

Issues: Group III (failure to follow policy – contraband), Group III (unauthorized removal of State property), Group III Written Notice (failure to follow policy – passing notes to inmates), and Termination; Hearing Date: 01/28/14; Decision Issued: 02/13/14; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 10223; Outcome: Partial Relief.

## **DECISION OF HEARING OFFICER**

**IN RE: CASE NO.:** 10223

**HEARING DATE:** January 28, 2014

**DECISION ISSUED:** February 13, 2014

### **PROCEDURAL HISTORY**

On September 19, 2013 Grievant was questioned during an ongoing investigation in which he had been implicated. On that day Grievant took a polygraph test and consented to a search of his vehicle. Also, on that day, Grievant read and signed a report indicating his acknowledgement of wrongdoing.<sup>1</sup> On September 24, 2013 Grievant met with the Assistant Warden in order to respond to the allegations regarding his behavior.<sup>2</sup> On October 4, 2013 Grievant was issued three (3) Group III Written Notices for bringing contraband into the facility, for removing state property without permission from the facility, and for passing items (“kites”) between inmates.<sup>3</sup>

Grievant timely filed a grievance to challenge the Agency’s action. On November 21, 2013 a hearing officer was assigned to the case. On December 9, 2013 a pre hearing conference with Grievant and Agency’s advocate was held at which time the matter was set for January 7, 2014. On January 3, 2014 there was an additional phone conference regarding discovery requested by Grievant. The January 7, 2014 hearing date was moved at the request of Agency’s Advocate who was ill. The case was reset for January 22, 2014 and was continued due to bad weather to January 28, 2014 at which time the matter was heard.

### **APPEARANCES**

Agency advocate  
Agency representative as witness  
Two additional Agency witnesses  
Grievant advocate  
Grievant as witness  
Six additional Grievant witnesses

### **ISSUES**

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<sup>1</sup> Agency Ex. 1 and 2

<sup>2</sup> Agency Ex. 4

<sup>3</sup> Agency Ex. 5, 7 and 8

1. Did Grievant violate Operating Procedure 135.1 and DOC Offense Code 13 by bringing contraband (tobacco) into the facility as described in the Written Notice?<sup>4</sup>
2. Did Grievant violate Operating Procedure 135.1 and DOC Offense Code 72 by removing state property from the facility without authorization as described in the Written Notice?<sup>5</sup>
3. Did Grievant violate Operating Procedure 130.1 and Offense Code 13 by passing items from one offender to another as described in the Written Notice?<sup>6</sup>
4. Did the three (3) Written Notices clearly state offenses?
5. Was there sufficient evidence of disparate disciplinary action to reduce or remove Grievant's discipline?
6. Were proper steps followed in issuing Written Notices?
7. Did the Warden have a bias in issuing discipline?<sup>7</sup>

### **BURDEN OF PROOF**

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 is to be proved is more probable than not. G.P.M. § 9. Grievant has the burden of proving any affirmative defenses raised by Grievant GPM § 5.8.

### **APPLICABLE LAW AND POLICY**

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq, the Rules for Conducting Grievances effective July 1, 2012 and the Grievance Procedure Manual (GPM) effective July 1, 2012.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination." Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the Agency and the fact that the potential consequences of the performance or misconduct substantially exceeded Agency norms.

Other procedures or offense codes pertinent to this case are:

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<sup>4</sup> Agency Ex. 3 and 5 offense code 13

<sup>5</sup> Agency Ex. 3 and 7 offense code 72

<sup>6</sup> Agency Ex. 9 and 8 offense code 13

<sup>7</sup> Issues 4,5,6 and 7 are Grievant's verbal motions in his defense and Grievant Ex. 1,2,3 and 4

Operating Procedure 135.1: pg 9 D2 (d);<sup>8</sup> pg 10 D2 (gg)<sup>9</sup>

Operating Procedure 130.1<sup>10</sup>

DOC Offense Codes 13 and 72<sup>11</sup>

Operation Procedure 135.1 outlines the steps to assure Grievant has ample opportunity to know of the charges against Grievant and to respond to those charges. Normally three (3) elements are recognized, an investigation and investigative findings made known to Grievant, an opportunity for Grievant to respond to the allegation, and a Written Notice of Agency's discipline.

### **FINDING OF FACTS**

After reviewing the evidence presented and observing the demeanor of each witness the hearing officer makes the following finding of fact:

All three (3) charges against Grievant were clear written descriptions and further referred to in Operating Procedure Standards of Conduct and Department of Corrections Offense Codes as related to each offense. Grievant admitted to all three (3) charges in an investigative report that was read and signed by Grievant. The testimony of the Agency's investigator and the Assistant Warden collaborated Grievant's admission of wrongdoing. There were four (4) meetings with Grievant on September 19, 2013, September 24, 2013, September 30, 2013 and October 4, 2013 which satisfied the procedural steps providing Grievant with information and opportunity to respond. Further sworn testimony of the Assistant Warden stated that Grievant verbally admitted all three (3) charges to the Assistant Warden.

Grievant admitted in his testimony that he did have a tobacco product inside the facility for personal use. He did admit to removing a laundry bag owned by the facility for personal use. He admitted to passing notes among offenders stating he did not examine them and did not know the content.

Grievant's witnesses gave testimony regarding passing items between offenders by Correction Officers. All four (4) of Grievant's witnesses stated some items such as library books were passed with the knowledge of the Agency. These witnesses further stated that they never passed notes ("kites"). Grievant produced another witness who had been disciplined for having a tobacco product within the facility and produced evidence that this person received only probation and not a five (5) day suspension as issued to Grievant.<sup>12</sup>

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<sup>8</sup> Agency Ex. 3

<sup>9</sup> Agency Ex. 3

<sup>10</sup> Agency Ex. 6

<sup>11</sup> Agency Ex. 5 and 7

<sup>12</sup> Grievant Ex. 2 and 3

## OPINION

Grievant admitted to all three (3) charges. Each of these charges could be serious offenses in a prison setting. The most serious charge was the passing of notes (“kites”) from one inmate to another by the Corrections Officer. This offense was disciplined as a Group III offense with a disciplinary action of termination. The Agency has proven its case chiefly by the Grievant’s own statements.

## MITIGATION FACTORS

Grievant gave several reasons for his believe that his discipline should be reduced. Grievant did have a good thirteen and a half (13 ½) year employment record and attendance record. Agency stated that they did consider this before issuing the termination.

Grievant was charged with a Group III five (5) day suspension for use of tobacco or bringing tobacco into the facility. Grievant did produce a witness who stated he had brought tobacco into the facility and received only a probation period. While Agency attempted to distinguish this behavior their testimony was not convincing.

Grievant contended that the passing of items between offenders by Correction Officers was condoned by the Agency. Grievant produced four (4) witnesses in regards to this issue. All four (4) witnesses stated that some items were passed such as library books with the Agency’s knowledge. However, each stated that they never passed notes (“kites”). One of Grievant’s witnesses further testified that in his opinion it would never have been acceptable for (“kites”) to be passed. Grievant further argued he received disparate treatment when comparing himself passing notes to that of an Officer who had passed a towel to an Offender from a cell where two were mistakenly given.<sup>13</sup> This was not a valid comparison which was sufficiently distinguished by the Agency

Grievant suggested that the Warden of the facility had a conflict in being involved in his discipline since it was alleged one of the passed notes involved harm to the Warden or his family. There was never any allegation or evidence presented that connected Grievant to any specific note being passed that regarded the Warden.

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<sup>13</sup> Grievant Ex 4

Grievant admitted in a signed document as to actions sufficient to warrant Written Notices. Grievant now argues that the Written Notices were not specific enough to warrant discipline and alternately argues one notice was so specific that the Warden needed to recuse himself from the matter. Neither alternative claim is justified by examination of the three (3) Written Notices.

Grievant further argued that he received disparate treatment for his possession of tobacco product in the facility. It is agreed Grievant produced sufficient evidence that will cause the hearing officer to reduce this particular discipline.<sup>14</sup>

Grievant finally argues his good record of thirteen and a half (13 1/2 ) years should be considered. Grievant's Group III for unauthorized removal of state property without permission had no disciplinary action attached. However, Grievant's past record should reduce this infraction to a Group II, "unauthorized use of state property" as Grievant's excuse for having the bag seemed plausible and not intended for permanent removal or any action dangerous to the facility.

## DECISION

For the above reasons the three (3) Group III disciplinary actions will be decided as such:

1. As to carrying a tobacco product into the facility the Group III disciplinary action is **reduced** to a Group I with a probationary period similar to that which was given to Grievant's witness.
2. As to removing state property without permission the Group III disciplinary action is **upheld** with no further action taken.
3. As to passing items ("kites") among and between offenders the Group III disciplinary action with termination 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 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

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<sup>14</sup> Testimony and Grievant Ex. 2 and 3

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.<sup>15</sup>

[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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Sondra K. Alan, Hearing Officer

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<sup>15</sup> Agencies must request and receive prior approval from EDR before filing a notice of Appeal.