

Issue: Two Group III Written Notices with termination (writing a personal letter to an inmate, and filing a false incident report); Hearing Date: 09/12/05; Decision Issued: 09/13/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8163



COMMONWEALTH of VIRGINIA  
*Department of Employment Dispute Resolution*

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8163

Hearing Date: September 12, 2005  
Decision Issued: September 13, 2005

PROCEDURAL ISSUES

On the last workday prior to the hearing, grievant requested a postponement because she had just obtained a representative. The hearing officer denied this request because grievant had not demonstrated good cause for postponement. Grievant requested qualification of the hearing on July 15, 2005 and therefore had nearly two months to obtain a representative prior to this hearing. Moreover, during the pre-hearing conference on August 15, 2005, grievant agreed to the hearing date. During that pre-hearing conference, the hearing officer advised grievant that if she obtained a representative shortly before the scheduled hearing date, a postponement would not be granted.

Four workdays prior to the hearing, grievant submitted a list of witnesses she wanted ordered to appear at the hearing. The hearing officer issued orders the same day. All but one of the witnesses are agency employees (who were also called by the agency) and appeared for the hearing. One witness was a state employee from another agency. Grievant did not contact this witness in advance to ask him to appear. An order was issued for his appearance but he did not appear. The witness's supervisor called the hearing officer just before the hearing and said that the witness would not appear because he did not know why he was being called.

During the hearing, grievant averred that she had never received any documents from the agency prior to the hearing. The agency had mailed the documents by certified mail but has not received the return receipt card from the U.S. Postal Service to show that grievant received the documents. During the hearing, another set of documents was copied and given to grievant. Grievant and her representative were given an opportunity to review the documents before they were entered into the record.

The Rapid-Eye security camera record of the stairwell incident was preserved in digital format on a computer disc and was reviewed during the hearing by both parties and the hearing officer. The agency is instructed to retain the subject computer disc pending any further appeal of this case.

### APPEARANCES

Grievant  
Representative for Grievant  
Warden Senior  
Seven 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 a Group III Written Notice issued for writing a personal letter to an inmate,<sup>1</sup> and from a Group III Written Notice for filing a false incident report.<sup>2</sup> As part of the disciplinary action, grievant was removed from employment effective May 24, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>3</sup> The Department of Corrections (DOC) (Hereinafter referred to as "agency") had employed grievant as a corrections officer for four years. Grievant has one active prior disciplinary action – a Group II Written Notice for failure to report to work as scheduled without proper notice.<sup>4</sup>

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<sup>1</sup> Exhibit 10. Group III Written Notice, issued May 24, 2005.

<sup>2</sup> Exhibit 11. Group III Written Notice, issued May 24, 2005.

<sup>3</sup> Exhibit 14. Grievance Form A, filed June 21, 2005.

<sup>4</sup> Exhibit 12. Group II Written Notice, issued January 24, 2005.

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 her responsibilities.<sup>5</sup> Such a violation may be treated as a Group III offense.

On May 2, 2005, inmate G entered an unauthorized area (stairwell leading to control booth on the fourth level). During the next 17 minutes (from 17:33 to 17:50 hours), inmate G remained in the stairwell staying mostly out of camera view on the landing leading to the fourth level. On two occasions he briefly came down the stairs to the third and second levels as if he was looking for someone. At 17:50, grievant left the fourth level control booth and came down the stairwell where she encountered inmate G. Grievant asked the inmate what he was doing in the stairwell. Inmate G told grievant to "come here" to which grievant responded, "Don't touch me."<sup>6</sup> The inmate grabbed grievant's left arm and attempted to embrace her.<sup>7</sup> Grievant pulled away from him, went down the remaining steps to the third level, and banged on the door to gain entrance.<sup>8</sup> She immediately told another corrections officer what had occurred. The other officer notified a sergeant and shortly thereafter the inmate was charged with assault and taken to a special housing area.

While being taken to the special housing area, inmate G told a sergeant that grievant had written him a note. No attempt was made to search the inmate's regular cell for this note. Several days later when inmate G was allowed to return to his regular cell, he gave the sergeant the note alleged to have been written by grievant.<sup>9</sup> Grievant denies writing the note.

A sergeant was assigned to investigate the case. He reviewed a video recording of the stairwell incident and the written incident reports of the shift commander, grievant, officer A, and letters written by the inmate. Grievant was disciplined and removed from employment on May 24, 2005. The investigator submitted his report to the warden on August 16, 2005.<sup>10</sup>

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<sup>5</sup> Exhibit 8. Section V.B, Agency Operating Procedure Number 130.1, *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*, February 15, 2004, 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*.

<sup>6</sup> Exhibit 4. Captain's Incident Report, May 2, 2005.

<sup>7</sup> Exhibit 7. Disciplinary Offense Report and grievant's Incident Report, May 2, 2005.

<sup>8</sup> Exhibit 3. Incident report of fellow control booth corrections officer, May 2, 2005.

<sup>9</sup> Exhibit 2. Anonymous note supplied by inmate G. The note is unsigned and undated.

<sup>10</sup> Exhibit 1. Investigator's Incident Report, August 16, 2005. The agency did not explain why the investigation report was not submitted until nearly three months after the discipline and the week after a hearing officer was appointed to hear the grievance.

## 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 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.<sup>11</sup>

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 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.<sup>12</sup> The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state

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<sup>11</sup> § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

<sup>12</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

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 are defined identically to the DHRM Standards of Conduct.<sup>13</sup> Violation of DOC Procedure 5-22 (Predecessor policy to Operating Procedure 130.1) is one example of a Group III offense. Falsification of records including reports is a Group III offense.<sup>14</sup>

### Falsification of report

The agency asserts that grievant's report of an assault (unwelcome physical contact initiated by a male inmate) was false because of: 1) an alleged contradiction between the two written statements submitted by grievant and, 2) because the Rapid Eye video recording does not show the assault.

The only two statements written by grievant that were submitted as evidence were the Disciplinary Offense Report and her Incident Report. Both statements describe the same incident and are consistent with each other. Both statements describe the conversation and the inmate's actions in an almost identical manner. There is no contradiction or inconsistency between the two written statements.<sup>15</sup> The video recording does not show the assault because of the camera angle. The recording shows only the inmate's lower legs during the time he accosted grievant in the stairwell.<sup>16</sup> The video does not show what the inmate was doing with his hands and arms, and does not show grievant until she comes down the stairs to the third level landing to bang on the door.<sup>17</sup> Accordingly, the video recording neither proves nor disproves whether the inmate grabbed grievant's arm and attempted to embrace her.

The investigator "concluded that officer A saw the inmate and grievant in the stairwell and there was no struggle." In fact, officer A's statement is that, when she put her camera on the stairwell, "I could not see above their waist. Then I turned around to look thru the sally port but all I could see were their feet.

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<sup>13</sup> Exhibit 5. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

<sup>14</sup> Exhibit 9. Section 5-10.17.B.2, Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

<sup>15</sup> The investigator's incident report refers to a statement (top of page 2) in which grievant purportedly said she pushed the inmate to the wall when she got away from him. The agency asserts that this contradicts the grievant's other written statements. However, the agency did not submit such a statement as evidence. When a party fails to submit a document that might prove its allegations, it is presumed that the document would not have been favorable to the party that had control of the document and could have submitted it.

<sup>16</sup> The investigator's incident report asserts that the video recording shows both the inmate and grievant facing each other during the encounter. As noted above, the video recording offered as evidence and viewed during the hearing shows only the inmate's lower legs during his encounter with grievant. From what little is visible, it is impossible to determine what the inmate was doing with his arms and upper body and what movements grievant may have been making.

<sup>17</sup> The video recording is valuable to show that the inmate deliberately waited several minutes for grievant to come down the stairwell, that he was acting suspiciously during this time, and that grievant promptly got away from him after the stairwell encounter.

I turned back around and proceeded working.” Officer A could not have seen the inmate assault grievant because officer A had turned away to perform her own work. Therefore, the investigator’s conclusion that there was no struggle because officer A didn’t see it is based on the faulty premise that officer A watched the entire incident.

Fortunately, there is other available evidence to resolve the question of whether an assault occurred. First, in addition to grievant’s two written reports, she gave a verbal account of the incident to the shift commander (captain). The shift commander’s written report of what grievant told him is consistent with grievant’s written reports. Second, grievant reported this incident immediately to another officer who corroborated her account that the inmate grabbed her arm. Third, and most significantly, the inmate testified during the hearing that he physically accosted grievant by embracing her on the stairwell. His admission of guilt is, by itself, sufficient to corroborate grievant’s accusation and to disprove the falsification charge against grievant. Accordingly, both grievant and the inmate have testified that the inmate initiated a physical encounter. Grievant avers that the inmate’s physical grappling was unsolicited and unwelcome. The available verbal and written reports of those involved, as well as those to whom it was reported immediately afterward, are consistent with a conclusion that the inmate assaulted grievant. The video recording is inconclusive as to the assault because it does not show anything other than the inmate’s lower legs. Therefore, a preponderance of evidence reflects that an assault did occur. The agency has not borne the burden of proof to demonstrate that it did not occur. The Group III Written Notice for falsification of a report must be rescinded.

### Fraternization

The agency asserts that a personal note supplied by inmate G (the same inmate who assaulted her) matches grievant’s handwriting. It is undisputed that the note contains personal information and suggests a relationship between the note’s author and the inmate. If a corrections officer wrote this note to the inmate, it would constitute a violation of Operating Procedure 130.1 because it is indicative of an improper relationship between an employee and an offender. The agency concluded that grievant wrote the note based on a comparison of the note with the handwriting on grievant’s Incident Report of May 2, 2005.

At first blush, the handwriting on the note looks similar to the handwriting on grievant’s incident report. Several letters appear to be written in the same way on both documents. However, other letters appear to be written differently on the documents. Still other letters, while appearing similar, appear to have been written in a forced or unnatural manner. The agency did not have a professional handwriting analyst examine the documents. Instead, the investigator concluded that grievant had written the note based on the similarity in handwriting.

It is, of course, *possible* that grievant wrote the note. However, it is also possible that one of six other female officers working in the building could have written the note. It is also possible that the inmate wrote the note by imitating grievant's handwriting. The inmate did not give this note to a sergeant until several days after the May 2<sup>nd</sup> incident, thus giving him ample time to prepare it. Certainly, the inmate had a motive to retaliate against grievant since she was the one who filed the assault charge against him. All of the agency witnesses who were asked testified that they had no knowledge of any relationship between grievant and the inmate, let alone the type of relationship suggested by the content of the note.

In some cases, the handwriting on two documents may be so identical that a lay person might reasonably conclude that they were written by the same person. This is not such a case. While there are similarities, there are a sufficient number of differences in letter formation that raise a question about whether the same hand wrote both documents. The agency's investigator in this case stated that during prior employment in the private sector some 18 years ago, he received training in handwriting comparison; however, he is not a certified handwriting analyst. In his report, the investigator offers neither a detailed comparison of the two documents nor an explanation of the obvious differences in the formation of many letters. He ventures only a conclusion that "the handwriting appears to be similar."

An *appearance of similarity* is not a preponderance of evidence. This hearing officer cannot conclude that grievant wrote the note to the inmate. On the other hand, the hearing officer also cannot conclude that grievant did not write the note. What the hearing officer must conclude, however, is that a mere appearance of similarity, without more, is not sufficient evidence to carry the burden of proof in this case.

### DECISION

The decision of the agency is reversed.

The Group III Written Notice issued on May 24, 2005 for falsification of a report is hereby RESCINDED.

The Group III Written Notice issued on May 24, 2004 for fraternization and grievant's removal from employment are hereby RESCINDED.

Grievant is reinstated to her position with full back pay (from which any interim earnings must be deducted), full benefits and seniority.



## 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. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> 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 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.<sup>18</sup> 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.<sup>19</sup>

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<sup>18</sup> 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).

<sup>19</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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