

Issue: Group III Written Notice with termination (refusal to obey instructions that could result in a weakening); Hearing Date: 01/28/03; Decision Date: 01/29/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5620



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5620

Hearing Date: January 28, 2003
Decision Issued: January 29, 2003

PROCEDURAL HISTORY

On September 17, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Refusal to obey instructions, which could result in a weakening of Security. On August 30, 2002, you brought contraband into the facility which was a serious violation of Institutional Policy and Security.

On September 23, 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 January 2, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 28, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Site Tech

Lieutenant
Corrections Officer
Major
Warden Senior

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 Plumber Steamfitter Supervisor. Part of his duties included supervising inmates at the Agency’s Facility.¹ He began working for the Facility when it opened several years ago. He received a Group I Written Notice on May 14, 2002 for inadequate or unsatisfactory job performance.²

Since 1996, the Facility has been a multidisciplinary therapeutic institution designed to provide substance abuse treatment to inmates who are approaching the end of their sentences. In April 2000, the Facility, including its parking lot, became a tobacco-free environment. All staff, including Grievant, were notified of the change. During a 12-month phase in period, tobacco products were phased out. Additional steps were taken to assist employees who smoked to quit their habit. Such steps included smoking cessation classes and the formation of support groups to provide assistance to those desiring to quit. For those unable to quit smoking, the Warden made available transfers to other correctional facilities that still permitted smoking. Grievant was not aware of these steps to make the Facility smoke-free. He

¹ Agency Exhibit 5.

² Agency Exhibit 7.

independently considered taking other positions in other institutions permitting smoking but did not do so because the cost and inconvenience of moving.

On August 30, 2002, Grievant brought two packs of cigarettes into the Facility. Grievant admitted bringing the cigarettes into the Facility and that he knew he was not supposed to do so. He has been smoking for forty years and because of recent stress in his life felt he needed to continue smoking at work.

CONCLUSIONS OF 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.

Group III offenses include “refusal to obey instructions that could result in a weakening of security.”³ Contraband such as cigarettes is used as currency in prisons and can undermine the security of the prison. At this Facility, the presence of tobacco undermines the Facility’s treatment program by creating unnecessary temptations to return to addictive behavior. The Agency’s prohibition of tobacco at the Facility is sound and appropriate.

Grievant knew he was prohibited from bringing tobacco products into the Facility. His actions were contrary to the instructions he received from Facility managers and his behavior could have weakened security. Thus, the Agency’s disciplinary action against him must be upheld. No circumstances were presented sufficient to mitigate the disciplinary action.

Grievant argues the Agency has violated his smoker’s rights and that when he began working for the Facility several years ago, the Facility permitted smoking. Grievant alleged the Agency treated differently other employees caught smoking, but offered no proof of this allegation.

There is no right to smoke under federal or Virginia statutes or under State policies. What Grievant argues as a right is merely a longstanding tolerance for smoking. That tolerance does not create a right. An Agency can change its requirements for employee behavior on its facilities and smoking is one of those requirements. Grievant was obligated to comply with the Agency’s smoking prohibition. There is no basis to reverse the Agency’s action.

³ DOCPM § 5-10.17(B)(16).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with 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 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.⁴

[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].

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer