Issues: Two Group III Written Notices with termination (falsifying records and fraternization); Hearing Date: 01/18/07; Decision Issued: 01/22/07; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8423; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8423

Hearing Date: January 18, 2007
Decision Issued: January 22, 2007

APPEARANCES

Grievant
Attorney for Grievant
Five witnesses for Grievant
Warden
Advocate for Agency
Three 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 two Group III Written Notices – one for falsification of records by colluding with others to fabricate a false charge

against an inmate,[1] and one for fraternization with an offender.[2] As part of the disciplinary actions, grievant was removed from state employment effective April 5, 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[3] The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant as a counselor for ten years. Grievant's performance has been rated satisfactory or better during the past three years.[4]

Agency policy prohibits improprieties or the appearance of improprieties, fraternization, or other nonprofessional association by and between employees and offenders. Associations between staff and offenders that may compromise security or undermine the employee's effectiveness to carry out his responsibilities may be treated as a Group III offense.[5] Grievant understood the fraternization policy. Agency policy provides that inmates are not to be held in a facility if they can more appropriately be assigned to a lower level facility and, once an inmate is approved for transfer, only the warden or superintendent has authority to remove the inmate from the transfer list.[6]

From time to time, inmates are transferred from one correctional facility to another for various reasons. Inmates who have demonstrated good behavior and who are deemed good security risks may be transferred to facilities with a lower security level. Inmate F became aware that he might he transferred to such a facility in the near future but did not want to transfer because he preferred living in a cell to living in a dormitory, and because he wanted to complete a GED (General Equivalency Diploma) program in which he was enrolled. He knew that one method of avoiding transfer was to incur a charge for a rule infraction. The inmate was assigned to grievant's caseload and, over several weeks he made grievant aware that he did not want to transfer and was willing to incur a charge to accomplish that goal.

On March 28, 2006, grievant asked a correctional officer to come to grievant's office. Grievant explained to the correctional officer that inmate F

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[1] Agency Exhibit 7. Group III Written Notice, issued April 5, 2006.
[2] Agency Exhibit 8. Group III Written Notice, issued April 5, 2006.
[3] Agency Exhibit 11. Grievance Form A, filed April 20, 2006.
[4] Grievant Exhibit 9. Performance Evaluations. [Evaluations older than three years old are too remote in time to be of any measurable relevance.]
[5] Agency Exhibit 9. 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 the Department's *Standards of Conduct and Performance*.
[6] Grievant Exhibit 6. Memorandum from Deputy Director to wardens, February 6, 2006. Prior to this date, counselors had authority to override transfers but the Deputy Director's memorandum restricted that authority to the wardens.

wanted to avoid a transfer by incurring a rule infraction charge. Grievant also discussed the deputy director's February 6, 2006 memorandum and the restrictions it imposed. The inmate came into the office during this conversation. Grievant suggested to the inmate and correctional officer that the inmate could commit a relatively minor offense that would nonetheless warrant a written charge by using vulgar language toward the correctional officer. Grievant told the correctional officer to return to his post at a gate and told the inmate to approach the correctional officer and use vulgar language. The correctional officer would then file a written charge against the inmate for vulgar language and that would hopefully result in the inmate's transfer being cancelled.

The scheme was carried out as planned. The inmate approached the correctional officer at the gate and made a vulgar comment to him ("Stop grabbing my f___ing nuts!"). Another corrections officer standing in the area became very upset and started to approach the inmate. The correctional officer who was in on the scheme told the other officer to back off because this was just a set-up.[7] He then wrote an incident report charging the inmate with the use of vulgar language and gave the report to his sergeant.[8] The incident report has disappeared; it is unknown how it disappeared or in whose custody the report was at the time of its disappearance.

On March 30, 2006, another counselor advised a parole and probation officer that she knew that an inmate on grievant's caseload was trying to have a charge fabricated. The probation officer advised her to promptly report this information to her supervisor. She did report and the matter was immediately referred up the line to the warden. The warden spoke with the probation officer, her supervisor, grievant, and the correctional officer. He then referred the matter to the Inspector General for a complete investigation. The special agent assigned to the case interviewed relevant people including the inmate. The inmate made two charges against grievant (later determined to be unsubstantiated) and confirmed that he and grievant had conspired with the correctional officer to generate a bogus charge against the inmate.[9] Grievant denied the two unsubstantiated charges but admitted to conspiring to stage an incident to fabricate a charge against the inmate.[10]

The inmate has subsequently been transferred to another facility. Discipline is pending but has not yet been imposed on the correctional officer who schemed with grievant.

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[7] Agency Exhibit 6. Written statement of other correctional officer who witnessed inmate using vulgar language, April 5, 2006.
[8] Agency Exhibit 5. Written statement of correctional officer, April 5, 2006.
[9] Agency Exhibit 4. Memorandum from special agent to warden, April 4, 2006.
[10] Agency Exhibit 3. Grievant's written statement to special agent, April 3, 2006.

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. In all other actions the employee must present his evidence first and must prove his claim by a preponderance of the evidence [11]

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

[11] § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

should warrant removal from employment.[12] The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section XII.A of the DOC *Standards of Conduct* addresses Group III offenses, which are defined identically to the DHRM *Standards of Conduct*.[13] Procedure 135.1 specifies that falsifying any records including reports and, violation of DOC Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders* are each Group III offenses.[14]

The agency has carried the burden of proof in this case because grievant admitted that he did scheme and direct the conspiracy that resulted in a bogus charge against an inmate.

Grievant correctly observes that the incident did not result in a breach of security. The warden testified that he felt there was a *potential* for a breach in security if the other correctional officer had tried to restrain the inmate and called for other security officers to come to the scene. While this potential did exist, there was no *actual* breach in security. Accordingly, the Written Notice which cited a breach in security is incorrect. Notwithstanding this error, the gravamen of the charge (falsification of a charge against an inmate in collusion with others) is correct and the agency has borne the burden of proof to demonstrate that charge.

Grievant contends that vulgar language is relatively commonplace from both correctional officers and inmates. Assuming this to be so, it is not the use of vulgar language that is at issue in this case. The issue is that grievant suggested the use of vulgar language as a mechanism by which an inmate could obtain a bogus charge and, moreover, conspired with an inmate and a correctional officer to fabricate a scenario whereby the inmate would deliberately use vulgar language in order to precipitate a charge.

Grievant argues that because the incident report charging the inmate with an offense has disappeared, grievant cannot be guilty of falsification. This argument is not persuasive for two reasons. First, the unrebutted evidence establishes that the report was, in fact, written. The officer who wrote the report testified that he wrote it, the witnessing correction officer corroborated that it was written,[15] and, the warden testified that the sergeant received the report. Accordingly, the fact that the report is not now available does not negate the fact that it was written. Second, grievant was not accused of falsifying the report but of fabricating the scheme to write a false report. Grievant has admitted to this charge on multiple occasions.

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[12] Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[13] Agency Exhibit 10. Operating Procedure 135.1*, Standards of Conduct,* September 1, 2005.
[14] Section XII.25, *Id*.
[15] Agency Exhibit 6. Other correction officer's written statement, April 5, 2006.

One of grievant's witnesses (a counselor) testified that she knew that some inmates were asking about getting a charge in order to avoid transfer. However, the counselor did not collude or cooperate with any inmate to facilitate them getting a bogus charge. Moreover, she reported to her supervisor that an inmate was attempting to generate a bogus charge. In contrast, when faced with the identical situation, grievant not only did not report inmate F, but he conspired with him to facilitate a charade of a bogus incident. It should also be noted that grievant had available an alternative course of action. Grievant could have gone to his supervisor and/or the warden and requested that the warden override the transfer for the reasons grievant has offered as his justification.

Grievant offered a witness who testified about an incident in which he lightly cuffed an inmate in a playful manner. The witness was counseled about the inappropriateness of his action but did not receive disciplinary action. Two other witnesses testified that they have not yet been disciplined for failing to make a required inmate count.[16] Neither of these incidents is similar to the instant case and, therefore, were given no evidentiary weight.

Fraternization can be a major problem in correctional facilities. When an inmate establishes a personal relationship with an employee, the inmate can use that relationship to persuade the employee to violate rules. It does not matter whether the relationship involves physical intimacy. For this reason, the agency has taken a very firm stand on disciplining fraternization infractions. In the instant case, grievant admitted to the warden that he cares too much about inmates. Grievant's participation in a scheme to fabricate a false charge against an inmate for the inmate's personal benefit corroborates that he indeed did care too much about inmate F. Such behavior is unprofessional conduct and fits within the parameters of fraternization as defined in agency policy.

What is most troubling about this case is that grievant admitted that he made the decision to fabricate the incident based on his own judgment that "no one would be hurt." Grievant thereby took upon himself the mantle of the warden's authority to override the transfer. When a subordinate makes a determination that is specifically reserved to a higher authority, he must accept the consequences. Moreover, in the paramilitary setting of a correctional institution, the chain of command is especially important. If grievant is allowed to bypass the warden's authority in this instance, it would set an unacceptable precedent for possible future policy violations.

Grievant asserts that he was motivated by doing what he believed was best for the inmate. He believed that the inmate would be better off staying in the same facility rather than being transferred elsewhere. Neither this hearing officer

[16] The warden testified that discipline is pending but has not yet been imposed in the missed count incident.

nor grievant is in a position to authoritatively make such a decision. Even if grievant was able to demonstrate that he is correct, his authority is limited to recommending – not overriding.

Finally, grievant argues that the charge against him should not have been bifurcated into two Group III Written Notices. One of the notices charges grievant with fraternization (by colluding with and, doing a favor for, the inmate) while the other charges grievant with falsifying a record by colluding with others to fabricate a false incident report. Because this entire episode was essentially one incident, the agency could have combined both charges into one written notice. On the other hand, DHRM has affirmed in the past that the *Standards of Conduct* does not prohibit an agency from bifurcating charges if there are separate and identifiable offenses. In this case, the issue is moot because both charges are Group III offenses, either one of which justifies removal from employment. The agency has proven that grievant's decision to collude with and do a favor for the inmate, despite his knowledge that he was violating policy, was unprofessional and a violation of the fraternization policy. The agency has also demonstrated that grievant was the primary originator and director of the scheme designed to fool facility administrators into thinking that the inmate had committed an infraction on his own without any assistance from employees. Part of the scheme involved the preparation of a false report. Although grievant did not wield the pen that wrote the report, he was the prime mover that resulted in it being written.

Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has both long service and an otherwise satisfactory performance record. The agency considered these factors but felt they were not sufficiently mitigating to reduce the disciplinary action.[17] Based on the totality of the evidence, the hearing officer concludes that the agency's disciplinary action was within the limits of reasonableness.[18]

[17] The warden testified that he was aware of grievant's length of service and good record but felt that the discipline was warranted under the circumstances.

[18] *Cf.* Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

DECISION

The decision of the agency is affirmed.

The two Group III Written Notices and grievant's removal from state employment effective April 5, 2006 are hereby AFFIRMED.

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 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 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.[19] 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.[20]

[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/David J. Latham

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David J. Latham, Esq.
Hearing Officer

[19] 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).

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