

Issue: Group III Written Notice with demotion (conduct unbecoming a corrections supervisor); Hearing Date: 04/23/04; Decision Issued: 05/12/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 674



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 674

Hearing Date: April 23, 2004
Decision Issued: May 12, 2004

PROCEDURAL HISTORY

On February 10, 2004, Grievant was issued a Group III Written Notice of disciplinary action with demotion to Corrections Officer Senior for conduct unbecoming a corrections supervisor. On February 12, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 5, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 23, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with demotion for conduct unbecoming a corrections supervisor.

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 Corrections Captain until her demotion on February 10, 2004 to a Corrections Officer Senior. The purpose of her position as Corrections Captain was to provide “Supervision of daily shift of security in administrative operations.”¹ She received favorable evaluations throughout her tenure, including a “Contributor” rating on her October 28, 2003 performance evaluation. She has been employed by the Agency for approximately 18 years. On August 21, 2002, Grievant received a Group II Written Notice for unauthorized personal use of an institutional telephone.²

One of Grievant’s friends died. She attended the funeral for her friend in Detroit. An inmate within the Facility also considered the decedent a friend and Grievant was aware of their friendship.³ Grievant received a poem at the funeral. She brought the poem and a copy of the obituary with her into the Facility. Because she had been previously injured, she had to work in the control booth. She called for the inmate to come to the control booth. She showed the poem and obituary to the inmate. The inmate asked for a copy of the poem. Grievant said he could have a copy and had a copy of the poem made. She gave the poem to the inmate. Shortly thereafter she realized she may have been making a mistake and the instructed the inmate to return the poem.

CONCLUSIONS OF POLICY

¹ Grievant Exhibit 1.

² Agency Exhibit 4.

³ No evidence was presented suggesting Grievant had a friendship or other relationship with the inmate.

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.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense. DOCPM § 5-10.16(B)(1). One of the Agency’s “golden rules” is that security staff should never give anything to an inmate. Security staff are taught this rule at the Academy and on a regular basis at the Facility. Grievant gave a poem to an inmate thereby violating this rule. She recognized that she had violated that rule and instructed the inmate to return the poem to her. Grievant’s behavior rises to the level of a Group II offense.

Accumulation of a second active Group II Written Notice “normally should warrant removal.”⁴ Including the Group Notice giving rise to this grievance, Grievant has two active group notices and, thus, could be removed from employment. The Agency is also entitled to demote her in lieu of removal. Neither DHRM Policy, nor DOC policy prohibits an Agency from demoting a Captain to a Corrections Officer Senior. The Agency’s demotion is in accordance with policy and the Hearing Officer must give deference to the Agency’s decision as required by the EDR *Rules for Conducting Grievance Hearings*. Although there are no mitigating circumstances meeting the requirements set forth in the *Rules*, the Agency may wish to reconsider the level of its demotion of Grievant in light of the Hearing Officer’s decision.

The Agency contends Grievant should receive a Group III Written Notice for “Violation of DOC Procedure 5-22 *Rules of Conduct Governing Employees’ Relationship with Inmates, Probationers, or Parolees*.”⁵ Procedure 5-22.7 states:

A. Improprieties. 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 the Standards of Conduct and Performance (Procedure 5-10).

⁴ DOCPM § 5-10.16(A).

⁵ Agency Exhibit 8.

B. Interactions. While performing their job duties, employees are encouraged to interact with persons under Department supervision on a personal, professional level as necessary to further the Department's goals. Interactions shall be limited to the employee's performance of job duties.

C. Special Privileges. Employees shall not extend or promise to an inmate, probationer, or parolee special privileges or favors not available to all persons similarly supervised, except as provided for through official channels.

Handing an inmate a poem does not, in itself, constitute a non-professional association. The testimony of the Western Regional Operations Manager showed that the "bottomline is whether security is compromised." She added that giving a poem to an inmate does not compromise a breach of security even though security staff are taught not to give or receive anything from inmates. She testified that calling an inmate to the control booth is not a special privilege since inmates are frequently called to the control booth for various reasons.

The Agency contends Grievant's possession of the poem constituted possession of contraband prohibited under DOC Procedure 412. Contraband is defined as:

Any unauthorized item determined to be in the possession of an inmate or within a correctional institution and accessible to an inmate which is not acquired through approved channels or in prescribed amounts ... [p]ersonal property of any type not specifically authorized for the possession or use of an inmate by Division, Regional or Institutional policy.

No evidence was presented suggesting inmates could not possess writings. There is nothing about the poem that would otherwise indicate it should not be possessed by an inmate. The inmate received the poem from Grievant and, thus, was authorized to possess it. The poem was not contraband when it was in the possession of the inmate.

Grievant contends the inmate did not actually possess the poem since Grievant retrieved the poem. There is no merit to this argument. The inmate held the poem with the present intent of keeping it. He returned the poem to Grievant only after she instructed him to do so. Even though the inmate held the poem for only a short period of time, he was in possession of the poem.

Grievant argues that the Agency attempted to corrupt some of her witnesses by contacting them. There is no credible evidence to suggest the Agency acted improperly or inappropriately contacted any witnesses. Grievant's allegations regarding the Agency's behavior are completely unfounded.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice for failure to follow instructions, perform assigned work, or otherwise comply with established written policy. Grievant's demotion is upheld based on the accumulation of disciplinary action.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 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. 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.⁶

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.