

Issue: Group III Written Notice with termination (permitting transfer of contraband between inmates); Hearing Date: August 28, 2002; Decision Date: August 29, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 5499



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 5499

Hearing Date: August 28, 2002
Decision Issued: August 29, 2002

PROCEDURAL HISTORY

On June 12, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Violation of Employee Standards of Conduct 5-10.17B.17 and DOC 5-22.7C. On June 6, 2002, you were interviewed by [Major], [Captains] and [Lieutenant]. During this meeting you stated that you have been 'turning a blind eye' to inmates passing things from the A-6 pod to the A-5 segregation inmates. You also stated that [Inmate F] had promised to keep the pod quiet if you allowed [Inmate R] to pass the contraband. You admitted that this type of activity had been occurring at least once or twice a week for a couple of months. Your admission that you have allowed this breach of security to occur has founded the charges against you. This is a serious policy violation and cannot be tolerated.

On June 20, 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 July 31, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 28, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Agency Party Designee
Legal Assistant Advocate

ISSUE

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

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 employed Grievant as a Corrections Officer Senior until his removal on June 12, 2002. He worked in a maximum security prison.

For a period of at least two months, Grievant was permitting inmates to pass items from the general population to the segregation pods. An inmate informed Grievant that if Grievant permitted the transfer, the inmate would keep quiet the pod where Grievant worked. Grievant did not know what items the inmates were passing. On June 6, 2002, senior staff were using security cameras to observe Facility operations. They observed an inmate in the process of transferring a substance from general population to segregation. They confronted the inmate and obtained the substance which they determined to be tobacco. They confronted Grievant who admitted to permitting the transfer of substances between the pods.

Grievant called the Facility on the morning of the hearing and indicated he would not be attending the hearing.

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 “(DOCMPM)” § 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.” DOCMPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCMPM § 5-10.17.

Group III offenses include, “non-professional relationships with inmates ... which pose a threat to the security of an institution”¹ Grievant knew that permitting inmates to transfer substances from general population to segregation was prohibited. By knowingly permitting an inmate to receive contraband in return for the inmate’s promise to minimize disturbances in the living area, Grievant engaged in a non-professional relationship with an inmate. This relationship posed a threat to the security of the institution because the contraband could be used as currency among the prisoners and Grievant exposed himself to being further manipulated (“blackmailed”) by the inmate. Grievant’s behavior rises to the level of a Group III offense justifying removal.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action 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.

Administrative Review – This decision is subject to four 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.

¹ DOCMPM § 5-10.17(B)(18).

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.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

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.

Carl Wilson Schmidt, Esq.
Hearing Officer