

Issue: Group III Written Notice with 5-day suspension (improprieties with inmates);
Hearing Date: August 26, 2002; Decision Date: August 30, 2002; Agency:
Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5505



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5505

Hearing Date: August 26, 2002
Decision Issued: August 30, 2002

PROCEDURAL HISTORY

On June 3, 2002, Grievant was issued a Group III Written Notice of disciplinary action with five work day suspension for:

Violation of Standards of Conduct, Procedure 5-10, and Rules of Conduct Governing Employee's Relationships with Inmates, Probationers and Parolees, Procedure 5-22, to wit: an Internal Affairs investigation has founded charges of improprieties with [Inmate G and Inmate B] which may compromise security or undermine your effectiveness to carry out your responsibilities. Behavior of this nature will not be tolerated, and any additional misconduct may result in further disciplinary action up to and including termination.

On June 7, 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 26, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Legal Assistant Advocate
Sergeant
Special Agent
Director of Food Operations
Corrections Officer

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with 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 employs Grievant as a Food Supervisor. He is not a corrections officer. His responsibilities include supervising inmates working in the Facility kitchen to prepare meals. Grievant supervised Inmates B and G. Inmate B began working in the kitchen only eight days before the incident giving rise to this grievance.

At approximately 10:55 a.m., on March 24, 2002, Grievant informed the Sergeant that the Sergeant could bring the inmates to the dining area for their meal. An inmate kitchen worker informed Grievant that the kitchen staff were out of bread and were not ready for the Sergeant to bring the inmates to the dining area. Grievant walked to Inmate B and said "Come on let's get some bread." They walked into a room-size cooler. Inmate G also walked into the cooler. Inmate G was blocking the way for Inmate B to lift a rack of bread, so Grievant pushed Inmate G against the arm to move him out of the way. Grievant described this as a "playful" push. Inmate B observed this

and then pushed Grievant onto several bags of bread mix. Grievant was surprised that Inmate B pushed him but did not interpret the push as resulting from anger. Grievant could tell that Inmate B was “just playing around.”

The Sergeant was working on March 24, 2002 in D building. He saw Grievant as the meals were being prepared. He made a security check in the kitchen. The Sergeant observed Grievant enter a cooler and saw two inmates go into the cooler as well. Approximately two minutes later, the Sergeant walked to the cooler and opened the door. He observed Grievant laying on his back on top of several bags of bread mix. Inmate B was standing below Grievant’s feet and was holding Grievant’s right leg approximately two feet above Grievant’s body. Inmate G was standing near Grievant’s chest but was not touching Grievant. The Sergeant reached for his pepper spray but did not use it once he realized that Grievant was not in danger. Grievant was laughing but when he saw the Sergeant, he stopped laughing.

The Sergeant ordered the inmates out of the cooler and handcuffed them. He then escorted the inmates towards the main hallway in the main kitchen. Grievant remained in the kitchen. After escorting the inmates out of the kitchen, the Sergeant contacted the Lieutenant and then escorted Grievant to the Warden’s office. Next, Grievant was escorted out of the institution.

Grievant denied engaging in horseplay with inmates.

CONCLUSIONS OF LAW AND POLICY

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.

The Agency contends Grievant violated DOCPM § 5-22.7(A). This section states:

Improprieties. 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 (Procedure 5-10).

The policy does not define the terms “improprieties” or “fraternization” but places them in the context of a “non-professional association”. *Webster’s New Universal Unabridged Dictionary* provides several definitions for “association” including, “friendship; companionship.”

An employee who often engages in horseplay with inmates, has engaged in friendship or companionship sufficient to show a non-professional association under DOCPM § 5-22.7(A). The question in this grievance is whether the Agency has presented sufficient evidence to support its contention that Grievant engaged in horseplay.

The Agency’s conclusion that Grievant engaged in horseplay is dependent on the statements made by inmates to the Agency’s Investigator. The Hearing Officer cannot rely on written hearsay statements of inmates because inmates (1) are typically convicted felons unworthy of trust, (2) have substantial free time to develop and coordinate rumors, and (3) often have reason to harm those who control them. The Hearing Officer gives little weight to the statements of Inmates G, B, J, and L.¹

Without including inmate statements, the Agency’s evidence of an association depends on Grievant’s written statement and testimony of the Sergeant. At best, the Agency can show a gesture of friendship when Grievant “playfully” pushed Inmate G.² One gesture of friendship is not sufficient to establish an “association.” The Agency has failed to present sufficient evidence to show that Grievant violated DOCPM § 5-22.7(A). Consequently, the Agency has not established a basis to issue Grievant a Group III Written Notice.

DOCPM § 5-22.7(B) states:

Interactions. While performing their job duties, employees are encouraged to interact with persons under Department supervision on a personal, professional level as necessary to further the Department’s goals. Interactions shall be limited to the employee’s performance of job duties.

Pushing an inmate without provocation is an interaction that exceeds an employee’s performance of job duties. When Grievant pushed Inmate G, he acted contrary to

¹ Even if the Hearing Officer were to grant credibility to written statements of the inmate, the statements presented are indecipherable. The Agency’s Investigator interviewed the inmates and then wrote the statements in his own handwriting. A significant portion of the Investigator’s handwriting was not readable such that the Hearing Officer cannot rely on the inmate statements. The Agency did not offer a typed translation.

² Grievant was facing a deadline within five minutes. He expected inmates to be brought into the dining area for their meal. He would not have had sufficient time to “wrestle” with inmates for a lengthy period of time.

Agency policy. DOCPM § 5-22.7(B) is an established written policy of which Grievant had sufficient notice.³ “Failure to ... comply with established written policy” is a Group II offense.⁴ Grievant’s behavior rises to the level of a Group II offense.

When an employee receives a Group II Written Notice, “[d]iscipline shall normally take the form of the notice and up to 10 workdays maximum suspension without pay.”⁵ Suspension is appropriate under the facts of this grievance because of the risk Grievant created when he pushed an inmate. The inmate may have misinterpreted Grievant’s gesture and responded by engaging in a brawl with Grievant. Had this happened, the Agency would have been in the position of having to defend the actions of an employee who started a fight with an inmate. Grievant confirmed the unpredictability of inmate behavior when he testified that he did not expect Inmate B to place him on the bread mix.

The Agency contends Grievant acted contrary to DOCPM § 5-10.16(B) which defines Group II offenses to include, “Violating safety rules where there is not a threat of bodily harm.” No safety rules were presented as evidence. Although DOCPM § 5-22 may assist in the safe operation of an institution, the procedure does not specifically address safety. Indeed, its purpose is “[t]o establish the rules of conduct to be observed by employees when dealing with inmates, probationers, or parolees of the Department.” Grievant did not violate safety rules where there was not a threat of bodily harm.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. The five day 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.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

³ See Agency Exhibit 3, where Grievant acknowledges receipt of Procedure 5-22.

⁴ DOCPM § 5-10.16(B)(1).

⁵ DOCPM § 5-10.16(C).

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

