Issue: Group III Written Notice with termination (fraternization with inmates); Hearing Date: 07/28/03; Decision Issued: 07/30/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5769

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5769

Hearing Date: July 28, 2003
Decision Issued: July 30, 2003

PROCEDURAL ISSUES

At the beginning of the hearing, grievant requested that the hearing officer recuse himself because he had read agency documents before the hearing. Grievant argued that some agency documents contain irrelevant and possibly prejudicial information that the hearing officer should not see. The grievance process requires that both parties provide the hearing officer with a copy of all documents they intend to proffer at least four workdays prior to the hearing. In a significant number of cases, the evidence may include irrelevant and sometimes prejudicially irrelevant information. It is axiomatic that a hearing officer cannot ascertain whether a document contains irrelevant or prejudicial information until he reads the document. As part of the adjudication process, hearing officers must ignore irrelevant information and discount prejudicially irrelevant information. Because any hearing officer assigned to the case would also review the documents before the hearing, this hearing officer declined to recuse himself.

Second, grievant requested that the hearing be postponed to allow more time for preparation. Grievant requested a hearing on June 2, 2003. Following appointment of the hearing officer on July 7, 2003, repeated attempts were made by the Division of Hearings to discuss hearing procedures with grievant. Grievant was either unavailable, claimed he had an attorney (but would not divulge his attorney's name), or failed to return messages left with his wife. On July 25, 2003, the last workday prior to the hearing, an attorney called the Division of Hearings requesting a postponement of the hearing. That request was denied because grievant had known for nearly two months that a hearing was to be held; waiting until the last day to secure representation does not constitute just cause for a postponement. Grievant then secured representation by a different attorney who represented him at the hearing and who also requested a postponement. This request for postponement was also denied because just cause had not been demonstrated.

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Warden
Advocate for Agency
Two witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the agency's 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 grievance from a Group III Written Notice issued for allowing an inmate to tattoo him - a violation of agency policy prohibiting non-professional associations with inmates.[1] He was removed from employment as part of the disciplinary action. Following failure by the parties to resolve the matter, the agency head qualified the grievance for a hearing.[2] The Department of Corrections (DOC) (hereinafter referred to as agency) employed grievant as a corrections officer for four years.

Agency policy prohibits improprieties or the appearance of improprieties between employees and inmates.[3] Grievant received a copy of this policy (Procedure Number 5-22), the Standards of Conduct policy, and a list of the Conditions of Employment.[4]

On July 1, 2002, inmate J sent a handwritten note to the facility warden alleging, among other things, that he had tattooed an unnamed corrections officer on two occasions. On the same date, the inmate also sent to an agent in Internal Affairs a handwritten note accusing an unnamed corrections officer of providing contraband to inmates. On July 10, 2002, inmate M wrote a note (addressee unknown) alleging that he had tattooed grievant. Subsequently, inmate J wrote another note to whom it may concern alleging that he and a few other inmates had tattooed grievant. On July 11, 2002, inmate J wrote a note to the regional director making the same allegation.[5]

Between July 19 and August 1, 2002 an investigator interviewed three inmates. Inmate J had observed grievant receiving a tattoo (right arm) from inmate C.[6] Inmate J approached grievant in early 2002 and arranged to tattoo grievant in exchange for grievant bringing him ink from outside the facility. He tattooed on grievant's upper left chest an outline of three hearts surrounded by a vine, with the names of grievant's three children in banners across the hearts.[7]

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[1] Exhibit 1. Written Notice, issued April 28, 2003.
[2] Exhibit 1. Grievance Form A, filed May 1, 2003.
[3] Exhibit 3. Section 5-22.7A.1. DOC Procedure Number 5-22, *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*, June 15, 2002. "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 DOC Procedure 5-10, *Standards of Conduct.*"
[4] Exhibit 4. Receipts signed by grievant, December 10, 1998.
[5] Exhibit 2E. Notes from inmate J and inmate M, July 2002.
[6] Another inmate had also observed inmate C apply this tattoo to grievant. *See* Exhibit 2D, Investigative interview with another inmate, July 19, 2002.
[7] Exhibit 2B. Investigative interview with inmate J, August 1, 2002.

Inmate W completed the tattoo by adding shading. Inmate W also tattooed grievant's left arm with a thorned vine circling the upper arm.[8]

Grievant was interviewed on March 12, 2003 and claimed that his wife's friend had tattooed him, but that he didn't know the friend's name, address, or telephone number. The investigator gave grievant one week to obtain the information. Six weeks later, grievant had still not provided any information about the friend. On April 23, 2003, the warden advised grievant that discipline was pending and gave him one more opportunity to obtain information about the friend. On April 25, 2003, grievant submitted a notarized letter from a person who claimed to have performed grievant's tattoos at a party in April 2002. The person stated that he charged $65 per tattoo but did not specify how many tattoos he performed. The warden attempted to call the telephone number provided by the friend but the number belonged to an elderly female who did not know the friend.

Following issuance of discipline on April 28, 2003, grievant met with the warden more than two weeks later on May 15, 2003 for the second-step resolution of his grievance. Grievant had still not obtained either the correct telephone number or an address for the friend.

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.

[8] Exhibit 2C. Investigative interview with inmate W, July 19, 2002.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[9]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards provide a set of rules governing the professional and personal conduct and acceptable standards for work 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. Section V.B.3 defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment.

The Department of Corrections, pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct. Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. Group III offenses include violation of DOC Procedure 5-22 *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*.[10]

Procedure 5-22 does not offer examples of the types of conduct that constitute improprieties. However, the tattooing of a corrections officer by an inmate is an improper association because the officer becomes indebted to the inmate. Sooner or later, the inmate will expect payment, either in cash or contraband, or by using the information as leverage over the officer. Inmates with such leverage clearly undermine the officer's ability to effectively perform his duties.

The evidence in this case essentially pits the written statements of three inmates against grievant's denial.[11] While the written statements must individually be accorded less evidentiary weight than grievant's sworn denial, it is concluded for the following reasons that the agency has demonstrated by a preponderance of evidence that grievant received tattoos from inmates. First, the written statements of the inmates are generally consistent with each other. While the possibility of collusion among the three inmates has been considered,

[9] § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.
[10] Exhibit 5. DOC Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.
[11] In the period since the inmates were interviewed, all three have either been paroled or transferred to other corrections facilities.

the statements are not carbon copies of each other and do not appear to have been rehearsed.

Second, inmate J was able to give the investigator a detailed verbal description of the chest tattoo. Inmate W drew a detailed drawing of both the chest tattoo and the left arm vine tattoo.[12] While the drawing is not a perfect copy of the actual tattoos, the amount of detail provided makes clear that inmate W also had detailed knowledge of the tattoos. Inmate W even recalled both the nickname of one of grievant's children tattooed in the banner across the bottom heart, and the fact that the name is in cursive. It is especially noteworthy that two inmates had such detailed knowledge of the tattoos because grievant maintains that he never showed his tattoos to the inmates.

Third, when grievant was interviewed about this matter, he averred that his wife's friend had tattooed him.[13] However, he was unable to provide the name, address, or telephone number of the friend. He was also unable to state how much he had paid for the tattoos. The investigator offered grievant one week to provide this information but grievant did not provide any information. If grievant had been tattooed by a friend, it should have been a simple matter to obtain the requested information within a day or two. Grievant has offered no credible explanation for having failed to promptly provide this information. Grievant was interviewed on March 12, 2003, but six weeks later he still had not obtained any information about the friend.

Fourth, the friend failed to provide credible information to support grievant's case. By the day of the hearing, grievant had obtained the correct telephone number (cell phone) for the friend. Grievant had not requested an Order for this witness but the hearing officer decided to call the witness during the hearing. His testimony was less than convincing and contained several inconsistencies. He could not recall when he tattooed grievant except that it was one and a half years ago; however, in his written note he stated that it was April 2002.[14] He testified that he charged about $40 or $50 for each tattoo; but in his note he stated that he charged $65 per tattoo. Grievant testified that the tattoos were given over a three or four-day period; however, the friend's note claims that he performed the tattoos during a party.

Grievant suggests that his friend was reluctant to get involved in this case because he does not have a license to engage in tattooing. While the Commonwealth does not yet regulate tattooing,[15] the city in which grievant's friend lives does regulate the procedure. However, while the friend may have been reluctant, there is no evidence to support this speculation. Neither grievant

[12] Exhibit 2H. Inmate W's drawing of two of grievant's tattoos.
[13] Exhibit 2A. Investigative interview with grievant, March 12, 2003.
[14] Grievant claimed he was tattooed in the spring of 2001.
[15] However, *see* Va. Code § 54.1-703, which provides that those engaged in tattooing will be required to obtain a license effective July 1, 2004.

nor the friend testified that the friend had previously told grievant not to disclose his name or phone number. To the contrary, the friend did provide his name and phone number on a notarized statement. If he was truly afraid of being charged with violating the law, it is inconsistent that he would admit to doing so in writing. His written statement amounts to a *mea culpa* that would almost certainly guarantee his conviction in court. For all of the above reasons, it is difficult to give much evidentiary weight to this witness' testimony.

Accordingly, it is concluded that the cumulative weight of the inmates' evidence outweighs grievant's denial and the questionable alibi of his friend. However, even if a reviewer considered grievant's version to be more credible, it must nonetheless be concluded that grievant violated Procedure 5-22. There are only three probable ways in which inmates J and W could have obtained such detailed descriptions of grievant's tattoos. They could have tattooed grievant, or viewed the tattoos at very close range, or obtained a very detailed description from grievant. Grievant adamantly denies both that the inmates tattooed him and that he ever showed them his tattoos. The only remaining possibility is that he gave detailed descriptions to the inmates. It is difficult to imagine that grievant would have given so much detail when describing tattoos. However, if he did, he provided so much information, including the name of at least one of his daughters, that the inmates acquired as much leverage over him as they would have by tattooing him. Providing this much detailed personal information to an inmate is an improper, unprofessional association that has prevented grievant from effectively carrying out his responsibilities.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued for violation of agency Procedure 5-22 and grievant's removal from employment on April 28, 2003 are hereby UPHELD.

The disciplinary action shall remain active pursuant to the guidelines in Section 5-10.19 of the Standards of Conduct.

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.[16] 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.[17]

[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

[16] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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