

Issue: Group III Written Notice with termination (fraternization with an inmate);  
Hearing Date: August 23, 2002; Decision Date: August 27, 2002; Agency:  
Department of Corrections; AHO: David J. Latham, Esq.; Case No.: 5506



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5506

Hearing Date:	August 23, 2002
Decision Issued:	August 27, 2002

**APPEARANCES**

Grievant  
Attorney for Grievant  
Legal Assistant Advocate for Agency  
Superintendent  
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 for fraternizing with an inmate on June 18, 2002.<sup>1</sup> Grievant was discharged effective July 7, 2002. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup>

The Department of Corrections (DOC) (hereinafter referred to as agency) has employed the grievant as a corrections officer since 1998. Grievant has one active disciplinary action – a Group III Written Notice issued for sleeping during working hours on March 4, 2001.<sup>3</sup> Grievant did not appeal that Written Notice.

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

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.<sup>4</sup>

Policy and practice is that inmates should never intentionally place their hands on a corrections officer, and corrections officers should never intentionally touch inmates unless it becomes necessary to subdue an inmate or defend oneself.

On June 18, 2002, grievant was assigned to the night shift (6:00 p.m. to 6:00 a.m.) as a floor officer on one side of a dormitory. At 6:05 p.m., grievant had just completed an inmate head count on his side of the dormitory. He left the dormitory, exited to the vestibule, and took his count sheet into the control room. The control room is a relatively small room with windows on three sides and overlooks both sides of the dormitory as well as the entrance vestibules and the wire-mesh hall gates that separate the vestibules from the dormitories. The control room officer electronically controls the gates from inside the control room.

After handing his count sheet to the control room officer, grievant went from the control room into the vestibule and then entered the dormitory when the control room officer electronically opened the gate. As grievant went through the

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<sup>1</sup> Exhibit 6. Written Notice, issued July 7, 2002.

<sup>2</sup> Exhibit 9. Grievance Form A, filed July 10, 2002.

<sup>3</sup> Exhibit 7. Written Notice, issued March 13, 2001.

<sup>4</sup> Exhibit 5. Section 5-22.7.A.1, DOC Procedure Number 5-22, *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*, June 1, 1999.

gate, an inmate was waiting just inside near the gate. This inmate was assigned to take ice and water to the inmate ballfield each evening just before inmates were allowed out to play softball. He would regularly wait at the gate each night for the “clearing” of inmate count so that he could leave to complete his assignment. On this night, the inmate count had not yet been “cleared” when grievant reentered the dormitory.<sup>5</sup> The inmate assumed that he could now leave the dormitory to attend to his assignment and started to walk towards the gate and grievant. Grievant held both his arms straight out in front with palms open and said, “You can’t go yet; the count hasn’t cleared.” The timing of grievant raising his hands and the inmate’s attempting to leave resulted in the inmate walking up against grievant’s outstretched hands.

The control room officer heard noise just outside the control room on grievant’s side of the dormitory, turned to his right, and observed grievant pushing the inmate away from him. The control room officer turned away to pick up his portable radio from the desk because he thought he might have to call other officers to assist grievant. When he looked back towards grievant, he observed the inmate behind grievant with his left arm over grievant’s left shoulder. Both were facing away from the control room officer and it appeared from his view that the inmate might be attempting to put a headlock on grievant. However, grievant and the inmate then separated and both were laughing. Immediately thereafter, the count cleared and inmates were allowed to go to the ballfield. The control room officer concluded that there was no problem and that grievant and the inmate had been engaged in horseplay. The control room officer later spoke to grievant, who referred to the inmate by a nickname and said, “We do this all the time.” Grievant has known the inmate for more than one year. The control room officer then reported the incident to his sergeant.<sup>6</sup>

The sergeant spoke with grievant to get his side of the incident. After hearing grievant’s account, the sergeant said that it appeared that grievant and the inmate were engaged in horseplay. Grievant responded to the effect that, “You can call it horseplay if you want but that’s not what I would call it.” The sergeant then wrote a Notice of Improvement Needed/Substandard Performance.<sup>7</sup> The matter was subsequently reported to the superintendent and investigated. The inmate said that there was no physical altercation; his version of the encounter was similar to grievant’s written statement about the incident.<sup>8</sup> The superintendent issued a Group III Written Notice and terminated grievant’s employment on July 7, 2002.

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<sup>5</sup> Inmate counts are called in to the watch commander’s office. When the watch commander is satisfied that the count matches the number of inmates that are supposed to be in custody, he “clears” the count and all officers are notified that normal activities may resume.

<sup>6</sup> Exhibit 1. Memorandum from control room officer to sergeant, June 18, 2002.

<sup>7</sup> Exhibit 2. Performance Management documentation, June 19, 2002.

<sup>8</sup> Exhibit 4. Incident report filed by grievant, June 26, 2002.

After grievant was discharged, the Chief of Security returned from a vacation and conducted a further investigation by questioning the inmate again. On this occasion, the inmate had a completely different version of the incident, contending that grievant threatened to “kick his ass,” grabbed his elbows and scuffled, going around each other two or three times. He also alleged that grievant showed him grievant’s written incident report and encouraged him to repeat that story when questioned by the Chief of Security.<sup>9</sup>

### 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 procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee’s ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth’s grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>10</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to §§ 2.2-1201 and 53.1-10 of the Code of Virginia, the Department of Personnel and Training<sup>11</sup> promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work

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<sup>9</sup> Exhibit 3. Inmate’s written statement, July 8, 2002.

<sup>10</sup> § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*.

<sup>11</sup> Now known as the Department of Human Resource Management (DHRM).

performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses those offenses that include acts and behavior of such a serious nature that a first occurrence should normally warrant removal. One such Group III offense is fraternizing with inmates in violation of DOC Procedure 5-22.<sup>12</sup>

Fraternization between corrections officers and inmates of correctional facilities is a matter of serious concern for obvious reasons. Inmates constantly observe each other and corrections officers in order to ferret out weaknesses that can be exploited. If inmates observe apparent fraternization between an inmate and an officer, that information can be used to intimidate the officer into performing favors in exchange for silence about the officer's violation of the prohibition against fraternization. In many cases, even seemingly innocent interaction may be perceived as fraternization. Since the mere appearance of impropriety is sufficient to create morale problems, corrections officers must avoid any activity that might suggest favoring one inmate over another.

In this case, there were two identifiable segments of the interaction between grievant and the inmate. The first portion of the physical contact occurred when grievant raised his hands as he advised the inmate that he could not leave the dormitory until the count cleared. At the same time, the inmate walked forward, bumped into grievant's outstretched hands, and grievant pushed him back. The hearing officer concludes that this contact was incidental and accidental, and therefore does not constitute fraternization.

Testimony about the second part of the physical contact is in dispute. Grievant contends that there was no contact. He states that the inmate had his arm against the gate over grievant's shoulder but that the inmate did not touch him. The inmate initially corroborated grievant's story but later recanted and told a significantly different story in which he maintains that grievant threatened him, grabbed his elbows and swung him around three times. The only independent witness – the control room officer – maintains that the inmate put his left arm over grievant's shoulder and down across his neck or chest. It is appropriate to evaluate the credibility of these witnesses in order to assess the veracity of their testimony. Grievant knew that physical contact with inmates is prohibited unless necessary to defend or subdue. Therefore, he has an obvious self-interest in maintaining that there was no physical contact except for the accidental first portion of the encounter.

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<sup>12</sup> Exhibit 8. Section 5-10.17.B.25, DOC Procedure Number 5-10, *Standards of Conduct*, June 1, 1999.

The inmate is a convicted felon and therefore his testimony is somewhat suspect. More significantly, the inmate admitted that he lied about what happened in this case. The question is whether he lied in his first version, the second version, or both. It must be noted that the inmate's second version of events came out only after grievant had been discharged. This second version was prompted by the Chief of Security reopening an issue that had already been effectively closed when grievant's employment was terminated. It is more likely than not that the inmate's second version was the product of his knowledge that grievant no longer posed any potential threat (because he had been discharged), and fear of the unknown because the Chief of Security was apparently reopening a closed matter. In his second version, the inmate attempts to completely distance himself from grievant by claiming that grievant threatened him, physically grabbed him, and coerced him into corroborating grievant's incident report. This is an unlikely scenario because the control room officer credibly testified that both inmate and grievant were laughing when they separated. It is highly unlikely that the inmate would have been laughing if he had just been threatened. Accordingly, the inmate's second version is illogical in light of the independent witness's observations. Further, the lack of credibility of the second version significantly taints the credibility of the first version as well. Therefore, it is concluded that the inmate's entire testimony must be accorded little evidentiary weight.

The control room officer is the only witness who has no apparent bias in favor of either grievant or the inmate. There was no evidence of any prior adverse interaction between the control room officer and either grievant or the inmate. Moreover, the control room officer's testimony was detailed, consistent with his prior written statement, and otherwise credible. Further adding to his credibility was the control room officer's concern about reporting this incident. As a relatively new officer, he was reluctant to cause trouble for a more experienced officer. However, upon reflection, he decided the incident was serious enough to warrant reporting. In his initial glance at grievant and the inmate, the control room officer interpreted grievant's pushing the inmate back as a possible defensive action. Therefore he concluded, reasonably, that grievant might require assistance from other corrections officers and turned to pick up his radio. When he turned back towards grievant and the inmate, they quickly separated from each other and both were laughing. At this point he concluded, again reasonably, that the brief tussle was not a fight but rather apparent horseplay.

Grievant argues that control room officer was a new officer and may have misinterpreted what he saw.<sup>13</sup> This argument is not persuasive because the control room officer's demeanor was calm and measured, his recollection of the event detailed, and his interpretation logical. Grievant also asserts that there was no physical contact between him and the inmate after the initial rebuffing of

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<sup>13</sup> The control room officer was hired in January 2002, went through training, and was certified for duty in April 2002.

the inmate's approach to the gate. This assertion is rejected because grievant has not shown that there was any reason for the control room officer to fabricate this portion of the encounter. Since the control room officer's observations were otherwise credible and logical, there is no reason to question the accuracy of his observation of the physical contact.

The agency has demonstrated, by a preponderance of the evidence, that grievant and the inmate were engaged in horseplay that involved physical contact. Grievant's subsequent admission to the control room officer that he and the inmate "do this all the time" makes it more likely than not that he and the inmate had engaged in such joking physical contact on prior occasions. Grievant's assertion that the control room officer misinterpreted what he saw was most likely intended to mean that the control room officer thought a fight may have been starting when, in fact, grievant and the inmate were just harmlessly playing. It is concluded that the second portion of grievant's encounter with the inmate constituted both inappropriate physical contact with an inmate and the appearance of impropriety. Such impropriety, or the appearance thereof, constitutes fraternization as used in Procedure 5-22. It is just this type of behavior that can lead other inmates to conclude that grievant has formed some type of relationship with the inmate. It also affords those inmates the opportunity to gain leverage over grievant by not reporting him in exchange for favors.

The grievant had a prior active Group III Written Notice for which he could have been discharged. While the agency elected to retain grievant following that offense, any further disciplinary action normally results in dismissal. Given the grievant's past record, the accumulation of a second Group III Written Notice, and the lack of mitigating circumstances, the agency's decision must be affirmed.

### DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued to the grievant on July 7, 2002 and his removal from employment are UPHELD.

### APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.



2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>14</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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David J. Latham, Esq.  
Hearing Officer

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<sup>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.