

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 07/11/11; Decision Issued: 07/13/11; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9628; Outcome: Full Relief.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9628

Hearing Date: July 11, 2011
Decision Issued: July 13, 2011

PROCEDURAL HISTORY

Grievant was a corrections officer for the Department of Corrections (“the Agency”), with 6 years of service. On February 2, 2011, the Grievant was charged with a Group III Written Notice for fraternization. The discipline was job termination. The Grievant had no other active Written Notices.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On June 13, 2011, the Department of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. A pre-hearing conference was held by telephone on June 14, 2011. The hearing ultimately was scheduled for the first date available between the parties and the hearing officer, July 11, 2011, on which date the grievance hearing was held, at the Agency’s facility.

Both the Agency and Grievant submitted documents for exhibits that were, without objection from either side, accepted into the grievance record, and they will be referred to as Agency’s or Grievant’s Exhibits, respectively. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Grievant
Representative and Witnesses for Agency
Advocate for Agency

ISSUES

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?

The Grievant requests rescission or reduction of the Group III Written Notice, reinstatement and back pay.

BURDEN OF PROOF

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, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

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.

The Agency's Standards of Conduct, Operating Procedure 135.1, defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 7. An example of a Group III offense is fraternization or

non-professional relationships with offenders, and violations of Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships with Offenders.

The Agency's Operating Procedure 130.1, rules of Conduct Governing Employees Relationships with Offenders, provides, at Section V.B., "Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited." Section V.C. provides that employees' "[i]nteractions shall be limited to the employee's assigned job duties." Section V.E. provides "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 of the region involved, and for good cause shown or for professional reasons." Fraternization is defined in the definitional section, Section III, as

The act of, or giving the appearance of, association with offenders, or their family members, that extends to unacceptable, unprofessional and prohibited behavior.

(Examples omitted.) Agency Exh. 4.

When issuing a Group III Written Notice, management should issue such notice as soon as practical, and discipline shall normally take the form of the notice and removal or notice and up to 30 workdays maximum suspension without pay. Operating Procedure 135.1, ¶ XII.C.1.; Agency Exh. 7.

Section VI (B) of the *Rules for Conducting Grievance Hearings* provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge." EDR's rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer. In addition, the *Rules* provide that "Any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing." Under the grievance procedure, charges not set forth on the Written Notice (or an attachment thereto) cannot be deemed to have been qualified. Thus, such unstated charges are not before a hearing officer. EDR Ruling # 2010-2621 (May 21, 2010).

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a corrections officer, with 6 years of service. The Grievant has no other active disciplinary actions, with a performance review history establishing a contributor rating. Agency Exh. 3; Grievant Exh. 10. The Written Notice charged:

Fraternization. You admitted to incidents of giving candy, writing pens and gum to incarcerated offenders at [Agency's facility] on January 21, 2011 to the Special Investigative Unit. This is a violation of Policy 135.1, Standards of Conduct, and

DOC Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships with Offenders.

At hearing, the special investigator testified that, following a rumor that the Grievant had given tobacco to offenders, an investigation ensued that included an interview of the Grievant. Although the tobacco suspicion was found to be unsubstantiated, the investigator testified that the Grievant, during his interview on January 19, 2011, admitted to giving writing pens to offenders at some unspecified time. The Grievant's handwritten statement from that interview stated:

I have never given an inmate tobacco or any cigarettes or any other contraband.

The Grievant voluntarily submitted to a polygraph examination on January 21, 2011. The polygraph examiner reported to the special investigator that the Grievant verbally admitted to the examiner having given pens, candy and gum to inmates. Agency Exh. 2.J. The polygraph examiner did not testify at the grievance hearing.

The Grievant provided another handwritten statement on January 21, 2011, in which he wrote (*sic*):

During my time working here, I never give any things to inmates (including pen and candy if I remember and the best to my knowledge). For the contraband's allegation bring against me, that's baseless hard evident. Though what test or any question, I failed. The officers and offenders don't like me, I'll take into account/understand. I wish to cover/collaborate (more) or explain to you more. However, what I can be assisted I am more than happy to do so.

Adding to the circumstances, the special investigator testified that another corrections officer questioned why the Grievant was occasionally in the inmates' living quarters without any apparent assignment. Agency Exh. 2.E. This circumstance presented opportunity for the Grievant to deliver to offenders any contraband. The corrections officer making the allegation did not testify at the grievance hearing. The facility warden testified that based on the Grievant's admission and the Agency's zero tolerance of fraternization, the Group III and job termination was justified.

The Grievant testified that he did not give or deliver any contraband to offenders. He testified that, through questioning, the agents tried to put words in his mouth. It is apparent that English is not the Grievant's native language, and there is obviously a language divide. While there is evidence that the special investigator heard verbally from the Grievant what he deemed an admission, the Grievant adamantly denied he made such admission and his contemporaneous handwritten statements are corroborative of the Grievant's assertions rather than the special investigator's.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and

managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. See, e.g., *Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting *Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy... "the hearing officer reviews the facts *de novo*... as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

As referenced above, the offense of fraternization falls squarely within the Group III category of offenses. The Agency, however, has the burden of proving fraternization. The discipline was based on equivocal evidence of a doubtful admission. The Grievant has denied he actually made an admission, and the hearing officer finds his denial credible, especially in light of the language deficiency.

The Agency presented no independent testimony of inmates involved, dates of occurrences or nature of contraband allegedly provided by the Grievant. The Grievant testified credibly that he neither provided contraband to inmates nor admitted he did so. The special investigator testified that he genuinely believed the Grievant admitted the offending conduct, but the admission had no specificity as to when and to whom contraband was given. In the totality of circumstances, the admission was unclear, at best.

Based on the manner, tone, and demeanor of the witnesses, I find the Grievant to be credible. The hearing officer cannot, on the face of interview summaries from non-testifying persons, weigh the credibility of the witnesses; they cannot be cross-examined, nor their recollections probed. While the Agency may point to certain corroborating circumstantial information to support its conclusions, the weight of such evidence does not overcome the Grievant's testimony. The Agency has the burden to show convincing information beyond equipoise. When there are conflicting, credible accounts regarding a situation or issue, the charging party needs to show a reliable basis on which to conclude the offense occurred.

The testimony of the Agency witnesses seemed to indicate that a major concern with the Grievant was that he accessed inmate quarters without apparent assignment to do so, giving some appearance of fraternization. However, the Written Notice did not address such conduct.

Since the Grievant's access to inmates is not the issue, then the question is whether the Grievant provided contraband to offenders, and the evidence does not preponderate in proving that assertion. There is insufficient evidence to find that the Grievant committed the misconduct alleged in the Written Notice. Without more, the Agency has not borne its burden of proving an inappropriate non-professional relationship as charged.

The Agency has presented insufficient evidence to support the issuance of the Group III Written Notice. Accordingly, the disciplinary action must be reversed.

It is reasonable for the Agency to discipline an employee based on the conclusions of an internal investigation, and the warden here acted accordingly and issued reasonable discipline in the face of the conclusions his agency presented to him. However, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. I find the Grievant's testimony to be at least as credible as the contrary information and conclusions charged by the internal investigation. The evidence presented at the grievance hearing did not show by a preponderance of the evidence that the Grievant violated applicable policy. As charged, the Written Notice does not comport with evidence presented at the hearing. For this reason, I find that the Agency's case does not meet its burden of establishing the charged misconduct.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action and termination is **reversed and 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 leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to

ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer