

Issue: Group III Written Notice with termination (fraternization or non-professional relationships with inmates); Hearing Date: 09/24/02; Decision Date: 10/19/02; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5519/5520



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5519 / 5520

Hearing Date: September 25, 2002
Decision Issued: October 19, 2002

PROCEDURAL HISTORY

On March 15, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Fraternizing with inmates, or non-professional relationships with inmates, probationers, or parolees which pose a threat to the security of an institution, an employee, an inmate, or citizen of the Commonwealth. Providing false information to a Corrections Sergeant, regarding your knowledge of the whereabouts of an inmate. This is considered a serious breach of security. Based on your investigative unit reports and investigative interviews.

On March 15, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Sexual Misconduct with Offenders. Any behavior of a sexual nature between employees and inmates, probationers, parolees or other offenders under the Department of Corrections supervision is prohibited. This includes behavior of a sexual nature such as, but not limited to sexual abuse, sexual assault, sexual harassment, physical conduct of a sexual

nature, sexual obscenity, and conversations or correspondence of an emotion, romantic, or intimate nature.

Grievant timely filed grievances to challenge the disciplinary actions. The outcome of the Third Resolution Step for each grievance was not satisfactory to the Grievant and she requested a hearing. The grievances were consolidated by the Department of Employment Dispute Resolution. On August 21, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 24, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel
Sergeant
Corrections Officer
Special Agent
Warden
Dental Assistant
Major
Institutional Investigator
Lab Technician
LCSW

ISSUE

1. Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for providing false information to a corrections sergeant.
2. Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for sending an inmate correspondence of an emotion, romantic, or intimate nature.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 Dental Assistant at one of its Facilities. According to her supervisor, she was among the best and most professional dental assistants he had ever worked with. As part of her orientation and ongoing training, Grievant received copies of DOCPM § 5-10, *Standards of Conduct* and DOCPM § 5-22 *Rules for Conduct Governing Relationships with Inmates, Probationers, or Parolees*.¹

Inmate W worked in the area near Grievant. He communicated with Grievant on a daily basis. He stands approximately 6'5" tall and weighs approximately 280 pounds. Grievant weighs 120 pounds. Grievant feared Inmate W because of his size and because of his sometimes unusual behavior such as pressing his genitals against work equipment while polishing floors and cleaning in the Facility.

On March 12, 2001, the Dentist brought to the attention of a corrections officer his concerns about Inmate W's inappropriate behavior such as annoying medical staff personnel and improperly handling supplies.² No action was taken to remove Inmate W from Grievant's work area. Grievant had previously informed the Dentist she felt uncomfortable around Inmate W and asked not to be left alone with Inmate W. The Dentist had asked three different head nurses and the corrections officers who work in the medical unit to remove Inmate W from the medical unit, but no action was taken.

On October 3, 2001, Inmate W was determined to have possessed contraband and make photocopies of an adult magazine. As a consequence of his behavior, he was removed from working in the medical and dental area where Grievant worked. Grievant and several coworkers were relieved when Inmate W was removed. A short time later, he was returned to work in the medical and dental area. A management level employee must have requested his return. The Facility's Chief of Security did not know of the return and would not have approved the return had he known of the request.

On December 21, 2001, Inmate W handed Grievant a romantic note as she was entering the staff bathroom. She left the note in the bathroom hoping that it would be discovered by others and used to remove Inmate W from the dental unit. The note was discovered³ and identified as being written by Inmate W, but no action was taken to remove Inmate W from the dental unit. The letter was returned to Inmate W by the corrections staff because Inmate W said the letter fell out of his pocket while cleaning.

¹ Agency Exhibits 6 and 7.

² Grievant Exhibit 1.

³ Agency Exhibit 9.

Grievant did not report that Inmate W gave her a letter because she feared he would react in a hostile manner towards her.

After repeated unsuccessful attempts by several employees in Grievant's unit to have Inmate W removed from their work area, Grievant concluded that the Agency did not intend to remove Inmate W and would not protect her from Inmate W. She attempted to appease Inmate W by speaking with him when he sought her attention and complying with his requests. She also attempted to avoid him whenever possible, for example, by asking to work at another institution on alternating Fridays.

On February 11, 2002, Grievant needed to use the restroom. She walked to the staff bathroom but it was occupied. She started walking towards another restroom when Inmate W called her from inside the infirmary. The infirmary is a small room where ill inmates can stay. A door inside the infirmary opens to an inmate restroom and shower. Inmate W was inside the infirmary restroom and Grievant stepped just inside the doorway to the restroom. As they conversed, the Sergeant walked outside the hall adjoining the infirmary and called for Inmate W to come to her. There was no response and the Sergeant called several times without response. On the final calling, Grievant heard the Sergeant call and turned to walk out of the restroom. As she walked out, Grievant expected Inmate W to follow her since she assumed he had heard the Sergeant calling for him. Instead, he remained in the restroom. As Grievant passed the Sergeant the Sergeant asked "Have you seen [Inmate W]." Grievant did not hear or was not paying attention to the Sergeant's question since she was focused on finding an available restroom. After Grievant left the infirmary, the Sergeant walked into the bathroom and observed Inmate W in the back of the bathroom trying to hide in the shower. He had his shirt off and his pants partially undone.⁴

The Agency immediately began an investigation of the incident. As part of the investigation, the Agency searched Inmate W's property. Six romantic greeting cards were found in the inmate's possession. Of the six, Grievant admitted at the hearing to sending the inmate four of the cards. She signed the cards using a nickname. She put two cards in one envelope and two other cards in a second envelope and mailed them to Inmate W. By placing two cards in one envelope, Grievant hoped that officers working in the mailroom would become suspicious when they received a thick envelope intended for Inmate W. She hoped they would read the cards and then remove Inmate W from her work area as his punishment. She also sent the cards in order to satisfy Inmate W's request that she send him cards.

⁴ Grievant testified that Inmate W did not have his clothing off while she was speaking to him. The agency contends Inmate W's partial state of undress shows there was some sexual relationship in progress between Inmate W and Grievant. No witnesses testified they had seen Grievant act in a manner showing any affection towards Inmate W or ever intentionally touching him. It is just as likely that Inmate W was pretending to be starting or finishing a shower once he realized the Sergeant was looking for him as it is that he and Grievant were engaged in sexual behavior. The Agency has not established that Grievant and Inmate W were engaged in sexual behavior on February 11, 2002.

Inmate W informed Grievant that he would send her letters by sending them to the business of a former co-worker and friend of Grievant's. He sent several letters expressing a romantic relationship. Grievant received the letters.

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.

Fraternizing with Inmates

Policy 5-10.17(B)(18) states that Group III offenses⁵ include,

Fraternizing with inmates, or non-professional relationships with inmates ... which pose a threat to the security of an institution, an employee, an inmate, or a citizen of the Commonwealth.

Policy 5-10 does not define "fraternize". *Webster's II New Riverside Dictionary* defines "fraternize" to include, "To associate with others in a friendly or brotherly way."

The Agency contends Grievant was engaged in inappropriate behavior with Inmate W and that Grievant lied to the Sergeant by saying "no" when the Sergeant asked if she knew Inmate W's location. Although the Agency's suspicion is understandable based on the circumstances, the Hearing Officer finds that Grievant did not hear or understand the Sergeant's question and did not intend to mislead the Sergeant regarding Inmate W's whereabouts. This is confirmed by the Sergeant's testimony that "it happened so fast" and Grievant "whizzed past" her. Thus, the Agency's Group III Written Notice for fraternizing with inmates by providing false information to a corrections sergeant must be rescinded.

Sexual Misconduct with Offenders

Policy 5-10.17(B)(23) states that Group III offenses include:

Sexual Misconduct with Offenders. Any behavior of a sexual nature between employees and inmates, probationers, parolees or other

⁵ Fraternalization or non-professional relationships with inmates that are not directly related to Department business constitute Group II offenses.

offenders under the Department of Corrections supervision is prohibited. This includes behavior of a sexual nature such as, but not limited to, sexual abuse, sexual assault, sexual harassment, physical conduct of a sexual nature, sexual obscenity, and conversations or correspondence of an emotional, romantic, or intimate nature.

Grievant admits to sending Inmate W four cards containing expressions of affection and intimacy.⁶ These cards constitute “correspondence of an emotional, romantic, or intimate nature” as prohibited by DOCPM § 5-10.17(B)(23). The Agency has met its burden of proof regarding this alleged violation of policy.

Grievant contends she did not engage in sexual misconduct with Inmate W because she sent him the cards out of fear rather than out of affection. Grievant’s expert testified that Grievant acted out of her frustration that the Agency was not taking any action to remove Inmate W from Grievant’s work area and out of her fear that Inmate W would hurt her if she failed to act on his request to send him cards. Although Grievant’s actions are explained by her fear, they are not excused by it. Placating an inmate by sending him romantic cards represents a serious security breach to the institution. By sending the inmate romantic cards, Grievant placed Inmate W in a dramatically superior position of power and control over her. Inmate W was in a position to threaten Grievant with informing the institution of Grievant’s actions if Grievant did not grant whatever Inmate W wished. If Inmate W wanted Grievant to bring contraband into the institution or wanted Grievant to permit him to receive special privileges inside the institution, Inmate W would be in a position to pressure Grievant to do so. When an employee creates a risk that an inmate may control her, that employee has jeopardized security at the institution. Grievant’s behavior rises to the level of a Group III offense.

Retaliation

Grievant contends the Agency retaliated against her for filing a complaint with the U.S. Department of Labor. No credible evidence was presented to establish a connection between Grievant’s complaint with the U.S. Department of Labor and the disciplinary actions against her. Grievant’s request for relief regarding retaliation is denied.

Remedy

Grievant contends that *Va. Code § 2.2-3003(D)*⁷ requires the Agency to provide the first step respondent with the authority to grant a remedy including reinstatement

⁶ The printed text of one card states, in part, “It’s amazing what merely being near you does to me It’s something that goes beyond my control or understanding. *** I think I could live forever in the shelter of your arms” Grievant signed this card “Love ya, Baby.” Grievant always used a nickname when signing the cards.

⁷ This section states:

and that since the first step respondent would have reinstated Grievant if given the chance to do so, Grievant should be reinstated. If the Hearing Officer assumes for the sake of argument that Grievant's legal analysis of section 2.2-3003(D) is correct, Grievant's argument fails based on testimony presented. The first step respondent recused himself from making a decision because he did not have a copy of the investigation report and did not feel he could make an intelligent decision. Thus, the first step respondent did not determine that Grievant should be reinstated. In the absence of a step respondent granting Grievant a remedy, there is no basis to enforce *Va. Code § 2.2-3003(D)*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for fraternizing with an inmate by providing false information to a corrections sergeant is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for sending an inmate correspondence of an emotional, romantic, or intimate nature is **upheld**. Grievant's removal is **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

D. Upon receipt of a timely written complaint, management shall review the grievance and respond to the merits thereof. **Each level of management review shall have the authority to provide the employee with a remedy.** At least one face-to-face meeting between the employee and management shall be required. The persons who may be present at this meeting are the employee, the appropriate manager, an individual selected by the employee, and an individual selected by the manager. Witnesses may be called by either party. (Emphasis added).

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.⁸

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.