

Issue: Group III Written Notice with Termination (fraternization with inmate);
Hearing Date: May 10, 2002; Decision Date: May 14, 2002; Agency:
Department of Corrections; AHO: David J. Latham, Esq.; Case No.: 5436



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5436

Hearing Date:	May 10, 2002
Decision Issued:	May 14, 2002

APPEARANCES

Grievant
Attorney for Grievant
Legal Assistant Advocate for Agency
Warden Senior
Four witnesses for Agency

ISSUES

Did the grievant's actions warrant 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 January 29, 2002 for fraternizing with an inmate.¹ Grievant was discharged effective January 29, 2002. 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 corrections officer since 1998. She held the rank of corrections officer senior at the time of discharge. Grievant has three active disciplinary actions. A Group I Written Notice was issued on March 16, 2001 for using obscene or abusive language. A Group II Written Notice was issued on April 18, 2001 for failure to follow a supervisor's instructions. A Group II Written Notice was issued on January 11, 2002 for failure to follow a supervisor's instructions.²

At the time of hire, grievant received a copy of the agency policy governing relationships with inmates, which states, in pertinent part:

At all times, employees should be respectful, polite and courteous in their contact with inmates, probationers, or parolees, as well as with citizens and other employees. Such behavior is a primary factor in maintaining order, control, and good discipline, and in effectively and efficiently carrying out the mission of the Department.³

Section 5-22.7.A of the same policy addresses improprieties and states:

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.⁴

In March 2001, grievant was assigned to a roving patrol that required her to drive a vehicle along the fence perimeter of the facility. A lieutenant observed grievant stop her vehicle on two occasions to converse with inmate O and another corrections officer. The lieutenant did not hear the conversation. He

¹ Exhibit 11. Grievance Form A, filed February 13, 2002.

² Exhibit 10. Previously issued active Written Notices.

³ Exhibit 1. Section 5-22.6.E, DOC Procedure Number 5-22, *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*, June 1, 1999.

⁴ Ibid.

reported this incident to his supervisor by e-mail and added his observation that had seen grievant "on many occasions" having conversations with this same inmate and one other inmate.⁵ Neither the lieutenant nor the major discussed these observations with grievant. They reported the incident to an assistant warden who requested that an investigator be assigned to look into the matter. The first assigned investigator apparently took little action to complete the investigation during the next six months. In September 2001, the case was reassigned to a different investigator who conducted interviews during the next three months.

On March 26, 2001, an ex-inmate called the facility asking for the grievant. When the officer who answered the call advised him that the grievant was not working that day, the inmate terminated the telephone call.⁶ Grievant was never told about this telephone call until she was disciplined in 2002. At some point after this, the same ex-inmate called the facility while grievant was working. When the ex-inmate identified himself to grievant, she told him not to call her and ended the telephone call. The inmate has never again called grievant.

On August 11, 2001, grievant complained to her supervisor that another corrections officer had been asking inmates if they knew the identify of the inmate with whom grievant was allegedly having sexual relations. On the following day, the supervisor met with grievant, the other officer and the other officer's supervisor. Grievant became very upset because of the other officer's false accusations and used vulgar language to express her displeasure. No disciplinary action was taken as a result of this incident. Inmate O has denied having any involvement or relationship with the grievant.⁷

Sometime during 2001, inmate O was found to be in possession of a gold chain with medallion. The gold chain was not listed on inmate O's inventory forms either when he arrived at the facility in 2000 or when another inventory was taken in April 2001. Grievant denies any knowledge of how inmate O came to be in possession of the gold chain.

When grievant was given a written notice on March 16, 2001, the assistant warden utilized that opportunity to counsel grievant to avoid the appearance of impropriety by minimizing her contact with inmate O.

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

⁵ Exhibit 3. E-mail from lieutenant to major, March 14, 2001.

⁶ Exhibit 3. E-mail from major to internal affairs investigator, March 26, 2001.

⁷ Exhibit 8. Report of Investigation (undated).

The agency alleged that an out-of-state inmate sent a letter to grievant sometime during 2001.¹¹ The agency did not proffer this letter during the hearing. The grievant was never told about the letter and was unaware that such a letter had been received. As there is no evidence to support this allegation, no evidentiary weight is given to this allegation.

Grievant's supervisor alleged that grievant had inappropriately allowed inmate O into a housing unit and was complicitous in concealing the inmate's whereabouts in a cell. Grievant denied that this event had ever occurred. The agency did not proffer the testimony of the only other corrections officer who may have had knowledge of this event. It is incredible that an inmate would attempt to "hide" in a locked prison cell. If grievant's supervisor had actually observed the inmate going into a cell that was then locked, it would have been a simple matter for the lieutenant to personally ascertain whether an unauthorized inmate was in the cell. Therefore, the agency has not borne the burden of proof to show that this event occurred.

The agency alleged that grievant had given inmate O a gold chain with medallion. The gold chain was not produced at the hearing because it has been destroyed. The investigator took photographs of the gold chain but they were also not produced at the hearing. Inmate O did not testify. Grievant denied giving the chain to the inmate. The agency's sole evidence is a statement signed by an inmate informant who had just been released from the segregation unit.¹² The inmate claims to have seen grievant hand the gold chain to inmate O. The informant inmate did not testify during the hearing.

The same informant alleged that inmate O wrote letters to grievant and sent them to his mother or brother to forward to grievant. The investigator subsequently monitored all incoming and outgoing mail from and to inmate O. During the several-month monitoring period, inmate O did not send any mail and received only one incoming letter (in Spanish) from his brother. This failure to corroborate the informant's allegation significantly taints his credibility.

The written notice specifies three allegations against grievant.

First, grievant was alleged to be having a "relationship" with inmate O. The intimation is that this relationship may have been sexual, although there is no evidence to support this. The primary basis for the allegation is information provided by an inmate informant who had been placed in segregation for drug abuse. The informant did not testify (even though everyone involved in this grievance knows his identity). For the reasons stated above, the informant's credibility is questionable. The grievant has denied under oath all the informant's allegations. Her sworn testimony must be accorded more evidentiary weight

¹¹ Exhibit 4. E-mail from grievant's supervisor, November 11, 2001.

¹² Exhibit 7. Interview statement signed by informant inmate, October 16, 2001.

than the unsworn, hearsay allegations of an informer. Therefore, the agency has not shown, by a preponderance of the evidence that grievant was involved in a relationship with an inmate.

Second, grievant was alleged to have given a gold chain to inmate O. It is undisputed that inmate O had a gold chain that is not accounted for on his inventory lists. However, other than mere allegation, there is no corroborating evidence to show that grievant gave the chain to the inmate. Neither the chain nor the photographs of the chain were produced. The only witness who allegedly saw grievant give inmate O the chain did not testify. The hearsay information from this less than credible informant is insufficient to overcome grievant's sworn denial of involvement.

Third, grievant is said to have been having lengthy conversations with inmate O more frequently than with other inmates. A preponderance of the evidence leads to a conclusion that grievant did talk to inmate O very frequently. Two officers who worked with grievant indicated to the investigator that grievant did speak with inmate O daily but that grievant talked with other inmates as well. However, neither officer observed any suspicious behavior between the two.¹³ Grievant acknowledged that she spoke with inmate O but avers that she also spoke with all of the inmates who worked for her. There was no evidence about the topics of conversation between grievant and inmate O. There is no allegation that any of the conversations posed a threat to institutional security. What has been demonstrated, at most, is that grievant talked with inmate O more frequently than she talked with other inmates.

When a corrections officer converses more frequently with one inmate than with other inmates, that creates the appearance of impropriety. Other officers or inmates can quickly conclude that the officer is treating preferentially the inmate to whom she talks more frequently. As in this case, others may speculate that the officer is giving that inmate sexual favors or contraband. Even when the speculation is incorrect, the mere appearance of impropriety is sufficient to create morale problems. Thus, the Standards of Conduct applicable to correctional facilities must necessarily address this type of fraternization in order to avoid such problems.

Grievant was counseled about her conversations with inmate O as early as March 16, 2001. Then, on August 12, 2001, grievant's supervisor met with her about the allegation that she was involved in a sexual relationship with the inmate. Grievant knew, or reasonably should have known, that her interaction with inmate O was by then under close scrutiny. From this point forward, grievant could have made it a point to avoid conversation with inmate O unless absolutely necessary.

¹³ Exhibit 8. Report of Investigation (undated).

It is concluded that grievant's conversations with inmate O were sufficiently frequent and/or lengthy as to create the appearance of impropriety. Accordingly, this impropriety, or the appearance thereof, constitutes fraternization as defined in Procedure 5-22. However, there is no evidence to support a conclusion that institutional security was threatened by this fraternization. Therefore, the grievant's actions are most appropriately categorized as a Group II offense.

The grievant had accumulated sufficient disciplinary actions prior to this offense to warrant termination of employment. While the agency elected to retain grievant before this offense, a third Group II Written Notice normally results in dismissal. Given the grievant's past record, there are insufficient mitigating circumstances to justify retaining her in State service.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice issued to the grievant on January 29, 2002 is VACATED. In its place, the agency shall prepare a Group II Written Notice citing only the grievant's frequent and extended conversations as the offense. References to the other charges shall be deleted.

The grievant's removal from employment is AFFIRMED.

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