the information he withheld, suspension is appropriate.

Fraternization

The Agency contends Grievant should receive a Group III Written Notice because he fraternized with Inmate CM by passing information from Inmate CM to Officers S and E that Inmate CM wanted to see them regarding the tattoos they received. This argument is unsupported.

Policy 5-10.17(B)(18) states that Group III offenses⁶ include,

Fraternizing 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.

Policy 5-10 does not define “fraternize”. *Webster’s II New Riverside Dictionary* defines “fraternize” to include, “To associate with others in a friendly or brotherly way.” Grievant had a conversation with Inmate CM during which Inmate CM discussed tattoos given by inmates. This conversation does not establish that Grievant associated with an inmate in a friendly or brotherly way. The evidence showed that inmates often ask

³ In *Wren v. Commonwealth*, 67 Va. 952, 957 (1875), the Virginia Supreme Court held, “Or if he agree for money not to prosecute the felony; or if knowing of a felony, fails to make it known to the proper authorities; none of these acts would be sufficient to make the party an accessory after the fact.”

⁴ Agency Exhibit 6.

⁵ Agency Exhibit 5.

⁶ Fraternization or non-professional relationships with inmates that are not directly related to Department business constitute Group II offenses. It is not necessary for the Hearing Officer to determine whether Grievant’s behavior is a Group II or a Group III offense for fraternization or non-professional relationship since the Hearing Officer concludes no fraternization or non-professional relationship occurred.

one corrections officer to ask another corrections officer to speak with the inmate. No evidence was presented to suggest Inmate CM spoke with Grievant only because of some ongoing friendship between them.

Policy 5-10 does not define “non-professional relationships.” *Webster’s // New Riverside Dictionary* defines “professional” to include, “Engaged in a specific activity as a career.” Grievant’s career is to maintain supervision and security of inmates. A non-professional relationship with an inmate would be a relationship that adversely affects security. No evidence was presented of any relationship between Inmate CM and Grievant what would affect security.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action for being an accessory to fraternization is **reduced** to a Group II Written Notice with ten workday suspension for failure to follow established written policy. The Agency’s issuance of a Written Notice of disciplinary action for fraternization is **rescinded**. The Agency is directed to **reinstate** Grievant to his former position or, if occupied, to an objectively similar position. The Agency is further directed to **suspend** Grievant for ten workdays and then to provide Grievant with **back pay** after applying Grievant’s suspension less any interim earnings that the employee received and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a).

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.

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