

Issue: Three Group III Written Notices with termination (falsifying records, fraternization with inmates, and failure to follow supervisor's instruction); Hearing Date: January 11, 2002; Decision Date: March 14, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5333



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5333

Hearing Date: January 11, 2002
Decision Issued: March 14, 2002

PROCEDURAL HISTORY

Grievant received three Written Notices on August 20, 2001. First, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Falsifying any records. Such records include, but are not limited to vouchers, reports, insurance claims, time records, leave records, or other official state documents. This constitutes a violation of Standards of Conduct 5-10.17.B.2, in that you denied receiving any letters from any inmate in an investigative report to the Investigative Unit of the Inspector General's Office and provided at least two false statements.

Second, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

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, a violation of Standards of Conduct 5-10.17.B.18. This is also a violation of Department of Corrections Operating Procedure 5-22.7A. "Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and inmates,

probationers, parolees or families of inmates ... which may compromise security or which undermine the employee's effectiveness to carry out his responsibilities. According to investigative findings you received personal letters on at least four different occasions from two inmates of [the Facility] and failed to report such letters to management.

Third, Grievant was issued a Group II Written Notice of disciplinary action with removal based on the accumulation of discipline for:

Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy, a violation of Standards of Conduct 5-10.16.B.1. In that you received letters on at least four different occasions from two inmates and reportedly flushed the unread letters in the toilet instead of giving such letters to security management for review for possible threats, contraband, etc.

On September 24, 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 she requested a hearing. On November 26, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing date was originally scheduled for December 14, 2001 but had to be continued due to the illness of a representative. On January 11, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Legal Assistant Advocate
Institutional Investigator
Special Agent
Training Lieutenant

ISSUE

1. Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for falsifying records.
2. Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for fraternization.
3. Whether Grievant should receive a Group II Written Notice of disciplinary action with removal for failure to perform assigned work.

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 until her removal on August 24, 2001. She began working for the Agency in July 1999. Her evaluations show she was a good employee.

On July 6, 2001, mailroom staff opened a letter without a stamp sent by Inmate RS. The return address on the letter was for Inmate CH who resided in the same institution. The letter inside asked Inmate CH to deliver an enclosed second letter to "Sugar Mamma". Inmate RS told Agency investigators that he wanted the letter to be delivered to a civilian female. The investigators concluded his statement was untrue because Inmate CH could not have delivered the letter to anyone outside of the institution.

Agency investigators questioned Grievant regarding her receipt of letters from Inmate RS on July 11, 2001. Initially, she denied receiving any letters from Inmate RS.¹ In a subsequent interview later in the day, she admitted receiving a letter from Inmate RS that was addressed to "Sugar Mamma".² She did not read the letter and flushed it down the toilet.

The Agency became suspicious that Grievant may have been receiving letters from another inmate, Inmate BR. During an interview on July 20, 2001, Grievant initially denied receiving any letters from Inmate BR but later admitted that Inmate BR had given her three³ personal letters during the prior month. She said she threw the letters into the trash without reading them. She told the investigators she previously lied because she was afraid of getting in trouble for not reporting the incidents. In her written statement Grievant says:

¹ In her written statement, Grievant states, "I have not received any letters from [Inmate RS]."

² Grievant testified that Inmate RS referred to many women including those he saw on television as "Sugar Mamma".

³ Inmate BR informed the investigators he delivered four letters to Grievant and had another inmate deliver a fifth letter to her on his behalf.

I was not forth coming at first because after everything I have just went through with this last inmate⁴ and investigation I am very upset. But as told I figure I will be better off if I go ahead and tell the truth. I can assure there are no other incidents.

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.

Falsification of Records

Group III offenses include:

Falsifying any records. Such records include, but are not limited to vouchers reports, insurance claims, time records, leave records, or other official state documents.⁵

Grievant’s actions represent a pattern of misdirection and deception directed at the Agency’s investigators. Rather than cooperating fully with the investigation, Grievant withheld information and provided false information in order first to learn what the investigators knew about her and to minimize the charges against her.⁶ During the first investigation regarding Inmate RS, Grievant denied receiving a letter from him and then later changed her statement. Nine days later she was asked about receiving letters from Inmate BR and she initially denied receiving any letters from him. When the investigators informed her of Inmate BR’s comments, she changed her statement and admitted receiving several letters of a personal nature from Inmate BR. In her July 20, 2001, Grievant assures the Agency that there are no other incidents. During the hearing, however, Grievant admitted receiving a letter from a third inmate.⁷

⁴ Grievant is referring to Inmate RS as the last inmate.

⁵ DOCPM § 5-10.17(B)(2).

⁶ Grievant took a college course on criminal justice in which she learned to respond to investigations by attempting to learn as much as possible from the investigator before providing any information to the investigator.

⁷ Grievant contends that she did not consider that third inmate to be one she should have identified. Since she had informed her supervisor about the letter from this inmate, she did not think the

Grievant contends that although she may have been untruthful initially during her interviews she voluntarily corrected her statements thereby absolving her of untruthfulness. This argument may have been persuasive if Grievant had had only one example of changing her statement. On July 11th, she voluntarily informed the investigator of the correct information. This may have excused her lack of candor. By July 20th, however, she should have known to tell the truth at all times to the investigators. Instead, she denied receiving any letters from Inmate BR. Only after being confronted by the investigator with information supplied by Inmate BR did she tell the truth.

Fraternalizing with Inmates

Group III offenses include:

Fraternalizing 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.⁸

The Department has issued Procedure Number 5-22 addressing “Relationships with Inmates, Probationers, or Parolees.” The purpose of this policy is to “establish the rules of conduct to be observed by employees when dealing with inmates, probationers, or parolees of the Department.” The policy encourages staff to interact with inmates in a courteous and respectful manner, but cautions:

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.⁹

The Facility has adopted Institutional Operating Policy 211 governing employee conduct. This policy¹⁰ states:

investigators were seeking information about this letter. Based on the depth of the investigation, the Hearing Officer finds it unlikely Grievant did not understand she should have fully disclosed all inmate letters.

⁸ DOCPM § 5-10.17(B)(18).

⁹ DOCPM § 5-22.7(A).

¹⁰ IOP § 211-7.1.

All staff members must remember that inmates are human beings and, as such, are deserving of fair and humane treatment. At the same time, staff should avoid excessive familiarity with the inmate population. Under no circumstances are staff to conduct unauthorized dealings with inmates such as buying, selling or trading possessions, lending or borrowing money, carrying letters, packages, etc., in or out of the institution for inmates (except authorized mail handling), or perform any other act that might be detrimental to the security of the institution.

To the greatest extent possible, staff members are to avoid involvement in the personal lives of inmates. Staff should not ask inmates questions of a personal nature except as part of authorized treatment procedures. Accordingly, staff members should keep their personal lives to themselves when dealing with inmates. Above all, staff members are to respect the rights of each inmate to hold his own philosophical, political and religious beliefs, however disagreeable such beliefs may be to the staff member.

The Agency's policies unequivocally prohibit fraternization between corrections officers and inmates. It is not surprising that male inmates would show attention towards and propose relationships with female corrections officer. In order to meet its burden of proof, the Agency must prove more than the actions of inmates; the Agency must show action by the corrections officer to establish a non-professional relationship with an inmate.

The Agency has not established that Grievant fraternized with any inmates. Receiving and failing to report inmate letters of a romantic nature is insufficient in itself to show that Grievant engaged in a relationship with inmates. No evidence was presented suggesting Grievant responded to the attention she received from the inmates. The Group III Written Notice for fraternization must be reversed.

Failure to Follow Perform Assigned Work

The Facility has adopted Institutional Operating Procedure 421 governing, "Reporting Institutional Incidents." An incident is defined as:

An event or happening outside the ordinary routine which results in disruption or threatens security, good order and discipline of an institution and/or harm or threat of harm to staff, inmates, visitors or the physical facility.

IOP 421 establishes several classes of incidents and requires different reporting for those classes. For example, class one incidents include homicide, riots, and hostage taking. Class three incidents include, simple assault, accidents resulting in less than serious injuries, fires, and inmate fighting. The reporting obligation exists between the institution and regional Agency managers.

Grievant did not violated IOP 421 when she failed to report to her supervisor that inmates had given her letters. The focus of IOP 421 is on incidents serious enough to warrant their reporting outside of the Facility to regional managers. Receiving letters from inmates is not serious enough that it should be reported to regional managers. No credible evidence was presented suggesting the Facility reports to the Regional Director when inmates give letters to corrections officers.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant’s Post Order¹¹ requires her to:

Maintain continuous observation of area of control. If any usual activities are observed, immediately report this to your supervisor. Also, report this to any other officers who may lend assistance if needed.

The Agency has established that it is an unusual activity for an inmate to give letters to a corrections officer. Inmates sending letters could be disciplined thereby improving their behavior. Grievant should have reported to her supervisor the receipt of letters from inmates.¹² Had she done so, the appropriate disciplinary action could have been taken to stop the inmates’ inappropriate attention directed towards Grievant. The Agency has established that the Group II Written Notice should be upheld because Grievant failed to follow her assigned work as defined by her post orders.

Grievant contends that on a previous occasion she reported to her supervisor that an inmate gave her a letter and no action was taken against the inmate. The Agency countered that once Grievant reported the inmate behavior, Grievant did not receive any additional letters from that inmate.

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 falsifying records is **upheld**. The Agency’s issuance to the Grievant of a Group III Written Notice for fraternization is **rescinded**. The Agency’s Issuance to the Grievant of a Group II Written Notice with removal for failure to perform assigned work is **upheld**.

APPEAL RIGHTS

¹¹ Agency Exhibit 10.

¹² Grievant admitted initially lying to Special Agent RH about receiving a letter from Inmate RS and Inmate BR because she was afraid that she would be disciplined for not reporting the letters.

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 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 Resource 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 DHRM, 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