

Issue: Group I Written Notice (fraternization with inmates); Hearing Date: April 17, 2002; Decision Date: April 18, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5412



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5412

Hearing Date: April 17, 2002
Decision Issued: April 18, 2002

PROCEDURAL HISTORY

On September 28, 2001, Grievant was issued a Group II Written Notice of disciplinary action for:

Violation of DOC Procedure 5-10, Standards of Conduct (fraternization or non-professional relationships with inmates, parolees, or probationers not directly related to Department business.) [Grievant] discussed her daughter's psychological problems with an inmate and asked the inmate to assist her in locating alternative forms of medical treatment for her daughter. Additionally, she accepted a candy bar from another officer, which she knew was a gift from an inmate.

On January 14, 2002, Grievant filed a grievance to challenge the disciplinary action.¹ The Third Step Respondent stated, "I will agree to reduce your penalty from a Group II Notice to a Group I Notice." The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On March 22, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 17, 2002, a hearing was held at the Agency's regional office.

¹ The grievance does not appear to be timely filed. Since the Agency qualified the matter for a hearing, timeliness of the grievance is moot.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Special Agent
Two Corrections Officers

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was 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 employs Grievant as a Corrections Officer Senior at one of its Facilities. She serves as a utility officer, which means she works throughout the Facility rather than being assigned to a particular location. No evidence was presented of any prior disciplinary action against Grievant.

On July 21, 2001, Corrections Officer SS observed Inmate JB in possession of a four-phrase note written by Grievant. The note reflected the changing moods of Grievant's daughter. Grievant's daughter had been receiving mental health counseling and was in the process of changing doctors. Grievant had written the note in order to remember what to tell the new doctor. She had the note with her one day while working at the Facility. She put the note down at her desk while she left the area to attend to other business. When she returned, the note was missing. She assumed she had simply lost the note or mistakenly thrown it away. When Corrections Officer SS confronted Grievant about Inmate JB having the note, Grievant responded, "That's where it is." According to Corrections Officer SS, Grievant's response was of genuine

surprise. Grievant further explained that Inmate JB had been in the office and the note disappeared.²

Inmate JB served his sentence at the Facility where Grievant worked. He performed various duties including cleaning and trash removal. He had access to areas throughout the Facility including the areas where Grievant worked. He frequently tried to speak with corrections officers including Grievant in order to obtain personal information about them. In the summer of 2000, Grievant had complained to her former field-training officer that Inmate JB was asking personal information about her. The field-training officer told her to report it to her supervisor. She did so and was later told that the matter had been addressed.

Inmate JB told the Agency investigator that on two or three occasions, he had given sodas and Reece Cup candy to Grievant. Grievant testified that she did not recall what Officer BF said when she handed Grievant a candy bar.

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.

The Agency makes two claims against Grievant to support its disciplinary action. First, it contends Grievant “discussed her daughter’s psychological problems with an inmate and asked the inmate to assist her in locating alternative forms of medical treatment for her daughter.” Second, it contends Grievant “accepted a candy bar from another officer, which she knew was a gift from an inmate.”

Group I offenses include, “Inadequate or unsatisfactory job performance.”³ If either claim against Grievant can be sustained, then Grievant’s performance would be inadequate or unsatisfactory thereby justifying issuance of a Group I Written Notice.⁴

² Corrections Officer SS testified that Inmate JB told her his “friend” had recently had her belly button pierced and he was interested in knowing where he could find a ring. Grievant also recently had her belly button pierced. Although the Agency contends Inmate JB was referring to Grievant, Inmate JB’s written statement does not address a belly button ring. Grievant testified that if Inmate JB was referring to her having a belly ring, the Inmate must have overheard her talking to another officer or obtained the information from another officer.

³ DOCPM § 5-10.15(B)(4).

The Agency's evidence regarding the first claim is based on a note in the possession of Inmate JB, the content of letters written by Inmate JB, and his knowledge of her having a belly ring. According to the Agency, this evidence permits an inference that Grievant had fraternized with Inmate JB. The Hearing Officer disagrees. Grievant credibly denied giving Inmate JB her note. This is confirmed by Grievant's reaction when she was questioned by Corrections Officer SS. When Corrections Officer SS asked about the note, Grievant's response was of genuine surprise regarding the location of the note. If she had given the note to Inmate JB, she would not have responded with genuine surprise as to the note's location. Grievant credibly denied speaking with Inmate JB about her daughter but provided a reasonable explanation as to how he would have known information about her daughter.⁵ Inmate JB did not testify at the hearing. His credibility depends on the contents of his letters. 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 invent fantasies, and (3) often have reason to harm those who control them. Inmate JB's letters are insufficient to overcome Grievant's credible denial that she informed him of her daughter's problems. The Agency's first claim cannot be supported.

The Agency's evidence regarding its second claim is based on the statements of Corrections Officer BF. In her initial statement, Corrections Officer BF stated she told Grievant the candy bar was from Inmate JB. In a second statement, she says Grievant did not want the candy bar and it was given back to the inmate. In a third statement, Corrections Officer BF states she could not explain the discrepancy between her first and second statements but says, "it was along time ago , and I can't remember exactly what happened or exactly what was said." The Special Agent testified that Corrections Officer BF gave a fourth written statement to the Warden that confirmed the first statement; but that fourth statement was not offered at the hearing. The Agency did not call Corrections Officer BF as a witness and did not offer any explanation as to why she might not be available to testify.

The second claim must be resolved based on the quality of the evidence before the Hearing Officer. Based on the conflicting written hearsay statements of Corrections Officer BF, the Hearing Officer cannot sustain the Agency's allegation that Grievant knowingly received a candy bar from an inmate. It may be the case that Corrections Officer BF's made a second statement in order to protect herself after having truthfully

⁴ If the allegations can be sustained, it is likely the Agency would have established a basis for issuance of a Group II Written Notice for "Fraternization ... with inmates ... not directly related to Department business." DOCPM § 5-10.16(B)(10). Since the Agency reduced the level of discipline to a Group I, it is not necessary for the hearing officer to evaluate whether Grievant engaged in behavior justifying issuance of a Group II Written Notice.

⁵ Inmate JB frequently cleaned the areas where Grievant worked and could have overheard her speaking to her daughter's doctors on the telephone. He also took out the trash and could have taken Grievant's notes while she stepped away from her desk.

admitted in her first statement to delivering a candy bar from an inmate. Or it could be that her third statement was correct that she really does not remember what happened or what was said. Without having Corrections Officer BF testify, the Hearing Officer cannot determine which story is correct and why the officer would make conflicting stories.

Grievant did not file an incident report on Inmate JB after she learned that he had taken her note. She explained that she had left work early because of sickness on the day she learned of his theft. She could not report the incident for the next few days because she was at home sick. She did not report the incident when she returned to work because she was informed she was being investigated. Grievant has not yet reported the incident although she should have. The Agency did not charge Grievant with failing to file an incident report on Inmate JB and, thus, there is no basis to discipline her for failure to do so.

Grievant seeks relief including reinstatement of the time she lost due to stress resulting from the disciplinary action and removal of a counseling letter concerning her time missed from work. The Hearing Officer only has the authority given to him by the Grievance Procedure. The relief Grievant seeks is not included within that authority. Thus, the Hearing Officer must deny Grievant's request.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. The Agency is directed to remove the Written Notice in accordance with DOCPM § 5-10.19.

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 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