

Issues: Group III Written Notice (failure to report contraband), Group III Written Notice (fraternization), and Termination; Hearing Date: 05/28/08; Decision Issued: 06/03/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8865; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re

Case Number: 8865

Hearing Date: May 28, 2008
Decision Issued: June 3, 2008

PROCEDURAL HISTORY

On March 17, 2008, Grievant was issued a Group III Written Notice of disciplinary action for failing to report an inmate showing him what appeared to be marijuana. On March 17, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On March 17, 2008, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 5, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 28, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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 began working for the Agency on March 10, 2006. He was removed from employment effective March 17, 2008. Grievant had prior active disciplinary action. On January 31, 2008, Grievant received a Group II Written Notice for being convicted of driving while under the influence. Grievant presented evidence of other corrections officers who considered him to be a good co-worker.

On March 12, 2008, the Agency was investigating several inmates at the Facility. As part of that investigation the Agency, the Agency brought specially trained dogs into the Facility to search for drugs. One of the dogs "alerted" on Grievant. Grievant consented to a strip search. No drugs were found on Grievant during that search.

The Lieutenant conducted the strip search. During the search, Grievant told the Lieutenant that, "The only thing I ever done wrong was pass some magazines and coffee [to inmates]." Grievant removed from his shirt pocket a handwritten note he received from a Gang General on the previous work day. Grievant had placed the note in his shirt pocket and then "forgot about it". The note served as a "thank you note" and showed that the Gang General respected Grievant. The note stated:

I appreciate that for real. The Houseman¹ got the book list² with my mag in it. I can lay off you on moving things cuzz [I] know a lot of dudes be on you to do that. But I need that³. Respect. [nickname of Gang member]

On March 12, 2008, Grievant was interviewed by the Special Agent regarding the allegations Grievant was passing drugs or money to inmates. Grievant denied those allegations. The Special Agent asked Grievant about the note from a gang member. Grievant provided a written statement as follows:

I got the note from [Inmate S] in cell [number]. On March 7 or 8, 2008, I had given [Inmate S] some coffee. It was around 7 p.m. and I passed it to him with some paperwork. [Inmate S] then gave me the note, asking me to get the book list from the Houseman in [cell number right]. The book list had [Inmate S's] magazine in it and he wanted me to get it back. I didn't do that. I have passed magazines from one inmate to another one probably 2 different occasions and I have provided coffee once or twice. Again I have not brought money or drugs inside the prison for inmates. [Inmate B] did show me a small plastic bag that looked like marijuana and he told me that a female officer ... had brought the marijuana in. *** I did not report the marijuana to anyone because I didn't think they would believe me and if they searched [Inmate B's] cell and didn't find it I'd look like a fool. ***

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."⁴ Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."⁵ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁶

¹ The Houseman is an inmate who has greater freedom to move about the Facility than do other inmates.

² The booklist consists of several pages containing the names of the books available to inmates from the library. Because the inmates at this Facility do not often leave their living areas, they select books to read using the booklist. The booklist is passed from one inmate to another. Some inmates conceal contraband inside the booklist so that the contraband may be passed to another inmate.

³ Inmate S is referring to the booklist when he writes "that".

⁴ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁶ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(25), *Standards of Conduct*, states that Group III offenses include “[v]iolation of DOC Procedure 130.1, *Rules of Conduct Governing Employees’ Relationships with Offenders*.

Fraternization is defined as:

The act of, or giving the appearance of, association with offenders, and/or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include excessive time and attention given to one offender over others, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing staffs’ personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.⁷

Black's Law Dictionary (6th edition) defines "associate", in part, "Signifies confederacy or union for a particular purpose, good or ill." Webster's New Universal Unabridged Dictionary defines "associate", in part:

2. to join as a companion, partner, or ally: *to associate oneself with a clause.* *** 5. To keep company, as a friend, companion, or ally: *He was accused of associating with known criminals.* 6. to join together as partners or colleagues. *** 8. a companion or comrade: *my most intimate associates.* 9. a confederate; an accomplice or ally: criminal associates.

Group III Written Notice Regarding Marijuana

The Agency contends Grievant fraternized with Inmate B because he failed to report that he had observed Inmate B holding up a bag of marijuana. The Agency has not established that this behavior constitutes fraternization with an inmate. Grievant's failure to report his observation was not because of his relationship or association with Inmate B, but rather was because he did not think anyone would believe his allegation and if his allegation was proven wrong, he would appear to be a fool. In short, Grievant's failure to report was not in furtherance of any relationship he had with Inmate B.

Grievant's Post Order required him to:

Contact your Building Supervisor about anything that you are unsure of or anything not covered in this post order. Do not assume anything.

⁷ Virginia Department of Corrections Operating Procedure 130.1(III), *Rules of Conduct Governing Employees’ Relationships with Offenders*.

Grievant was unsure of how to respond after Grievant observed Inmate B holding up a bag of marijuana in his cell. Grievant should have complied with his Post Order and reported his observation along with his uncertainty of how to respond to the Building Supervisor. Grievant's failure to do so amounted to a failure to comply with established written policy. Failure to follow established written policy is a Group II offense. Accordingly, the Group III Written Notice regarding and inmate's display of marijuana must be reduced to a Group II Written Notice.

Group III Written Notice Regarding Magazines and Coffee

Grievant fraternized with Inmate S by providing him with coffee and magazines in his cell at times when he was not entitled to have those items. Those items were contraband. Grievant knew or should have known he could not pass contraband to an inmate because doing so was prohibited behavior. By passing contraband to Inmate S, Grievant established his association with that inmate. That relationship was confirmed by the "thank you" note that Inmate S gave to Grievant. The note stated that Inmate S had respect for Grievant. The testimony showed that inmates do not often have or express respect for corrections officers. By writing that he had respect for Grievant, Inmate S revealed that he considered Grievant to be different from the other corrections officers because of Grievant's behavior towards Inmate S. The Agency has presented sufficient evidence to support the issuance to Grievant of a Group III Written Notice for fraternization. Upon the issuance of a Group III Written Notice, the Agency may remove Grievant from employment.

Grievant contends that he did not pass coffee or magazines to any inmates. He asserts that his statements to the Special Agent and to the Lieutenant were untrue. He was motivated to make the statements because he was scared. Grievant had been suspected of bringing drugs and money into the institution. Presumably Grievant confessed to a lesser behavior in order to bolster the credibility of his denial of having engaged in more serious behavior such as bringing drugs or money into the institution. Grievant's argument fails. The Agency is entitled to rely upon the statements of its sworn employees. The Agency's assertion that Grievant fraternized is supported by the "thank you" note Grievant held in his pocket. Inmate S would not have given Grievant such a note unless the inmate perceived a relationship with Grievant. Inmate S's note is evidence independent of whether Grievant was scared. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for fraternization despite Grievant's denial.

Grievant contends the disciplinary action should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..."⁸ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to

⁸ *Va. Code § 2.2-3005.*

the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary actions.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action regarding an inmate's display of marijuana is **reduced** to a Group II Written Notice. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for fraternization within inmate by providing that inmate with coffee and magazines is **upheld**. The Agency's removal of Grievant from employment 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
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 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.