

Issue: Group III Written Notice with 240 hour suspension (unauthorized removal of inmate's money); Hearing Date: May 7, 2002; Decision Date: May 8, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5428



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5428

Hearing Date: May 7, 2002
Decision Issued: May 8, 2002

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
Superintendent
Legal Assistant Advocate for Agency
One witness for Agency

ISSUES

Was the grievant's conduct on March 10, 2002 subject to disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on March 13, 2002 for theft or unauthorized removal of an inmate's money.¹ He was suspended without pay for 240 hours.² Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing. The Department of Corrections (Hereinafter referred to as "agency") has employed grievant as a correctional officer for ten years. The grievant has established a good work record and has no prior disciplinary actions.

Grievant had read and is familiar with the post order for reception visiting officer. Among the specific duties of the order is "Observe and report any unusual incident and/or behavior, to the OIC immediately."³ Grievant is also familiar with the institutional operating procedure (IOP) for control of contraband. That procedure states, in pertinent part:

Contraband: Any unauthorized item determined to be in the possession of an inmate or within a correctional institution and accessible to an inmate which is not acquired through approved channels or in prescribed amounts, including:

- F. Any monies, whether currency, coins, checks, bank drafts, etc., in the possession of an inmate except where specifically authorized. Specifically, the following will always be considered as contraband when found in the possession of, or in access to, inmates:
 - g. Currency or monies (inmates at Unit # __ are allowed to have \$2.00 in quarters only)⁴

In January 2001, the \$2.00 in quarters exception at Unit # __ was rescinded.⁵ Grievant was aware of this memorandum and the revised IOP 412. Grievant knew also that giving money to an inmate without first obtaining permission of the superintendent is a Class 1 Misdemeanor.⁶

On Sunday, March 10, 2002, grievant and one other correctional officer were assigned to the inmate visitation room during visiting hours. After visitors

¹ Exhibit 10. *Grievance Form A*, filed March 14, 2002.

² Exhibit 8. Written Notice, issued March 13, 2002. For a Group III offense, the Standards of Conduct provide for a suspension of up to 30 workdays in lieu of termination. The grievant normally works 12-hour shifts. Accordingly, the agency suspended him for 20 workdays – the equivalent of 30 eight-hour workdays.

³ Exhibit 2. Post Order 8A, issued March 7, 2001.

⁴ Exhibit 3. Section 412-6.0, Institutional Operating Procedure 412, *Control of Contraband*, March 4, 1998.

⁵ Exhibit 3. Memorandum from Major, *Quarters*, January 22, 2001. See also IOP 412, revised on February 14, 2002.

⁶ Exhibit 4. Code of Virginia § 18.2-474, signed by grievant on April 1, 1998.

leave and before inmates are returned to the main facility, they are routinely strip-searched to prevent the smuggling of contraband into the facility. During the strip-search of one inmate, and while grievant was searching the inmate's clothing, the other correctional officer discovered that the inmate had \$3.00 in quarters clenched in his hand. He confiscated the quarters from the inmate and put them in his pocket. He then returned two quarters to the inmate, telling him to buy himself a soda.

Following this incident, neither grievant nor the other correctional officer wrote an incident report. Procedure requires that any money found on inmates be turned over to the Inmate Welfare account; the other officer did not turn the money in to the account.⁷ Soon thereafter, the other correctional officer mentioned to a third correctional officer that he had confiscated the money from an inmate. The following morning, grievant and the other correctional officer discussed what had occurred the previous day and concluded that it "would probably get back to the administration."⁸

That same morning, March 11, 2002, the third officer told his lieutenant what the other correctional officer had told him.⁹ The superintendent was notified and he personally investigated the matter by interviewing the inmate, the grievant, and the other correctional officer. The inmate was shaken down and found to still have the \$.50 in his possession. The other correctional officer had spent part of the money but, upon the superintendent's request, turned in \$2.50. The superintendent asked both officers why they had taken the money and failed to report it or turn the money in. Grievant responded, "We messed up."

The grievant knew that the \$.50 returned to the inmate by the other correctional officer constituted contraband. He knew that what took place was wrong and that he should have reported it but he did not want to report a fellow correctional officer. Both grievant and the other correctional officer were given Group III Written Notices and each was suspended for 240 hours.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 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

⁷ Although agency testimony indicated that contraband money should be placed in the Inmate Welfare account, Section 412-7.2.1 of IOP 412 provides that such money shall be credited to the Commissary Fund.

⁸ Exhibit 7. Superintendent's file memorandum, March 14, 2002.

⁹ Exhibit 6. Incident Reports, filed by lieutenant and third correctional officer, March 11, 2002.

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 § 2.2-3000 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 § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹⁰

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training¹¹ 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.

Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment.¹² The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses Group III offenses; one example is theft or unauthorized removal of state records, state property or other person's property (to include employees, supervisors, inmates, and visitors, etc.).¹³

¹⁰ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

¹¹ Now known as the Department of Human Resource Management (DHRM).

¹² DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹³ Exhibit 9. Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 1, 1999.

The basic facts in this case are not in dispute. Another correctional officer confiscated \$3.00 from an inmate who was attempting to smuggle this contraband into the facility. Grievant knew the money was confiscated and knew that the other officer returned \$.50 to the inmate and allowed him to smuggle the money into the facility. Grievant knew that it was against policy and procedure to fail to report the confiscated money but he failed to file a report. Grievant knew that allowing the inmate to take contraband into the facility was a Class 1 Misdemeanor but he also failed to report the other correctional officer for this offense. Grievant admitted that he knew what he did was wrong.

The grievant acknowledges his culpability and agrees that discipline is warranted. However, grievant contends that he should receive the less serious discipline of a Group II Written Notice for failure to comply with applicable established policy. Grievant argues that he cannot be held guilty of theft because he did not personally steal the money, never had possession of the money and never received any benefit from the money. The other correctional officer testified that grievant did not receive any of the money confiscated from the inmate.

There is no doubt that the other correctional officer who properly confiscated the contraband money from the inmate, but then apparently spent part of it, and failed to turn the money over to the Inmate Welfare account is guilty of theft.¹⁴ However, the issue to be resolved in this case is whether grievant's actions amounted to theft. The agency contends that the grievant is equally culpable because he knew what the other correctional officer had done. In essence, the agency's argument is that the grievant "aided and abetted" the other correctional officer in the theft.

"Aid and abet" is defined as "Help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage counsel, or incite as to its commission."¹⁵ This definition suggests the need for active involvement by the abettor. Black's goes on to observe that:

It comprehends all assistance rendered by words, acts, encouragement, support, or presence, actual or constructive, to render assistance if necessary. *But it is not sufficient that there is a mere negative acquiescence not in any way made known to the principal malefactor.* People v. Barnes, 311 Ill. 599, 143 N.E. 445, 447.¹⁶ (Italics added)

¹⁴ Black's Law Dictionary, Revised Fourth Edition, notes that "generally, one who obtains possession of property by lawful means and thereafter appropriates the property to the taker's own use is guilty of a "theft"."

¹⁵ Black's Law Dictionary, Revised Fourth Edition.

¹⁶ *Ibid.*

The facts in this case are insufficient to conclude that grievant “aided or abetted” the other correctional officer. The inmate’s money was confiscated, as it should have been, and grievant assumed that the other officer would turn in the money and file an incident report. There is no evidence that grievant knew the other correctional officer intended to keep the money. Indeed, there is no evidence that the other officer had formed such an intent at the time he confiscated the money. However, even if grievant suspected that the other officer might have such an intent, grievant’s failure to say or do anything amounts, at most, to a negative acquiescence. This is insufficient to constitute aiding and abetting.

The agency maintains that both officers should have written incident reports about the confiscated money. Grievant asserts that, in prior similar situations, the actual practice has been that only the officer who actually confiscates the contraband writes the report, and that the other officer reviews and agrees to the report. The agency did not rebut or disprove grievant’s description of actual practice. Therefore, grievant’s failure to write an incident report about the confiscated money does not constitute theft.

However, pursuant to Post Order 8A, grievant was obligated to immediately report this incident to the Officer in Charge (OIC) for two reasons. First, he should have reported the confiscation of contraband. Second, grievant was obligated to report to the OIC that the other correctional officer had returned a portion of the contraband money to the inmate – a violation of Va. Code 18.2-474. While grievant may successfully argue that he assumed the other officer would report the contraband confiscation, grievant nonetheless had a clear obligation to report the other officer’s violation of the prohibition against giving contraband to an inmate. Grievant’s only explanation is that he didn’t want to “rat” on a fellow correctional officer. Grievant’s loyalty to another correctional officer is not a defense. As an employee of the agency, grievant’s first obligation and loyalty in such a case must be to the agency.

Therefore, it is concluded that grievant’s failure to report this entire incident was a failure to perform assigned work or otherwise comply with applicable established written policy – a Group II offense.

DECISION

The decision of the agency is hereby modified.

The Group III Written Notice and suspension issued on March 13, 2002 are VACATED. The agency shall prepare a Group II Written Notice for failure to perform assigned work or otherwise comply with applicable established written policy, with a suspension period of 80 hours (10 eight-hour workdays). The

agency shall restore to grievant his pay for 160 hours (the difference between 240 and 80 hours). This disciplinary action shall remain active for the period specified in Section 5-10.19.A of the 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.

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