

Issue: Group III Written Notice with termination (failure to comply with policies including inappropriate relationships with inmate's family members); Hearing Date: 01/26/05; Decision Issued: 02/17/05; Agency: DCE; AHO: Carl Wilson Schmidt, Esq.; Case No. 7946



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7946

Hearing Date: January 26, 2005
Decision Issued: February 17, 2005

PROCEDURAL HISTORY

On October 8, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Removal pursuant to Policy 1.60, the Standards of Conduct for failure to comply with policies and procedures (DCE policy 1-17, Employee/Client Relations and 6-1.9, Non Revenue Library Donations; and DOC Policy 130.1, Rules of Conduct Government Employees Relations with Offenders. [Grievant] gave her personal cell phone number to an inmate's sister to be contacted relevant to book donations. She met with the sister on an established location. The books were not logged into the DCE Library according to policy and some of the books were found in the inmate's cell (inmate was also an aide for [Grievant]). Additionally, the appropriate DCE established system for inspection and cataloging of donated materials was not adhered to. Statement by inmate that [it] was practice for the tutors to have first dibs on books before they were checked in. Violation of DOC's policy for fraternizing with inmates or family members was. [Grievant] was aware of policies stated above.

On October 20, 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 December 9, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 26, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party
Agency Advocate
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for failure to comply with policies including inappropriate relationships with inmate's family members.

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 Correctional Education employed Grievant as a Librarian at one of its Facilities until her removal effective October 8, 2004. The purpose of her position was:

To provide library services for incarcerated [individuals]. To support the academic and vocational programs by maintaining an organized, up-to-date Media Resource Center. To teach library information skills and to assist all patrons with selecting reading materials.¹

¹ Agency Exhibit 7.

Grievant's work responsibilities include, in part:

- Adheres to DCE/DOC policies and guidelines in selection/acquisition practices.
- Reviews and adheres to pertinent DCE policies and DOC Institutional Operating Procedures and applies them on the daily operation. Posts and enforces library rules.
- Adheres to all DCE and DOC policies on safety and security. Documentation of training participation for safety and security measures.

Grievant received an overall rating of "Contributor" in her most recent evaluation.

The Inmate is incarcerated at the Institution.² He works as a tutor in the library where Grievant worked. The Inmate's Sister lives in a distant location requiring her to drive approximately seven hours to visit the Inmate. The Sister usually visits the Inmate on weekends when Grievant is not working at the Facility.

The Sister wanted her brother to have access to certain books that might be of interest to him. He told the Sister to contact Grievant. The Sister had not met Grievant during her prior visits to the Institution.

The Sister contacted Grievant in order to determine how to donate books to the Institution. One of Grievant's responsibilities is to receive donated books. Grievant told the Sister that the donated books would become the property of the Institution and would be available to all inmates and not exclusively to the Inmate. Grievant said the Sister should make sure nothing is inside the books and nothing was written on the books. The Sister indicated that she sometimes traveled to the Institution on weekends in order to visit her brother and could bring the books with her. Grievant knew that if the Sister took the books to the Institution and left them at the Front Search, the books would likely be thrown away or the Sister would be told to keep the books. Grievant did not wish to make a special trip to the Institution on a weekend when the Sister arrived because Grievant lived approximately a 20 minute drive away from the Institution. Since the Sister would be staying at a hotel near Grievant's home, Grievant gave the Sister Grievant's cell phone number and told the Sister to call Grievant when the Sister arrived at the hotel.

On July 31, 2004, the Sister arrived at the hotel and called Grievant's cell phone number. Grievant drove to the hotel and met the Sister in the parking lot. The Sister gave Grievant approximately thirty books. Grievant took the books to her home. On the following Monday, Grievant drove to work and took the books with her to the Institution.

² The Institution is a Level 4 facility holding long term felons including those with single, multiple, and life sentences.

The Sister sent Grievant a thank you card to express her appreciation for Grievant having taken the books. Grievant put the card in her desk. The card said, in part:

Ms. [Grievant's last name],

I want to thank you ever so much for being kind enough to meet me and pick up the books that I brought. It means so much to me and [Inmate] that I was able to get him books that he otherwise wouldn't be able to get. You really went above and beyond for us and your kindness will never be forgotten.

I just met you but it is obvious that you are a special person. I felt like I could have talked to you all evening. Thank you for being so good to my brother. Knowing that he is able to be around good people like you where he is makes it a little more bearable for he and I both.

I hope the few books I gave you will be enjoyed by those who choose to read them.

Thank you³

Agency staff found the card and concluded it was necessary to began an investigation.

Agency investigators searched the Inmate's cell and located three books appearing to have been given to the Institution by the Sister. The Inmate told the investigator that the books were library books even though they had not been cataloged or otherwise marked as belonging to the library.

CONCLUSIONS OF POLICY

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." DHRM § 1.60(V)(B).⁴ 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." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

DCE Policy 1-17⁵ governs Employee/Client Relations. This policy provides:

³ Agency Exhibit 3.

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁵ Agency Exhibit 5.

Improper behavior, fraternization, or other non-professional associations by and between employees of the DCE and clients⁶ in the custody of the DOC or the DJJ are prohibited. Personal interaction or association with clients shall be limited to those times when the employee is performing duties directly relating to and pertaining to the best interests of DCE and the DCE client.

Non-professional visitations between DCE employees and clients in the custody of DOC or DJJ are only permitted with the explicit prior written consent of the Superintendent or the Superintendent's designee.

Grievant is obligated to comply with Department of Corrections Department Procedure 5-22 regarding Rules of Conduct Governing Employees Relationships with Offenders. This policy provides, in part:

Fraternization. Fraternization or non-professional relationships between employees and offenders is prohibited, including when the offender is within 180 days of the date following his/her discharge from Department custody or termination from supervision, whichever occurs last. This action may be treated as a Group III offense under DOC Procedure 5-10, *Standards of Conduct and Performance (old Department Procedure 5-10, dated June 15, 2002)*. Any exception to this section shall be reviewed and approved by the respective Regional Director/Administrator on a case-by-case basis.

Improprieties. Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited. Associations between staff and offenders that may compromise security, or undermine the effectiveness to carry out the employee's responsibilities may be treated as a Group III offense under Department's *Standards of Conduct and Performance (old Department Procedure 5-10, dated June 15, 2002)*.

Visitation. Non-job related visitations between employees and offenders, or families of offenders, shall not be permitted without the explicit written permission of the Regional Director/Administrator of the region involved, and for good cause shown or for professional reasons (e.g., approved research as part of an educational program.)

Grievant did not fraternize with the Sister because Grievant did not engage in a relationship with the Sister. Grievant's interaction with the Sister was limited and did not extend beyond what was necessary for the donation of books. Under the applicable policies, however, the question is not merely whether Grievant engaged in

⁶ A client is an "individual who receives services from DOC or DJJ, including inmate aides."

fraternization, the question is also whether she gave the appearance of having an improper relationship with the Sister.

Grievant should not have provided her personal cell phone number to the Sister. The Sister could have provided the cell phone number to her brother who, in turn, could have circulated it among the inmates. When speaking with the Agency's investigator, the Sister considered it "strange" that Grievant would provide the Sister with a personal cell phone number. Grievant should not have met with the Sister at the hotel parking lot. Grievant should have met the Sister at the Institution even though Grievant would have had to drive an additional twenty minutes. By providing the Sister with a personal cell phone number and meeting individually with the Sister at a location outside of the workplace, Grievant created the appearance of a non-professional association with an offender's family member. Under the applicable policies, the Agency may remove an employee who creates the appearance of a non-professional association with an offender's family member.⁷

Grievant contends the Agency retaliated against her for engaging in protected activity. No credible evidence was presented showing a connection between Grievant engaging in protected activity and the Agency's decision to take disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 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

⁷ The outcome of this case is close. The question is not whether the Hearing Officer would have imposed such disciplinary action, but rather whether the Agency has met the elements of its case. In this instance, the Agency has done so.

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 15 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 15-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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.