

Issue: Group III Written Notice with Termination (fraternization with detainees);
Hearing Date: 05/21/02; Decision Date: 05/24/02; Agency: Department of
Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 5439



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5439

Hearing Date: May 21, 2002
Decision Issued: May 24, 2002

PROCEDURAL HISTORY

On February 22, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Fraternization with offenders (Detainees). According to reports provided through an Internal Affairs investigation based on complaints and statements from Detainees, the employee was involved in making inappropriate sexually related comments to offenders and also inappropriately touching offenders. The complaints were deemed to be founded.

On March 14, 2002, 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 May 1, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 21, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

Grievant's Representative
Agency Party Designee
Legal Assistant Advocate
Lieutenant
Corrections Officer
Retail Specialist II
Food Service Manager A

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

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 Food Operation Manager A. She had been employed by the Department for approximately 17 years with satisfactory work performance until her removal on February 22, 2002. She received a Group I Written Notice on August 23, 2000 for absences from work or being late. Grievant received a Group I Written Notice on October 31, 2000 for unsatisfactory attendance and tardiness.

Grievant supervises several detainees as part of her job. She is a strict supervisor and is quick to discipline detainees who fail to work diligently and as directed. She filed disciplinary charges against Detainee S, Detainee E, and Detainee C. Within one or two days of Grievant's filing charges against the detainees, they filed complaints regarding Grievant.

As part of the Agency's investigation, several detainees made statements to the Agency's investigator. Detainee S¹ alleged Grievant hit him on his bottom with her hand and then walked away. On an occasion while sitting at a messhall table, Grievant rubbed Detainee S's hand and commented on how soft it was. She then told him her "pu—y" was still good, meaning just because she was older she was still sexually

¹ The Agency attempted to introduce the polygraph results of Detainee S. The Hearing Officer excludes from consideration the results of that test in accordance with *Va. Code § 8.01-418.2*. The polygraph examiner's interview with Detainee S before the polygraph, however, reveals an inconsistency with Detainee S's statement. In Detainee S's written statement, he writes, "I also recall [Grievant] telling me that her pu—y was still good to be her age" Yet Detainee S tells the polygraph examiner that Grievant "did not state to him that 'her pu—y is still good', but stated that another inmate told him that [Grievant] told him 'her pu--y is still good.'" When questioned, Detainee S could not identify this other inmate but said the inmate had moved from this area.

active. Detainee S denied that he was filing his complaint in retaliation against Grievant because Grievant had initiated disciplinary action against him for not reporting back to the messhall in a timely manner.

Detainee C alleged² that Grievant walked up behind him and touched his neck. Moments later Grievant was sitting at a table with Detainee E and Grievant made a moaning noise and she said, "Ya'll have heard that before," as she touched Detainee E behind the leg.

Detainee E alleged Grievant "has never approached me in a sexual manner nor has she said anything to me in a sexual manner. Although [Grievant] has made inappropriate statements during general conversation, such as, she gets off sexually when she puts a gun in a man's mouth, I didn't take her comment seriously.³ Nor did I report it because it was no big deal. I do not want to get back at [Grievant] for writing me up."

Detainee G alleged he had witnessed Grievant attempt to grab former Detainee W's testicles while working in the messhall.

Detainee W informed the Agency's investigator that Grievant never approached or commented to him in any type of sexual manner. The claim that Grievant "attempted to grab his testicle area is totally false."

Detainee Sh claimed that Grievant told him, during general conversation that she had good pu—y.

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

² Some of the difficulty with relying on the written statements of detainees is revealed by the rambling and incoherent statement of Detainee C. His statement, in original form, is as follows:

This is what happen she put her hand in my Shirt and I looked at her like what way going on with her and it's like her be doing this for a look good think put it is not nothing good about this because She be doing a lot of thing in the lunch room with not just me it's with some more Detainee that's in there with me and She be puting her hand on [Detainee E and S] and some other So we want to know what going on with this women because I don't want to get in something I don't know what's going on with her She just not being the right food work person for us and I want to know can something you can do about this for me. And she be looking at [Detainee S] and she put her hand on him and [Detainee E] to She put her hand on his leg and puting her hands on her breast so this is a nother thing that she do this going in the cold box with us with the door close.

³ Compare this with Detainee S's statement "[Grievant] was telling detainees that if they stole her car that she would put a gun in [their] mouth and she would get her thing off on that."

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 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.

The Agency has not met its burden of proof and the disciplinary action must be rescinded. Grievant credibly testified that she did not engage in the actions alleged by the detainees.⁴

To overcome Grievant’s credible denial, the Agency could have taken three actions. First, it could have had the detainees testify before the Hearing Officer so that the Hearing Officer could assess their credibility.⁵ The Agency offered no explanation as to why these detainees could not appear to testify or offered any security reasons for refusing to let them testify. As the evidence of the allegations was presented, it came in the form of written hearsay from convicted felons.⁶ The Hearing Officer gives less weight to written hearsay than he would to oral testimony because the Hearing Officer has the opportunity to assess credibility of a testifying witness and the opposing party has the opportunity to cross-examine the witness. All other things being equal, the Hearing Officer gives less weight to the testimony of a convicted felon⁷ than to someone not convicted of a felony. An individual who has been convicted of a felony is of such poor character that lying would be an insignificant act.⁸ Second, the Agency could have presented corroborating testimony from other employees who witnessed some of the

⁴ Grievant testified that the detainees made false claims as revenge against her. The Hearing Officer has no reason to believe her statement is not true.

⁵ Several of the detainee’s allegations appear more consistent with sexual fantasy than with a relationship working under a strict supervisor.

⁶ The detainees prepared written statements at the Agency’s request. The Agency’s investigator subsequently interviewed them. There are numerous differences between the written statements and the statements made to the investigator.

⁷ See, *Va. Code* § 19.2-269.

⁸ Grievant established a motive for the detainees to lie. They filed their complaints against her within a day or two of her seeking to discipline them. The Agency contends the detainees were acting out of a sense of fairness or justice. They believed that Grievant should not be able to freely discipline them when she was violating rules as well. Without being able to hear the detainees testify, it is difficult for the Hearing Officer to verify the purity of their motives.

allegations against Grievant. No such evidence was presented. Third, the Agency could have exposed any confessions by Grievant to the allegations made against her. Nothing admitted by Grievant rises to the level of fraternization.

Since the Agency has presented only written statements of detainees, the disciplinary action against Grievant must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency is ordered to **reinstate** Grievant to her former position or, if her former position is unavailable, to an objectively similar position with all incumbent rights at the time of removal. Grievant is awarded **full back pay** and **full back benefits** from the date of removal less any interim earnings.

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