

Issue: Group III Written Notice with 30-day Suspension (theft or unauthorized removal of inmates money); Hearing Date: June 5, 2002; Decision Date: June 21, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5452



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5452**

Hearing Date: June 5, 2002  
Decision Issued: June 21, 2002

**PROCEDURAL HISTORY**

On March 13, 2002, Grievant was issued a Group III Written Notice of disciplinary action with thirty workday suspension for:

*Violation of Policy and Procedure #5-10.17 section B4, Theft or unauthorized removal of inmates money (\$3.00).*

On April 10, 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 he requested a hearing. On May 30, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 5, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Legal Assistant Advocate  
Major

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with 30 workday suspension.

## **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 has employed Grievant as a Corrections Officer Senior for approximately ten years. No evidence of any prior disciplinary action against Grievant was presented.

The Facility has a separate building where inmates meet with visitors. After visitors leave the building, inmates are searched for contraband and permitted to return to the main building. Facility policy prohibits inmates from possessing contraband. In prior years, inmates were permitted to have up to two dollars in quarters. Beginning January 22, 2001, the policy was changed to prohibit inmates from have any quarters in their possession.

Inmates found in possession of contraband may be charged with violating policy. Institutional Operating Procedure 412-7.2(1) states, "All monies taken as contraband will be credited to the Commissary Fund and a record entered in the appropriate log book." This IOP also states, "Under no circumstances will an employee of the Department of Corrections be allowed to retain possession of any contraband found in an institution. Contraband may not be retained for anything other than official business."<sup>1</sup> Grievant was familiar with these policies.

On Sunday, March 10, 2002 at approximately 2:30 p.m., Grievant and another corrections officer were conducting a shakedown of an inmate. The inmate had three dollars in quarters in his possession. Grievant took the three dollars from the inmate

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<sup>1</sup> Agency Exhibit 3.

because the quarters were contraband that the inmate was not permitted to possess. Grievant then gave the inmate two of the quarters<sup>2</sup> and told him he could buy a soft drink with the money.

After finishing searching inmates, Grievant walked several paces to a desk where another corrections officer was sitting and told him that he found money on an inmate and let the inmate have fifty cents but confiscated the remaining money. Grievant's post orders obligated him to "Observe and report any unusual incident and/or behavior, to the [Officer in Charge] immediately."<sup>3</sup> He did not report to the Officer in Charge that he found an inmate with contraband. The corrections officer he spoke with was not the Officer in Charge.

The Superintendent learned of the incident early Monday morning. Grievant left the Facility for a transportation run early Monday morning but when he returned in the afternoon, the Superintendent confronted Grievant. The Superintendent asked Grievant if he got money from an inmate and if he still had the money. Grievant explained that keeping the quarters would hurt the inmate worse than charging the inmate with possession of contraband. Grievant did not respond regarding what he intended to do with the quarters. Grievant pulled out eight quarters (\$2) and gave them to the Superintendent. He then went to his vehicle parked outside and returned with fifty cents in the form of dimes and nickels. He did not return all of the quarters he removed from the inmate.

## 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.

"Theft or unauthorized removal of state records, state property or other persons' property (to include employees, supervisors, inmates, and visitors, etc.)" is a Group III offense.<sup>4</sup> The Agency has met its burden of proof and the disciplinary action must be upheld.

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<sup>2</sup> By giving the inmate fifty cents, Grievant violated *Va. Code § 18.2-474* prohibiting the delivery of any article to a prisoner without securing "the permission of the person in whose charge such prisoner is." The Agency has designed the Superintendent as the person from whom permission must be obtained. Grievant signed an acknowledgement of this statute. See, Agency Exhibit 4.

<sup>3</sup> Agency Exhibit 2.

<sup>4</sup> DOCPM § 5-10.17(B)(4).

This case can be resolved by focusing on whether Grievant intended to give the quarters to the Facility as contraband. When a corrections officer finds contraband, the officer knows to deliver the contraband to agency. There is no doubt that Grievant did not intend to return the quarters to the Facility. He did not report the finding of the quarters to the Officer in Charge. When he was confronted and asked to produce the quarters, Grievant provided eight quarters instead of ten quarters. He had spent the two other quarters. Grievant also did not intend to file an incident report because if he had done so, he would have had to confess that he collected three dollars in quarters and let the inmate keep fifty cents in contraband.

Grievant contends that if he intended to steal the money, he would not have been so foolish as to tell another corrections officer of the theft. Although this may seem unusual, there is no reason for the Hearing Officer to believe that Grievant intended to return the money. It may be the case that Grievant felt comfortable telling a fellow corrections officer because he did not think the officer would report him.

Grievant contends that his removal of the quarters was not unauthorized because his job required him to remove contraband from inmates. This argument misses the point. When Grievant removed the quarters from the inmate, he did so in his capacity as a corrections officer. The quarters became the property of the Agency to be disposed of as the Agency wished. When Grievant left the Facility without the intention of ever giving those quarters to the Facility, he removed state property from the Facility without authorization to do so.

Grievant argues that had he not been confronted so quickly by the Superintendent, he would have had the opportunity to turn in the quarters by the end of the next business day (Monday). The Hearing Officer does not believe that Grievant intended to give the quarters to the Facility even if the Superintendent had waited several weeks before confronting Grievant.

## **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with thirty workday suspension is **upheld**.

## **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.

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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.

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Carl Wilson Schmidt, Esq.  
Hearing Officer

