

Issue: Group III Written Notice with termination (conduct unbecoming a Warden);
Hearing Date: 12/04/03; Decision Issued: 12/23/03; Agency: DOC; AHO:
Lorin A. Costanzo; Case No. 5822

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS**

DECISION OF HEARING OFFICER

Case No. 5822

Hearing Date: December 4, 2003
Decision Issued: December 23, 2003

PROCEDURAL BACKGROUND

On June 11, 2003, Grievant was issued a Group III Written Notice of disciplinary action with Removal for:

Conduct unbecoming a Warden of the Department of Corrections. Specifically, you have been untruthful about your ownership of a bar and the relationship you had with the owner of the bar. You have made statements that you do not own the bar and you have made statements that you owned the bar. You have stated that you only received \$2500 from {name} as a repayment of a loan and {name} has stated that you received \$18,000 or an amount close to that figure which was "under the table" or was repayment for loans. You have provided contradictory information in your statements relevant to your ownership of the bar.

Grievant timely filed appeal from a Group III Written Notice issued on June 11, 2003. Following the failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing. (Tab 1)

Grievant requested consolidation of the five grievances filed on July 3, 2003, and requested that the five grievances proceed to three separate administrative hearings (two grievances being consolidated into each of two separate hearings and one grievance being addressed in a third grievance hearing). The Director granted Grievant's request for consolidation (see Compliance Ruling of Director- Ruling Number 2003-169, issued October 10, 2003). The Ruling further noted Grievant requested neither of the two EDR full-time hearing officers be assigned to conduct the hearings and the two full-time hearing officers voluntarily disqualified themselves.

On October 30, 2003 Grievant requested The Department of Employment Dispute Resolution to assign a three separate hearing officers to hear the three grievance hearings (consolidated as above set forth). However, by letter of November 21, 2003, Grievant withdrew his request and agreed to one hearing officer for all grievances.

On October 21, 2003 the Department of Employment Dispute Resolution assigned this appeal to the undersigned Hearing Officer.

At the parties' joint request, this grievance hearing was held at the Department of Corrections HQ, Richmond, Virginia to facilitate the testimony of witnesses for each party. Upon the motions of both party and by the mutual agreement of the parties, the Hearing Officer found just cause to grant an extension of the 30 day time frame for issuing the decision because of the conflicting schedule of the parties, the issue pending of Grievant's request for three separate hearing officers to be appointed, and witnesses availability.

APPEARANCES

Grievant
Counsel for Grievant
Agency Advocate
Agency Party Designee/Regional Director
Deputy Director Operations
Regional Director
Special Agent
Correctional Officer
TPS

ISSUES

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 FACTS

After reviewing the evidence admitted at hearing and observing the demeanor of witnesses present at hearing, the Hearing Officer makes the following findings of fact:

Grievant filed a timely appeal from a Group III Written Notice issued on June 11, 2003. Following denial of relief at the third resolution step in the grievance process, the agency head qualified the grievance for a hearing.

Grievant, at the times relevant to this proceeding, was employed by the Department of Corrections (the "Agency") as a Warden.

In April of 1999 a Hotline complaint was filed alleging Grievant owned a bar in West Virginia.

Grievant and TPS, a subordinate employee, both provided statements to an investigator that Grievant did not own or have any interest in a bar but Grievant loaned TPS \$2,500.00 to assist with startup costs of the bar and that this sum was repaid. (Tab C & D).

Grievant has told investigators and his supervisors that he does not own a bar in West Virginia.

On March 12, 2003 TPS signed a document indicating his agreement with Grievant concerning the bar was that Grievant would put up some money and he would put in some time and they would both be compensated equally. TPS estimated that he took approximately \$17,000.00 to \$18,000.00 out of the club over a 3 plus year period and Grievant close to the same, if not somewhat less. (Tab D)

On March 18, 2003 TPS modified his statement and told special investigators that he need to explain that the \$18,000.00 given to Grievant was to repay small loans that Grievant continually made to him and the loans were always made and repaid in cash. (Tab 3)

On December 20, 2002 Deputy Director summoned Regional Director and Grievant to his office for a meeting to discuss management issues at a Virginia Correctional Center. During the trip to the December 20th meeting Grievant told Regional Director that he was part owner of a bar in West Virginia. (Tab J) At the meeting Deputy Director advised Grievant that ownership of a bar may not be the best type of establishment in which to have an interest for a Warden. Grievant said, "We" closed it and there were additional statements about the consideration of opening it in the fall. (Tab I and testimony)

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 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. (Grievance Procedure Manual, '5.8)

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 Personnel and Training 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 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 Procedures Manual, Chapter Five: Subject: Standards of Ethics and Conflict of Interest (Tab 2, Book 1) provides at 5-4.6 GENERAL CONDUCT as follows: "Employees of the Department shall conduct themselves by the highest standards of ethics so that their actions will not be construed as a conflict of interest or conduct unbecoming an employee of the Commonwealth."

The Standards of Conduct include Group III offenses, which include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal from employment. Grievant was given a Written Notice of a Group III offense concerning, among other things, allegations of untruthful statements that Grievant made relating to ownership of a bar and his relationship with the owner of the bar.

Regional Director met and discussed with Grievant the charges and provided Grievant a copy of the Written Notice. (Tab 1). The Regional Director testified as to concerns that arose in determination of Group Offense Level and noted consideration was given to a number of factors including: a.) that Grievant held the position of Warden which is a supervisory position; b.) that being involved with lending/business with staff could raise issues of credibility for a supervisor; c.) inappropriateness of loaning money/being in business with to a subordinate; and d.) concerns that this action involves alcohol/owning a bar.

Additional concern was given to the fact that a Warden has a great responsibility and that a Regional Director has responsibility for a number of facilities and must have confidence and trust that the Wardens will do things, uphold policy and procedures, and especially that a Warden is going to be truthful and honest in dealings. These concerns were taken into account in determination that this matter rose to a Group III. Mitigating circumstances, including Grievant's long record and his employment record were considered, however it was determined that the seriousness of the matter outweighed these considerations and there were no circumstances warranting mitigation.

There never was deed or any document showing Grievant owned the bar. The reports of the two special agents were considered and the reported contradictory statements considered. Regional Director noted special attention to statements reported by Deputy Director Operations and Regional Director and to matters reported by TPS even though TPS provided inconsistent statements. Assistant Warden also indicated Grievant told him he owned a bar. (Tab 1)

This case involves some contradicting testimony and statements concerning money paid/received and ownership of a bar. Grievant and witnesses present different testimony concerning Grievant's statements. Grievant testified that he has consistently maintained he did not own or have an interest in a bar. Witness testimony at hearing and Investigation Reports indicated that Grievant made statements that he was an owner/part owner of a bar and made statements that he was not and owner/part owner of a bar.

A May 4, 1999 investigation report (see Tab 3) noted a complaint to the State Employee Fraud, Waste and Abuse Hotline alleging Grievant owns and operates a Bar in West Virginia. Grievant was reported therein as stating he made a personal loan to the silent partner of a bar but did not hold any interest or own the bar and the loan was repaid in full. The 1999 investigation reported that it was unable to substantiate the allegations of Fraud, Waste or Abuse by Grievant.

The Report of Investigation conducted by the Office of the Inspector General, Department of Corrections, (Tab 3) addressed issues concerning Grievant's ownership of a bar in West Virginia and indicated that:

On Feb. 25, 2003 TPS stated to one investigator that he opened a bar and Grievant was a silent partner who equally shared the proceeds and subsequently, in March 2003 provided a written statement that he had given Grievant approximately \$18,000.00 in monthly cash installments. TPS stated the agreement was that Grievant would put up the start up money and he would put in some time and they would be equally compensated. He estimated he received seventeen to eighteen thousand dollars over the three year period and that he paid Grievant in cash on at least a monthly basis. (see Tab C & D).

On March 17, 2003 Grievant stated he has never owned any interest in the bar and that he did not tell Deputy Director or Regional Director he owned or operated a bar. However, Deputy Director and Regional Director testified that

in December 2002 Grievant told them he was a partner owner of a bar in Princeton, West Virginia which was only open a couple nights per week.

On March 18, 2003 TPS wrote a document to modify/explained his statement and presented that the \$18,000.00 paid Grievant over the course of the business was to repay small loans Grievant made him to help keep the bar afloat.

Grievant has contended that there are alternative motivations in bringing this disciplinary action by Agency and that he has made no inconsistent statements as to ownership and that he has never had any ownership in any bar in West Virginia. However, statements were presented, in testimony and/or investigative reports, from a number of individuals indicating contrarily, including:

CC Counselor stated 4 years ago Grievant told him Grievant was opening a bar with another individual and Grievant suggested CC Counselor could work there.

Electronic Technician stated Grievant asked him to provide an estimate to install a video camera and big screen television in the bar that he ran with someone else. Additionally, both Grievant and the other person TPS have told him that the bar was a profitable venture for them.

Lieutenant stated on one occasion Grievant served him a drink from behind the bar. (Tab O)

Captain reported that Grievant discuss his owner shop of a bar in West Virginia and that he was a partner. (Tab L)

Counselor indicated he was told by Grievant he could work a his (ie Grievant's) bar. (Tab M)

Prior owner reported 3 parties, including Grievant, discussed purchasing the bar. He questioned Grievant about the appropriateness of a warden owing a bar and reported he transferred ownership to one party, not Grievant, and stated he is not aware of Grievant's role at the bar. (Tab P)

A prior employee of Grievant indicated Grievant told her he purchased a bar in W. Va. (Tab Q)

TPS indicated in a written statement that he and Grievant each took approximately \$17,000 00 to \$18,000.00 out of the club and Grievant and he would get cash on at least a monthly basis. TPS stated he was on the lease and the license because in W.Va. you must be a state resident to be on an ABC license. (Tab D)

On March 18, 2003 TPS presented that the \$18,000.00 given Grievant in cash was to repay small loans Grievant made him.

Testimony was presented that on December 20, 2002 Deputy Director summoned Regional Director and Grievant to his office for a meeting to discuss management issues/problems. The Deputy Director advised Grievant that ownership of a bar may not be the best type of establishment in which to have and interest for a Warden. Deputy Director indicated Grievant said, "We" closed it

While traveling to the December 20th meeting Regional Director testified Grievant stated that he was part owner of a bar. Regional Director recalled that he was later told by Grievant who the co-owner was but

did not remember the name. Grievant indicated a prior supervisor had approved Grievant to have outside employment and Grievant said he had a copy of a letter to this effect. Regional Director was not able to locate such letter.

The burden of proof on the Agency to show by "preponderance of the evidence" is of significance in determination of this cause. In reviewing the evidence consideration is given to the testimony of the witnesses presented directly at hearing and to the Reports of Investigation admitted into evidence. These Reports were conducted over time and by different investigators and involved contact with a diversity of individuals who provided information.

It is not the purpose of this hearing to determine the issue of ownership. This Group III Written Notice not for ownership of a bar but for:

"Conduct unbecoming a Warden of the Department of Corrections. Specifically, you have been untruthful about your ownership of a bar and the relationship you had with the owner of the bar. You have made statements that you do not own the bar and you have made statements that you owned the bar. You have stated that you only received \$2500 from {name} as a repayment of a loan and {name} has stated that you received \$18,000 or an amount close to that figure which was "under the table" or was repayment for loans. You have provided contradictory information in your statements relevant to your ownership of the bar."

Germane to this case are the allegations of untruthfulness and contradictory information. Information was provided Regional Director and Deputy Director by Grievant at a meeting and while going to the meeting which was contradicted. Agency Investigation Reports set forth numerous statements made concerning ownership of a bar to the investigators by Grievant, by witnesses who testified at hearing, and by other individuals who were not present at hearing.

Of concern in this cause is what was presented by Grievant to Agency. In reviewing the evidence in this case the following factors, among, others, were considered a.) Grievant denies under oath that he made contradictory statements as to ownership of the bar; b.) investigator's testimony concerning his investigation the interviews conducted; c.) additional investigations and interviews conducted; d.) witness testimony as to Grievant's statements made personally to witness and the circumstances surrounding those statements; e.) conflicting oral and written statements of TPS and the timing, interest in, and nature of these statements; f.) reports of statements of ownership made by Grievant from a variety of sources, over a period of time, and the circumstances surrounding such statements; and g.) TPS testimony re \$18,000.00 being loans repaid or being a sharing of moneys involves dealings done in cash. TPS estimated he received seventeen to eighteen thousand dollars over the three year period but also that received cash loans from Grievant to keep the bar afloat of about this same amount. (see Tab C & D).

In weighing the evidence it is noted that there is a conflict of certain statements. Grievant maintains he did not own a bar and did not make contradicting statements about ownership of the bar while other witnesses maintain Grievant did tell them Grievant did own a bar. TPS did make different statements about Grievant's role as to ownership and Grievant's receipt of moneys. TPS has confirmed that he has given Grievant cash in excess of the \$2,500.00 initially reported by Grievant and made contradictory statements that he has either given the approximately \$18,000.00 in cash to Grievant as a share or has given it as a repayment of loans.

When viewing the totality of the evidence, it must be concluded that more likely than not, Grievant did make contradicting statements as to ownership of a bar saying he did own a bar and also saying he did not own a bar. The cumulative weight of the testimony of witness plus the statements of ownership made by Grievant on numerous reported occasions noted in investigative reports outweighs the Grievant's denial of making contradictory statements of ownership and TPS's on and off denial of Grievant's ownership.

The Standards of Conduct allow agencies to reduce the disciplinary action if there are "mitigating circumstances, " which the Standards of Conduct describe as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance. The standards of Conduct also allows agencies to consider aggravating circumstances that would support the level of discipline issues.

The hearing officer may consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct. In considering mitigating circumstances, the hearing officer must also consider management's right to exercise its good faith business judgment in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy. (Rules for Conducting Grievance Hearings, Effective 7/1/2001, Department of Employment Dispute Resolution).

Mitigation considerations were taken into consideration by the agency and were addressed both in the Written Notices and at hearing. Mitigating circumstances were presented, argued, and have been considered. including evidence as to length of service, quality of service, and Grievant's impact and achievements. Evidence was presented and considered concerning the nature of the position of Warden and its unique responsibilities, authorities, and impact within the Department of Corrections.

DECISION

For the reasons stated herein, by a preponderance of the evidence the Agency has proven the actions taken were warranted and appropriate, and the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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

The hearing decision is subject to four types of administrative review, depending upon the nature of the alleged defect with the decision:

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 Resources 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 hearing 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.

4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substances Abuse Services which challenge allegations of patient abuse, a challenge that a hearing decision is inconsistent with law may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

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 HMR, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decisions

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.

Lorin A. Costanzo, Hearing Officer