

Issue: Two Group III Written Notices with suspension, demotion and salary reduction (violation of Rules of Conduct Governing Employee Relationships with Offenders); Hearing Date: 08/20/04; Decision Issued: 08/25/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 800



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 800

Hearing Date: August 20, 2004
Decision Issued: August 25, 2004

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Warden
Advocate for Agency
Four witnesses for Agency

ISSUES

Did grievant's conduct 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 grievance from two Group III Written Notices issued for violations of Rules of Conduct Governing Employee Relationships with

Offenders.¹ As part of the disciplinary action, grievant was suspended without pay for five days for each disciplinary action for a total of ten days, demoted from Agriculture Manager² to Agriculture Supervisor with a salary reduction of ten percent and, transferred to a different facility. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³ The Department of Corrections (DOC) (Hereinafter referred to as “agency”) has employed grievant for six years.

Agency policy prohibits improprieties or the appearance of improprieties, fraternization or other nonprofessional association between staff and inmates which may compromise security or which undermines the employee’s effectiveness to carry out his responsibilities.⁴ Such a violation may be treated as a Group III offense.

The general rule, known to all staff, prohibits giving inmates anything including but not limited to gifts, money, food, or cigarettes unless permission has been obtained from the Warden or an assistant warden. Management takes responsibility for approving such token gifts so that it can assure equitable treatment of all inmates and to avoid charges of favoritism against staff. From time to time, employees have sought permission to give inmates very small monetary gifts or food at Christmas parties. Generally, management has approved such gifts.⁵

As Agriculture Manager, grievant operated a farm to produce crops that are utilized within the correctional system and sometimes sold on the open market. He managed two full-time employees who supervised a work crew of 10-15 female inmates. During a visit to the facility by a university professor, one of the female inmates repeatedly used vulgar language in his presence. The professor complained to grievant who duly reported the matter to an assistant warden. After the inmate was counseled, she was unhappy that grievant had reported her. She complained that grievant had engaged in sexual misconduct with inmates, and bought food and cigarettes for them during return trips from another facility. The allegations were referred to the Office of Inspector General

¹ Exhibit 1. Written Notices, issued May 17, 2004.

² Exhibit 4. *Employee Work Profile Work Description*, November 1, 2002 to October 31, 2003.

³ Exhibit 2. Grievance Form A, filed June 10, 2004.

⁴ Exhibit 5. Agency Procedure Number 5-22.7.A.1, *Rules of Conduct Governing Employees’ Relationships with Inmates, Probationers, or Parolees*, June 1, 1999, states: 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 effective to carry out his responsibilities may be treated as a Group III offense under DOC Procedure 5-10, *Standards of Conduct*. NOTE: See also Exhibit 6. Agency Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*, superceded Departmental Procedure 5-22 effective February 15, 2004. The language cited above is virtually identical in both the old and new policies.

⁵ Exhibit 9. Memoranda approved by management for gift giving to inmates, 2002-2003.

(IG) in October 2003. The IG investigator interviewed several employees, inmates, and grievant, and issued a report in March 2004. While the IG investigation found no evidence to support the sexual misconduct charges, it concluded that grievant had engaged in fraternization and delivered contraband to inmates.

Grievant's wife is employed as a food service director at a local school. When the school prepared too much food, grievant's wife brought the food home and grievant took it to the facility to be shared with farm crew inmates. Grievant generally brought surplus food to the inmates about once a week during the school year. In the early fall of 2001, grievant spoke to his immediate supervisor (assistant warden) about bringing food in. The assistant warden understood from the conversation that grievant's wife prepared the food and approved grievant bringing the food in as long as he distributed it equally and evenly among the entire crew. The assistant warden did not understand that the food's source was the local school.

Grievant had been assigned a field-clearing project at another correctional facility located approximately an hour's drive from his regular work location. When he went to this facility, he took two inmates with him. He almost always took the same two inmates, one of whom worked in the farm office as grievant's recordkeeping assistant. They sometimes worked until dark in order to take advantage of available daylight in the fields. On these occasions, dinner hour at the correctional center had already been completed by the time they returned. Grievant, who has diabetes, needed to eat and sometimes purchased food from fast-food restaurants during the return trip. Grievant, using his own money, also bought food for the two inmates because he considered it impolite to eat in front of them without offering them food, and because the inmates were hungry. On some, but not all occasions, grievant requested, and the assistant warden granted, permission to purchase food during these trips. At times, the inmates ran out of their own cigarettes during these trips. Grievant purchased cigarettes for the inmates on these occasions.⁶

On May 6, 2004, the assistant warden promulgated a memorandum to Work Center Staff stating that, effective immediately, staff are not allowed to bring food or gift items to inmates without prior written approval from the Warden.⁷

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

⁶ Exhibit 3B. Investigative Interview, signed by grievant, February 3, 2004.

⁷ Exhibit 11. Memorandum from assistant warden to staff, May 6, 2004.

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. In all other actions, such as claims of retaliation, the employee must present his evidence first and must prove his claim by a preponderance of evidence.⁸

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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.

Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.⁹ 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 Group III offenses, which

⁸ § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

⁹ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

are defined identically to the DHRM Standards of Conduct.¹⁰ Violation of DOC Procedure 5-22 is one example of a Group III offense.

Bringing food to inmates

From the outset of the investigation, grievant has been forthcoming about providing food to inmates. In his signed interview statement, grievant explained that he brought to the farm crew inmates surplus food prepared by his wife in a local school. In 2001, grievant had obtained permission from the assistant warden to bring food to inmates. After hearing the testimony of both grievant and the assistant warden, it is apparent that the 2001 discussion lacked specificity, which resulted in the assistant warden not realizing that the food prepared by grievant's wife originated in a local school. It cannot now be determined whether grievant did not make this clear or whether the assistant warden missed this in their conversation. Similarly, it cannot now be determined whether grievant indicated that this was to be an ongoing weekly occurrence. The assistant warden did not understand it to be a regular ongoing event.

The assistant warden's primary concern (as evidenced by her testimony) was that any food brought to the facility be distributed equitably among the entire crew so that inmates could not allege favoritism. Grievant did distribute the food equally among inmates and the agency has not charged otherwise. The gravamen of the agency's complaint is that grievant did not obtain specific permission to bring food to the inmates. The evidence reflects that grievant did, in fact, seek and obtain permission from the assistant warden in 2001 to bring to inmates food prepared by his wife. The evidence reflects that the communication between grievant and the assistant warden was less than ideal because the assistant warden had a different understanding than the grievant did. This is corroborated by grievant's signed admission that he had not obtained "specific permission" to bring food to the inmates.¹¹ (Grievant now contends that he was nervous during the interview and didn't fully appreciate what he signed).

The agency acknowledges that it was not improper to bring food to inmates as long as management approved and the food was distributed equitably. If it was proper to bring food and distribute it evenly, then there was no appearance of impropriety in doing so. The staff, inmates or anyone else observing the process would not know whether grievant had obtained approval and would therefore, have no basis to conclude that the free food distribution was improper. Accordingly, the agency has not shown, by a preponderance of evidence, that grievant's distribution of food to inmates was either improper or had the appearance of impropriety.

However, the agency has shown that grievant did not obtain specific approval each time he brought food to inmates. The agency has not shown that

¹⁰ Exhibit 7. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

¹¹ Exhibit 3B. *Ibid.*

it had a written directive on this subject until well after it initiated the investigation in this case. The evidence reflects only that there was a policy, known to all, requiring management approval before bringing food to inmates. Grievant knew that he was required to obtain such approval. Although he had obtained approval three years ago from a prior supervisor, grievant never sought permission from the assistant warden who became his supervisor in April 2003. At the very least, grievant should have obtained permission from his new supervisor to assure that he had continuing permission to bring food to inmates. Given the unique circumstances in this case, it is concluded that the appropriate corrective action for grievant's failure would have been counseling.

Purchase of food and cigarettes

Agency witnesses testified that the purchase of food and a few cigarettes during long trips was not in itself objectionable. Management expects, however, that grievant would either seek permission in advance, or report after the trip what had occurred so that management was aware of which inmates were receiving food or cigarettes, and the quantity thereof. Grievant acknowledged that he did not always ask permission in advance to purchase food on the return trips from another facility. Grievant also did not report after the fact that he had made such purchases. Grievant's supervisors testified that such approval would have been routinely granted if grievant had asked.

Therefore, there was no actual impropriety because both grievant's prior assistant warden and the assistant warden assigned in April 2003 would have allowed grievant to make such purchases. However, grievant's purchases of food and cigarettes did create an *appearance* of impropriety because of the uniqueness of the situation. When grievant made the road trips to another facility, he almost always took the same two inmates – one of whom was his recordkeeping assistant and worked with him in the farm office. This situation could lead other inmates to conclude that the two inmates who regularly traveled with grievant were his favorites. Once other inmates learned that the two favored inmates were receiving food and cigarettes, an *appearance* of impropriety existed. To counter this appearance, it was critical that grievant fully inform his supervisor every time he purchased food or cigarettes so that management would be aware of the situation. Grievant's failure to do so was a violation of Procedure Number 5-22 – a Group III offense.

Retaliation

Grievant alleges that the disciplinary action was retaliatory because the Warden believed grievant had gone over his head to obtain permission to use inmates to harvest crops during a quarantine in the summer of 2003. Other than his allegation, grievant failed to provide any corroborative testimony or evidence. Grievant never claimed retaliation on either the Grievance Form A or his attachments to the grievance form. Once the grievance is initiated, additional

claims may not be added.¹² Accordingly, because grievant did not allege retaliation in his grievance, that issue is not part of the grievance before this hearing officer and will not be addressed further.

DECISION

The decision of the agency is modified.

The Group III Written Notice issued on May 17, 2004 for failing to obtain specific permission from management to bring food to inmates, and the five-day suspension from May 31, 2004 through June 4, 2004, are hereby RESCINDED. The agency is directed to reimburse grievant pay for the five-day suspension.

The Group III Written Notice issued on May 17, 2004 for purchasing cigarettes and food for two inmates during trips to another facility, five-day suspension from May 24-28, 2004, demotion with salary reduction, and transfer are hereby AFFIRMED. The disciplinary action shall remain active for the period specified in Section 5-10.19.A 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

¹² §2.4 *Grievance Procedure Manual*, effective July 1, 2001.

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.¹³ 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.¹⁴

[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]

David J. Latham, Esq.
Hearing Officer

¹³ 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).

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