Issue: Group III Written Notice with 5-day suspension (fraternization); Hearing Date: 11/18/03; Decision Issued: 11/19/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5844

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5844

Hearing Date: November 18, 2003
Decision Issued: November 19, 2003

PROCEDURAL ISSUES

Grievant suggests that the Written Notice constituted double jeopardy because he had previously been counseled about the same issues addressed in the Written Notice.

Grievant's actions first came into question in March 2003 and the Assistant Warden requested that an investigation be conducted.[1] After the investigation had been completed on April 1, 2003, the matter was referred from the central office to the Warden. He gave the report to the Assistant Warden for action. The Assistant Warden discussed the report with grievant and counseled him, documenting the counseling in writing.[2] Subsequently, after central office was advised that counseling had been conducted, it remanded the matter (via various management personnel) back to the Warden with instructions that

[1] Exhibit 3. Memorandum from assistant warden to assistant chief internal affairs, March 13, 2003.
[2] Exhibit 5. Memorandum from assistant warden to grievant, April 24, 2003.

disciplinary action should be taken. The Warden then issued the disciplinary action that is the subject of this grievance.

Grievant contends that this sequence of events amounts to double jeopardy because he was questioned about the matter on two occasions.[3] The meeting with the Assistant Warden, and the subsequent meeting with the Warden were characterized in their memoranda as "Hearings." Grievant may have been mislead by the use of the term "Hearing" and concluded that the matter had been completely resolved after counseling. However, these two meetings were simply an opportunity for the grievant to hear the agency's charge and respond to the charges, as provided for in the Standards of Conduct.[4]

It is instructive to note that the double jeopardy clauses of the United States and Virginia Constitutions bar prosecution of a **criminal** charge against an accused already convicted of an identical or lesser included offense.[5] Grievant has not been charged with a criminal offense. The general rule, supported by the weight of authority and the best considered cases, is that when a person has been placed on trial, on a valid indictment, before a court of competent jurisdiction, has been arraigned, has pleaded, and a jury has been impaneled and sworn, he is in jeopardy.[6] Since none of these preconditions occurred in grievant's case, he was not in jeopardy. Therefore, it is concluded that grievant has not been placed in double jeopardy as that term is used in Virginia law.

Moreover, what actually occurred in this case, in its simplest terms, is that grievant was questioned about the charges and then counseled. Counseling, by definition, is not a disciplinary action.[7] Subsequently, higher management determined that grievant's actions had constituted an offense that warranted disciplinary action. Since disciplinary action had not yet been issued, higher management directed that it be issued. There is no provision in the Standards of Conduct that prohibits counseling immediately after an offense, followed by issuance of a disciplinary action. Immediate counseling is intended to prevent a recurrence of offensive behavior, while the purpose of a disciplinary action is to more formally establish the offense and document the action taken.

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[3] Exhibit 5. *Notice of Potential Disciplinary Hearing*, April 21, 2003. The assistant warden met with grievant on April 24, 2003 to discuss the issues and counsel grievant. See also Exhibit 6. Memorandum from warden to grievant, August 13, 2003.

[4] Exhibit 2. Section 5-10.14.A, DOC Procedure Number 5-10, *Standards of Conduct*, June 15, 2002. During these meetings, no witnesses were presented, no testimony was taken under oath, and the usual due process safeguards (representation, an opportunity for cross-examination) were not afforded to grievant. Thus, although these meetings were conducted appropriately, they were not formal "Hearings" such as those provided by the grievance hearing process.

[5] *Rouzie v. Commonwealth*, 215 Va. 174, 207 S.E.2d 854 (1974).

[6] *Rosser v. Commonwealth*, 159 Va. 1028, 167 S.E. 257 (1933).

[7] Exhibit 2. Section 5-10.6, DOC Procedure No. 5-10, *Ibid.* Counseling means either informal counseling or an interim evaluation. Disciplinary actions may range from the issuance of an official Written Notice only, to issuance of a Written Notice and termination of employment.

Accordingly, it is held that grievant was not subjected to double jeopardy in this case. Even though the Decision below rescinds the disciplinary action, the basis for rescission is failure of the agency to shoulder the burden of proof, not the issue of double jeopardy.

Grievant also requested assurance that no retaliation would occur as a consequence of his grievance. The Commonwealth's grievance procedure prohibits retaliation, stating, in pertinent part, "An employee may ask EDR to investigate allegations of **retaliation** as the result of the use of or participation in the grievance procedure…."[8] EDR will investigate such complaints and advise the agency head of its findings.

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
Assistant Warden
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 fraternization.[9] He was suspended without pay for five working days as part of the disciplinary action. Following failure by the parties to resolve the matter, the agency head qualified the grievance for a hearing.[10] The Department of Corrections (DOC) (hereinafter referred to as agency) employs grievant as a food service director. He has been employed for seven years.

Agency policy prohibits improprieties or the appearance of improprieties between employees and inmates.[11]

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[8] § 1.5. *Ibid*.
[9] Exhibit 1. *Written Notice*, issued August 19, 2003.
[10] Exhibit 1. *Grievance Form A*, filed August 28, 2003.
[11] Exhibit 4. 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,

Grievant's job description requires that he provide ongoing food service training to his employees and, to inmates assigned to work in the food service area. The agency does not provide training materials or guidelines; each food service director determines the scope and content of training provided. Over an undetermined period of time, grievant had been providing extensive training to his staff and inmates assigned in the kitchen area. Grievant had previously acquired training material from courses he had attended and from his years of service in the military. From time to time, grievant brought books to the facility that he utilized in conducting training. The books covered a wide range of topics including not only food preparation but also food handling standards, accounting, worksheet preparation, business law, nutrition and business planning. The books also covered other topics that may be relevant to food service operation in the private sector but have little or no application in a penal setting. These topics include insurance, unemployment insurance, workers' compensation, court procedures, and the lodging industry.

Grievant conducts some training in group sessions and some in one-on-one sessions. He conducted some training with inmates in his office. Agency policy prohibits inmates from using computers that have either Internet capability or access to the agency computer network. Grievant allowed inmates to utilize stand-alone computers for preparation of worksheets and report compilation. He did not permit inmates to use the computer that is connected to the agency's network.[12] Grievant gave an equal amount of training to all employees and inmates; however, he would give additional training to inmates who demonstrated an interest and willingness to learn more. Grievant frequently photocopied training material and distributed it to inmates.

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

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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.*"

[12] During the period at issue herein, the computers in grievant's area of jurisdiction did not have Internet capability.

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.[13]

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*.[14] Procedure 5-22 does not offer examples of the types of conduct that constitute improprieties.

The agency has not borne the burden of proof necessary to demonstrate that grievant engaged in fraternization. It has failed to produce preponderant testimony or evidence to show that grievant had an inappropriate relationship with any particular inmate. The agency has also not shown, by a preponderance

[13] § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.
[14] Exhibit 2. DOC Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

of evidence, that the grievant's actions constituted the appearance of impropriety. First, the agency failed to offer any witnesses with first-hand testimony of the grievant's conduct. If the agency wanted to demonstrate that grievant spent an inordinate of time with certain inmates, it could have offered witnesses to testify to what they had witnessed. Grievant denied under oath spending more time training certain individuals, except for those who sought him out with questions or those who asked for more material.

The agency faulted grievant for bringing his personal training material to the facility. Grievant readily acknowledged doing this, however, the Region I Food Service Director, testified that it is a common and accepted practice for facility food service directors to bring in training material from whatever source they can obtain it. Grievant brought in his books openly and underwent security checks as he entered the facility; the security staff never challenged him or questioned the appropriateness of the material. The agency failed to produce any policy or memorandum prohibiting the use of outside training materials.

The agency disciplined grievant for photocopying and distributing training material to inmates. Grievant pointed out that it has been his practice for years to hand out copies of training materials during training classes. The agency did not offer any memorandum or policy that bans distribution of training material copies.

The agency especially focused on a house plan found among an inmate's training material. Grievant offered unrebutted testimony that the house plan was utilized in making placemats as part of one inmate's theme for serving dinner on one occasion. The agency did not offer any evidence to show that having dinner themes was prohibited or that house plans in particular were banned from being used as placemats, or that grievant had ever been so instructed.

The agency disciplined grievant because he trained some inmates one-on-one in his office. However, agency witnesses acknowledged that there is no policy prohibiting one-on-one training in an office. If others perceived that one or more inmates were receiving special treatment because of in-office training, it is possible that it might create the appearance of an impropriety. However, the agency did not offer testimony from any employee or inmate who felt that such was the case.

The agency disciplined grievant because he allowed one or more inmates to use a state computer. However, grievant's unrebutted testimony established that the inmates used only a stand-alone computer, and that they never used the one computer that is connected to the agency's network. Grievant further testified that he or a subordinate was always present when inmates used stand-alone computers. The Region I Food Service Director, who oversees several corrections facilities, testified that it is a common practice for inmates to use stand-alone computers. The agency did not produce any memorandum or policy

that prohibits inmates from using stand-alone computers, or demonstrate that grievant had ever received such an instruction. Moreover, one witness offered unrebutted testimony that the Warden in charge during the period at issue had specifically given authorization for inmates to use stand-alone computers.[15]

The appearance of impropriety is a serious concern in corrections facilities. A variety of problems can arise when inmates perceive that certain inmates may be receiving special treatment. It is entirely appropriate for the agency to establish policies that help avoid the appearance of impropriety. If the agency reasonably determines that employees should not utilize personal training material, photocopy or distribute training handouts, train inmates one-on-one in offices, or permit inmates to use stand-alone computers, it may prohibit any or all of these actions. However, in this case, the agency has failed to demonstrate that any of these actions were specifically prohibited. Moreover, it has failed to rebut the sworn testimony establishing that grievant's actions are common practice in corrections facilities. Most importantly, the agency has not shown that grievant's actions were either improper or constituted an appearance of impropriety.

From the available evidence, it appears that grievant is a dedicated and knowledgeable person who strives to educate those in his charge who show a willingness and desire to learn. If the agency believes reasonable parameters must be drawn to limit the scope of the training he conducts, those limits should be clearly stated, preferably in writing. This can be done either through facility policy memoranda or, accomplished through written counseling that addresses, in specific detail, what grievant may and may not do in fulfilling his training responsibility.

The evidence suggests, but is not preponderant, that grievant may have become overenthusiastic in responding to one inmate's thirst for knowledge. If the agency believes this to be a possibility, grievant should be counseled in writing as to specifically what he should and should not do with regard to that inmate. Any violation of such counseling instructions would then be subject to disciplinary action.

DECISION

The disciplinary action of the agency is reversed.

The Group III Written Notice for violation of agency Procedure 5-22 and the five-day suspension issued on August 19, 2003 are hereby RESCINDED. The agency shall reimburse grievant for the period of suspension and reinstate any benefits and seniority that may have been adversely affected.

[15] The current warden assumed his position on April 7, 2003.

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:

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.[16] You must file a notice of appeal with the clerk of the circuit court in the

[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).

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

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