

Issue: Group III Written Notice with termination (creating the appearance of fraternization); Hearing Date: 08/08/06; Decision Issued: 08/10/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8393; Outcome: Grievant granted full relief



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8393

Hearing Date: August 8, 2006
Decision Issued: August 10, 2006

PROCEDURAL HISTORY

On May 5, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for creating the appearance of fraternization. On May 31, 2006, 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 he requested a hearing. On July 18, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 8, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 Officer at one of its facilities. He was employed by the Agency for approximately ten years. The purpose of his position was to "[p]rovide security and supervision of adult offenders." No evidence of prior disciplinary action against Grievant was introduced during the hearing.

The Facility is home to several thousand inmates. Grievant worked in housing unit 5 where approximately 300 inmates lived. Inmate D lived in housing unit 4.

On February 25, 2006 at 3:29 p.m., Inmate D made a monitored¹ call to someone named "Ted" who made a conference call connecting someone named Greg W.² Inmate D told Greg W that "dude is going to call you today." Inmate D tells Greg W dude's telephone number. The telephone number Inmate D mentioned was the cell phone number of Grievant. Inmate D tells Greg W that "it is official" and tells Greg W to

¹ An Intelligence Corrections Officer listened to Inmate D's calls several weeks after the calls were made.

² Inmate made this call from housing unit 4.

call dude and tell dude that he was calling for LB. Inmate D said dude was going to “send some Timberlands.” Timberlands is slang for marijuana.

On February 28, 2006 at 6:51 p.m., Inmate D made a monitored call to his sister who made a conference call to Greg W. Inmate D told Greg W that dude said Greg W had not called dude’s phone. Inmate D confirmed the telephone number. The number he confirmed was Grievant’s cell phone number.

The Agency began an investigation. During the investigation, Grievant denied giving his cell phone number to any inmate at the Facility and denied bringing in contraband to the Facility.

CONCLUSIONS OF POLICY

The Agency’s concern that one of its employees may be working with an inmate to bring contraband into the Facility is understandable. A free flow of contraband into a Facility can undermine the Agency’s ability to operate the Facility and ensure public safety. Inmates are not supposed to have the personal cell phone numbers of corrections officers. If Grievant had knowingly given, directly or indirectly, his cell phone number to Inmate D, disciplinary action would be appropriate. The Agency has the burden of proving Grievant engaged in such behavior.

The Standards of Conduct address employee “professional conduct and work performance.” Employees are responsible only for their own conduct and not the conduct of other employees or individuals over whom they have no control.

The fact that Inmate D had Grievant’s cell phone number is not in and of itself sufficient to show that Grievant engaged in conduct justifying the issuance of disciplinary action. In order to justify its disciplinary action, the Agency must identify Grievant’s inappropriate conduct. In this case, the Agency must show that Grievant provided his cell phone number to another person and knew or should have known that the cell phone number would be provided to an inmate. The Agency has not done so.

There is no evidence to show that Grievant gave his cell phone number to Inmate D or any other inmate. Inmate D informed the Investigator that he obtained the cell phone number from another unknown inmate. Assuming this is true, no evidence was presented showing how that other inmate obtained Grievant’s cell phone number. Grievant testified he did not know Inmate D and no evidence was presented to contradict his assertion. Grievant worked in housing unit 5 while Inmate D lived in housing unit 4. Inmates do not usually leave their housing units except on special occasions or to go to the recreation yard. No evidence was presented showing Grievant and Inmate D communicated with one another or had met the other. The likelihood Grievant would have encounter Inmate D appears to be low.

Grievant testified that he had given his cell phone number to several other employees at the Facility. Presumably, Grievant gave them his cell phone number so that they could contact him about his work schedule, other matters relating to the Facility, or for conversations relating to personal interests or friendships. No policy prohibits Grievant from providing his cell phone number to co-workers. Any one of these employees could have given Grievant's cell phone number to Inmate D or another inmate who gave the number to Inmate D. Inmate D or another inmate could have overheard any of these employee discussing calling Grievant on his cell phone number. Based on the evidence presented, it is equally likely that Grievant's co-workers transferred the cell phone number to an inmate. Grievant had no control over whether his co-workers retained his cell phone number in confidence. Grievant is not responsible if a co-worker somehow enabled an inmate to learn Grievant's cell phone number.

The Agency contends Inmate D confirmed Grievant's identity by (1) picking out his picture from a photo-lineup of six male corrections officers, (2) knowing Grievant's cell phone, (3) stating that "dude" was a corrections officer³, and (4) calling Greg W a second time to tell Greg W that dude told Inmate D that Greg W had not called dude.⁴ Inmate D did not testify at the hearing. His comments were presented through hearsay statements. The Hearing Officer gives less weight to written hearsay than he would to oral testimony because the Hearing Officer has the opportunity to assess credibility of a testifying witness and the opposing party has the opportunity to cross-examine the witness. All other things being equal, the Hearing Officer gives less weight to the testimony of a convicted felon⁵ than to someone not convicted of a felony. An individual who has been convicted of a felony is of such poor character that lying would be an insignificant act. Grievant, on the other hand, testified under oath that he did not know Inmate D and did not provide Inmate D with his cell phone number.

The Agency challenged Grievant's credibility because he refused to take a polygraph test to confirm his innocence. Grievant was asked to take a polygraph examination. He initially agreed to do so but later changed his mind.⁶ Grievant's refusal to take a polygraph examination is admissible into evidence even though the results of a polygraph examination would not be admissible.⁷ The Agency contends Grievant's refusal to take a polygraph shows he was involved in transporting

³ Inmate D referred to dude as "official blue suit." Corrections officers wear blue suits at the Facility.

⁴ The Agency also contends it found a page from Inmate D's telephone address book purporting to be Grievant's cell phone number. The Agency's exhibits show a photocopy of the address page with a telephone number similar to Grievant's number. The eighth number from the left, however, is not the same as Grievant's cell phone number.

⁵ See, *Va. Code* § 19.2-269.

⁶ Grievant waived his Miranda Rights prior to being interviewed by the Investigator.

⁷ *Va. Code* § 8.01-418.2.

contraband. The Hearing Officer finds this evidence unpersuasive.⁸ Grievant explained that he believed Inmate D should take a polygraph first because it was the inmate who made the allegation relating to Grievant. Thus, Grievant's refusal to take a polygraph is not evidence of the appearance of fraternization.

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 **rescinded**. The Agency is ordered to **reinstate** Grievant to his former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for annual and sick leave that the employee did not otherwise accrue.

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
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

⁸ Grievant argued that evidence of his failure to take a polygraph could not be admitted into evidence because of Va. Code § 40.1-51.4:4. Although this section prohibits admittance of "the analysis of any polygraph test charts", it does not apply to the Department of Corrections. Va. Code § 40.1-51.4:4 applies only to law enforcement agencies as defined in Va. Code § 9.1-500. Va. Code § 9.1-500 does not mention the Department of Corrections.

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 all of your appeals to the other party and to the EDR Director. 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.⁹

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.