

**Group III Written Notice with Termination (fraternization and unauthorized use of State property and records); Hearing Date: 04/25/17; Decision Issued: 05/13/17; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 10991; Outcome: No Relief - Agency Upheld.**

**COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

**In the matter of: Grievance Case No. 10991**

**Hearing Date: April 25, 2017  
Decision Issued: May 13, 2017**

**PROCEDURAL HISTORY**

Grievant was issued a Group III Written Notice with termination on February 27, 2017. The Written Notice set forth Written Notice Offense Codes 55 ("Fraternization ...") and 51, ("Unauthorized use of state property or records") and alleged violations of OP 135.2 - *Rules of Conduct Governing Employees Relationships with Offenders*, OP 310.3 - *Offender Access to Information Technology*, and OP 310.2 - *Information Technology Security*.<sup>1</sup>

Grievant grieved issuance of the Group III Written Notice with termination and matters were ultimately qualified for a hearing. Undersigned was appointed Hearing Officer effective March 27, 2017. A pre-hearing telephone conference was held on March 29, 2017 and a hearing was held on April 25, 2017 at Facility.

**ISSUES**

1. Whether the Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the disciplinary action taken by the Agency 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 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 action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.<sup>2</sup>

<sup>1</sup> A. Tab 1.

<sup>2</sup> Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

## HEARING and EXHIBITS

The following appeared at the April 25, 2017 grievance hearing:

Grievant (who was a witness)  
Grievant's attorney  
Agency advocate  
Agency Party Representative at Hearing (who was a witness)  
Witnesses

By agreement of the parties, exhibits were admitted *en masse*. One Joint Exhibit was admitted, by agreement, at hearing. Exhibits admitted consist of:

Grievant's Exhibits - page numbered 1- 10.  
Agency's Exhibits - tab numbered 1 through 13.  
Joint Exhibit - OP 135.1- Standards of Conduct (effective date October 1, 2015)

## FINDINGS OF FACT

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

01. Facility is a correctional treatment center operated by Agency providing mental health services to offenders. Facility had one full time instructor/teacher, Grievant.<sup>3</sup>

02. Grievant was employed by Agency as an Adult Education/GED Instructor at Facility since March 25, 2014. Grievant worked with offenders including non-readers, offenders preparing for their GED, and offenders taking correspondence/distance learning courses from colleges. Grievant had no oral or written disciplinary actions prior to 2/27/17.<sup>4</sup>

03. Principal supervises three correctional center's educational programs, including Facility where Grievant was employed, and was Grievant's supervisor.<sup>5</sup>

04. Academic instructors Principal supervises, including Grievant, had permission to e-mail offenders' class assignments to certified programs providing distant learning courses to offenders.<sup>6</sup>

05. Inmate is an offender incarcerated at Facility. Inmate is a tutor to other offenders receiving instruction at Facility and has regular contact with Grievant. Inmate was taking a distant learning college level course work from a certified program providing distant learning courses to offenders. Grievant acted as Inmate's Proctor regarding such distant learning course matters.<sup>7</sup>

06. Grievant, with Agency permission, e-mailed Inmate's class assignments to Inmate's distant learning School prior to 12/29/16.<sup>8</sup>

07. On December 29, 2016, Grievant sent an e-mail with six attachments to Inmate's mother, having been previously requested to do so by Inmate. There were six attachments transmitted with the e-mail. The attachments were labeled in the e-mail as:

Assignment #1 .docx  
Assignment #2 .docx

<sup>3</sup> Testimony.

<sup>4</sup> Testimony.

<sup>5</sup> Testimony.

<sup>6</sup> Testimony.

<sup>7</sup> Testimony.

<sup>8</sup> A. Tabs 2, 9, 10 and Testimony.

Email .docx  
Intro Letter .docx  
[Name] .docx  
Scan0026 .pdf<sup>9</sup>

The six attachments contained documents related and not related to Inmate's education. The contents the attachment are summarized as:

**Assignment #1** - document related to distant learning class work

**Assignment #2** - document related to distant learning class work.

**Email** - letter from Inmate to his mother with Director's e-mail address and instructions.

**Intro Letter** - letter dated 11/14/16 from Inmate to his distant learning instructor.

**[Name]** - letter from Inmate to Director.

**Scan 0026** - nine pages of documents further summarized as:

1. Facility Weekly Menu - Week 1. with handwritten notes notes and further indicates as " Starts 12/25".
2. Informal Complaint form - marked received 8/30/16 and with withdrawal of informal complaint dated 8/31/16.
3. Informal Complaint form - marked received 8/30/16 and with withdrawal of informal complaint dated 8/31/16.
4. Informal Complaint form - marked received 10/4/16.
5. Informal Complaint form - marked received 8/30/16 and with withdrawal of informal complaint dated 8/31/16.
6. Facility Weekly Menu form - Week 4 with handwritten dates 8/28 - 9/3.
7. Facility Weekly Menu form - Week 1 with handwritten dates 9/4 - 9/10.
8. Facility Weekly Menu form - Week 2 with handwritten dates 9/11 - 9/17.
9. Facility Weekly Menu form - Week 3 with handwritten dates 9/18 - 9/24.<sup>10</sup>

08. Inmate's letter to his mother was dated 12/29/16 and was attached to Grievant 12/29/16 e-mail to Inmate's mother. Inmate's letter stated:

Here is a document with attachments I would like you to forward to [Director] his e-mail address is [redacted], I believe this is the best way to keep it from being intercepted. You can write a brief note explaining that you are simply forwarding a typed letter in my behalf. Make sure to eliminate any e-mail references from here. ...<sup>11</sup>

09. Inmate's three page typed letter to Director of Food Services ("Director") was dated 12/29/16 and was e-mailed 12/29/16 by Grievant to Inmate's mother. Inmate's letter addressed his concerns as to issues with Food Services at Facility and prior Informal Complaints.<sup>12</sup>

10. Inmate's mother e-mailed Director copies of Inmate's letter to Director and the nine pages of documents, which included five weekly menus and four informal complaints, all of which Grievant had e-mailed her on 12/29/16.<sup>13</sup>

11. On or about January 3, 2017 DOC Administrator and Director notified Warden that Director had received an e-mail letter with an attached PDF file from the mother of a person incarcerated at Warden's facility. On January 3, 2017 Director sent an e-mail to Warden which included a direct quote from the e-mail he received from the inmate's mother stating:

[Inmate] is a tutor in a classroom there and the teacher sent me an email with the above attachments of which I am forwarding."

Director expressed concern in his 1/3/17 e-mail, "the DOE teacher is doing something inappropriate". Director's e-mail further stated he would leave it up to Warden's facility to investigate and stated he would have a named individual look in the the Food Service allegations.<sup>14</sup>

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<sup>9</sup> A. Tabs 7, 8, and 9, and Testimony.

<sup>10</sup> A. Tab 8.

<sup>11</sup> A. Tab 8.

<sup>12</sup> A. Tab 8.

<sup>13</sup> A. Tabs 7, 8, 9, and Testimony.

<sup>14</sup> A. Tabs 7 and 9 and Testimony.

12. Director's 1/3/17 e-mail gave rise to Warden assigning Institutional Investigator ("Investigator") to conduct an investigation of matters related to an Agency employee contacting an offender's family member by e-mail as Director raised to Warden. An investigation was conducted and on 1/31/17 Investigator filed a written report concluding:

... a preponderance of the evidence shows that significant policy violations occurred. The facts gathered during the process of the investigation show that [Grievant] was grossly negligent in not inspecting the documents that were attached to an e-mail message that he authored and sent to an incarcerated offender's family member. According to [Grievant's supervisor], [Grievant] was not authorized to contact the Offender [name's] mother. These incidents are in violations of Operating Procedure 135.2 *Rules of Conduct Governing Employees Relationships with Offenders* and Operating Procedure 310.3 *Offender Access to Information Technology*. Taking this information into account, I have determined this investigation to be substantiated.<sup>15</sup>

13. On 2/27/17 Grievant was issued a Group III Written Notice with termination (Offense date 12/29/16). The Written Notice alleged "Fraternization with patient/inmate/client ...", "Unauthorized use of State property or records" (Written Notice Offense Codes 55 and 51) and violations of:

- DOP 135.2 - *Rules of Conduct Governing Employees Relationships with Offenders (including Fraternalization, Improprieties, and Special Privileges);*
- DOP 310.2 - *Information Technology Security*
- DOP 310.3 - *Offender Access to Information Technology*

The Written Notice alleged a violation of procedures when Grievant authored and sent an e-mail to an offender's family member on 12/29/16. Furthermore, the Written Notice stated, in pertinent part:

... You admitted that you sent assignments to the offender's mother, which you stated that your supervisor approved. However, the Principal confirmed that teachers have never been given permission to contact the parents of offenders. You alleged that the additional attachments to your email, which included a letter from the offender outlining his concerns with Food Service, weekly menus at the facility, informal complaints, and instructions the offender wrote his mother to email the Food Operations Director [name], were not inspected by you before you emailed them. You stated that you saved the attachments from the Division of Education server yet you denied knowingly scanning these documents. ...<sup>16</sup>

## CONCLUSIONS

### *OP 135.1*<sup>17</sup>

The Department of Corrections, pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department. The *Standards of Conduct* (Operating Procedure Number 135.1, Effective Date: October 1, 2015) divide unacceptable behavior into three groups according to the severity of the behavior, Group I being the least severe and Group III being the most severe.

Group III offenses include acts and behavior of such a serious nature that a first occurrence normally would warrant termination. Examples of Group III offenses include violation of the *Rules of Conduct Governing Employees Relationships with Offenders*.

Furthermore, § IV. of OP 135.1 provides that the list of offenses contained therein is illustrative and not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be

<sup>15</sup> A. Tab 9.

<sup>16</sup> A. Tab 1.

<sup>17</sup> A. Tab 3.

considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the Operating Procedure based on the severity of the offense.

**OP 135.2<sup>18</sup>**

OP 135.2 - *Rules of Conduct Governing Employees Relationships with Offenders* (Effective November 1, 2016) establishes rules of conduct that employees will observe when interacting with offenders under the direct supervision of the Virginia Department of Corrections and is applicable to all units operated by the DOC.

“Fraternization” is defined in OP 135.2 as “Employee association with offenders, or their family members, outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior...”. Except for preexisting relationships (addressed within OP 135.2) fraternization is prohibited. This OP provides that fraternization should normally be treated as a Group III offense under OP 135.1 unless surrounding circumstances and mitigating factors are present that warrant a reduction in the disciplinary action.

§ IV. B. of OP 135.2 Professional Conduct - provides Employees of the DOC shall exercise professional conduct when dealing with offenders to ensure the security and integrity of the correctional process. Additionally, standards for vigilance are set forth stating employees are expected to be alert to detect and prevent escapes from custody or supervision, or violations of departmental operating procedures.

§ IV C. 2. of OP 135.2 *Improprieties* - provides associations between staff and offenders that may compromise security, or undermine the employee’s ability to carry out their responsibilities may be treated as a Group III offense under Operating Procedure 135.1, *Standards of Conduct*.”

§ IV C. 3. of OP 135.2 *Special Privileges* of OP 135.2 provides employees shall not extend or promise an offender special privileges or favors not available to all persons similarly supervised, except as provided for through official DOC channels.

**OP 310.3<sup>19</sup>**

OP 310.3 - *Offender Access to Information Technology*, provides that offenders shall only be permitted to use IT resources to perform approved job assignments, educational, instructional, research, and specific career and technical educational duties as defined in this operating procedure. This OP additionally provides that offenders are strictly prohibited from unauthorized internet access and offender internet access shall be strictly controlled and monitored at all times.

Furthermore, § IV. B. 5. of OP 310.3 provides Offender shall not have direct, unsupervised access to output and storage peripherals such as printers, scanners, DVD burners, and copy machines unless to perform specific educational or job task. This OP additionally provides Offenders must be under constant sight supervision of DOC staff when performing such tasks and DOC staff should inspect printed or copied items to guard against misuse of DOC resources.

**OP 310.2<sup>20</sup>**

§ VI. B. 5, of OP 310.2, *Information Technology Security*, provides, among other matters, “The Organizational Unit Head will ensure employees, contractors, volunteers, interns, and authorized users shall NOT allow offenders to have access (supervised or unsupervised) to any DOC Information Technology Resource connected to the agency’s network/systems, or resource that can access the

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<sup>18</sup> A. Tab 4.

<sup>19</sup> A. Tab 5.

<sup>20</sup> A. Tab 6.

internet". This OP also provides offenders are strictly prohibited from any access to DOC Information Technology Resources on the agency's network/systems or resources that can access the internet.

Furthermore, this operating procedure provides "DOC has no tolerance for employees, contractors, interns, and volunteers who use DOC Internet services and information technology (personal computers, networks, etc.) for unacceptable, inappropriate, and unauthorized purposes.

**12/29/16:**

Grievant does not contest, on December 29, 2016, he transmitted an e-mail with six attachments to Inmate's mother. Inmate had asked Grievant if he had heard from his distant learning instructor concern his assignments in the distant learning course he was taking. When Grievant told him he had not, Inmate said his mother was worried about his class, since she had paid so much money for it. Inmate then asked if Grievant would send his course assignment(s) to his mother.

Grievant stated he pulled Inmate's assignments off the DCF server onto a jump drive and e-mailed what he pulled to Inmate's mother. However, Grievant did not review what he pulled off the DCF server on the day of his e-mail. He did state he had previously looked at Inmate's assignments briefly before sending them via e-mail to Inmate's distant learning instructor. Grievant was unsure of the date he previously e-mailed the assignments.

Agency contends Grievant's actions on 12/29/16 violated policy, including Operating Procedures 135.2, 310.2, and 310.3 and his actions gave rise to Agency concerns as to:

- a. *Fraternization.*
- b. *Grievant's failure to read/inspect the attachments e-mailed.*
- c. *Potential/possible impact on safety and security.*
- d. *Impropriety.*
- f. *Special Privileges.*

Grievant contends his actions were not improper and did not violate policy. He contends he received permission from his supervisor, Principal, to e-mail Inmate's mother. He also contends, while he had not looked at the attachments when he e-mailed them on 12/29/16, he looked at them when he had previously e-mailed them to Inmate's distant learning instructor.

Alternatively, Grievant argues that if his actions were to be found to be a violation of policy, his actions did not rise to the level of a Group III.

However, Hearing Officer notes that Agency policy provides "Fraternization" should normally be treated as a Group III offense under OP 135.1 and OP 135.2 provides that associations between staff and offenders that may compromise security, or undermine the employee's ability to carry out their responsibilities may be treated as a Group III offense.

***Investigation:***

Upon being notified by DOC Administrator and Director of concerns a Facility teacher had sent an e-mail to the mother of an offender, Warden initiated and investigation into matters. On 1/3/17 Warden requested Institutional Investigator to investigate whether there had been a violation of policy.

Investigator requested a review by Information Security Officer of the Facility e-mail accounts of Librarian and Grievant. Information Security Officer conducted such review and, on January 17, 2017, reported an e-mail message had been sent on December 29, 2016 at 1:41 p.m. from the outlook account of Grievant to the e-mail address of Inmate's mother. The "subject" indicated on the e-mail was "school work" and there were six attachments to the e-mail. The six attachments were:

<u>Attachment label</u>	<u>file</u>	<u>general description of attachment and/or miscellaneous information</u> <sup>21</sup>
1. Assignment #1	.docx	educational assignments of inmate
2. Assignment #2	.docx	educational assignments of inmate
3. Email	.docx	typed letter/memo from Inmate to his Mother with instructions
4. Intro Letter	.docx	typed letter to distant learning instructor with assignment noted to be included
5. [Name]	.docx	typed 3 pg. letter to Director (copy e-mailed to Director by inmate's mother)
6. Scan0026	.pdf	9 pages of documents (copy of the 9 pages e-mailed to Director by inmate's mother)

The attachments labeled "Assignment #1" and "Assignment #2" were documents relating to Inmate's distant learning class work.

The attachment labeled "Email" was a typed one page letter from Inmate to his mother. The letter included the e-mail address of Director and inmate's instructions requesting his mother to forward his letter to Director together with with certain attachments to Director.

The attachment labeled "Intro Letter" was a document entitled letter dated 11/14/16 to Inmate's distant learning instructor.

The attachment labeled "[Name]" was a three page letter to Director setting forth issues Inmate had with Food Services at Facility and prior Informal Complaints. This letter was subsequently e-mailed by Inmate's mother to Director together with the 9 pages of documents labeled "Scan 0026".

The attachments labeled "Scan 0026" consisted of nine pages of documents including:

- Facility Weekly Menu- week 1. with handwritten notes notes and further indicates as " Starts 12/25"*
- Informal Complaint form - marked received 8/30/16 and with withdrawal of informal complaint dated 8/31/16*
- Informal Complaint form - marked received 8/30/16 and with withdrawal of informal complaint dated 8/31/16*
- Informal Complaint form - marked received 10/4/16*
- Informal Complaint form - marked received 8/30/16 and with withdrawal of informal complaint dated 8/31/16*
- Facility Weekly Menu form - Week 4 with handwritten dates 8/28 - 9/3*
- Facility Weekly Menu form - Week 1 with handwritten dates 9/4 - 9/10*
- Facility Weekly Menu form - Week 2 with handwritten dates 9/11 - 9/17*
- Facility Weekly Menu form - Week 3 with handwritten dates 9/18 - 9/24<sup>22</sup>*

The e-mail of Inmate's mother to Director had attached her son's three page letter to Director and the 9 pages of documents, all of which Grievant had e-mailed her on 12/29/16.<sup>23</sup>

**Permission:**

Grievant does not contest he e-mailed Inmate's mother on 12/29/16, does not contest the contents of his e-mail, and does not contest, on 12/29/16, he didn't read/inspected the documents attached to his e-mail.

Grievant contends he received permission from Principal to send Inmate's school assignments to his mother. In his 1/18/17 statement Grievant stated Inmate asked him if he would send Inmate's school assignments to Inmate's mother. Grievant contended he asked his supervisor (i.e. Principal) about it, and "we were both in agreement that it would be okay since it for educational purposes".<sup>24</sup>

Principle denies he gave Grievant permission to e-mail Inmate's mother Inmate's educational assignments or to contact her for any purpose. Principal further testified he was never asked by Grievant for permission to contact Inmate's mother, such contact was against the fraternization policy, and if he were to have been asked he would have denied such permission.

<sup>21</sup> A. Tabs 8, and 9, and Testimony.

<sup>22</sup> A. Tab 8.

<sup>23</sup> A. Tab 7.

<sup>24</sup> A. Tabs 10.



On 1/18/17 Grievant sent an e-mail to Principle stating he had been summoned to Investigator's office concerning his 12/29/16 e-mail to Inmate's mother. Grievant stated in the e-mail, "I was asked if you were aware of this and I stated yes that we were both on the same page with sending stuff for his classes and informing his mother of this work.". Grievant testified Principal did not reply or deny what he had written in his 1/18/17 e-mail. Grievant contends Principal's failure to reply or deny is supportive of his contention of being given permission by Principal.

Hearing Officer, however, is not persuaded by Grievant's arguments. Grievant testified when, about a week later Grievant spoke to Principal, he was told by Principal that, as there was an ongoing investigation, Principal had been informed not to discuss anything. Additionally, it is noted Grievant's interview with investigator was on 1/18/17, Principal's hand written statement, referenced in the Investigation Report, was dated 1/18/17. The investigation was initiated by Warden on 1/3/17 and Investigator's written Investigation Report to Warden was dated 1/31/17.

Principal testified he did not give Grievant permission to send Inmate's school assignments to Inmate's mother. Principal's written statement of 1/18/17 indicated educational instructors, as part of their jobs, have permission to contact and send assignments to outside educational programs. Principal also stated therein that at no time have teachers been given permission to contact parents and, "The permission to contact parents was never given."<sup>25</sup>

Principal's and Grievant's testimony conflict as to permission. There is no evidence or allegation of the existence of any writing granting such permission and, except for Grievant's written statement to Investigator and his e-mail to Principal (after his interview by Investigator), there is no evidence or allegation of any writing confirming or memorializing such permission.

In giving weight and determining credibility, the demeanor and testimony of Grievant and Principal have been taken into consideration, as well as all the written statements given Investigator, the timelines, and the totality of the evidence admitted. Principal's demeanor at hearing is found to be open and forthright. His testimony was clear, credible, and consistent with his written statements.

The evidence indicates a number of offenders take distant learning courses from certified programs but no evidence was presented that permission was granted any of the other offender's parent(s) to receive school assignments or education material from a Facility Teacher/Instructor.

Furthermore, if, for the purposes of argument, it were found Principal had given permission to Grievant to have contact with Inmate's mother, that permission, as Grievant indicated in his statement to Investigator, was limited to contact related to educational assignments/educational purposes. Grievant's written statement provided, "we were both in agreement that it would be okay since it for educational purposes").<sup>26</sup>

Thus, even if it were determined Grievant had permission to contact Inmate's mother for educational assignments or educational purposes, Grievant would not have had permission to send non-educational documents or contact her regarding non-educational purposes. And, as discussed, Grievant e-mailed documents which were not related to educational matters or for educational purposes, including:

<sup>25</sup> A. Tabs 9, 10.

<sup>26</sup> A. Tabs 10.

<u>Attachment label</u>	<u>file</u>	<u>general description of attachment</u> <sup>27</sup>
Email	.docx	typed letter/memo from Inmate to his mother with instructions to her to forward his letter and certain attachments to Director
[Name]	.docx	typed 3 pg. letter to from Inmate to Director re Inmate's Food Service complaints and prior Informal Complaints
Scan0026	.pdf	9 pages of documents including Informal Complaints and Menus

For the reasons stated above, Grievant did not have permission to send the e-mail of 12/29/16.

For the reasons stated above, Grievant did not have permission to contact Inmate's mother for educational purposes or for non-educational purposes.

Furthermore, for the reasons stated above, the e-mail of 12/29/16 contained documents which were not related to the education of Inmate or for educational purposes and

***Failure to inspect/read documents:***

Grievant testified, on the date he e-mailed the attachments, he did not inspect or read the documents he was attaching and transmitting to Inmate's mother. He basically chose to assume he was e-mailing Inmate's assignments. He did raise he had looked at the assignments on a prior date when he had sent the assignments to Inmate's distant learning instructor. Grievant wasn't sure when he previously e-mailed the assignments, however, the date was long enough ago that Inmate was concerned about not hearing from his distant learning instructor as to the assignments.

At the request of an offender, Grievant used Facility equipment to e-mail documents, which he had not read/inspected on the date he sent them. He thus allowed an offender, who was restricted as to use of e-mail, to transmit an un-inspected e-mail communication to a family member.

Agency is responsible for the safety and security of the offenders placed in its charge and for the safety and security of its employees. Agency expressed valid concerns as to the possible effect of Grievant's actions on safety and security at Facility. His actions in e-mailing unknown/unread/un-inspected documents could have resulted in the death or serious injury of an offender or an employee, the escape of an inmate, or a further breach of security. His association with Inmate could have compromised security.

***Fraternization, Special Privilege, and Impropriety:***

OP 135.2 addresses professional conduct and prohibits Fraternalization, Special Privileges, and Improprieties.

Grievant contends he could not be guilty of "Fraternalization", as defined in OP135.2, as his conduct was not "outside of employee's job function". However, Hearing Office is not persuaded by this argument. Grievant's job functions related to the education of offenders and in his job he only had permission to e-mail Inmate's assignments to Inmate's distant learning instructor. As more fully discussed above, the evidence indicated he did not have permission to contact Inmate's mother or e-mail her educational related matters. Furthermore, even if it were to have been found, as Grievant contends, he had permission to e-mail or contact Inmate's mother as to educational matters, he e-mailed and contacted her as to matters not related to Inmate's education and not related to his job functions as an instructor at Facility.

The evidence indicates Grievant, in sending the e-mail with attachments on 12/29/16 to Inmate's mother, violated policy forbidding "Fraternalization".

<sup>27</sup> A. Tabs 8, and 9, and Testimony.

Agency also raised concerned Grievant granted Inmate special privileges and his association with Inmate may have compromised security. The evidence indicates Grievant extended Inmate a special privilege when he, at Inmate's request, sent the e-mail, with attachments, to Inmate's mother.

Contacting an offender's family member, at the request of the offender, and transmitting documents to the offender's family member was a privilege or favor not available to all persons similarly supervised and the evidence does not indicate it was provided for through official DOC channels.

OP 135.2 charges employees with exercising professional conduct when dealing with offenders to ensure the security and integrity of the correctional process and charges employees with being alert to detect and prevent escapes from custody or supervision or violations of departmental operating procedures.

Grievant's actions in not reading or inspecting what he, at Inmate's request, was transmitting to Inmate's family member, was unprofessional. In doing so Grievant was not alert "to detect and prevent escapes from custody or supervision or violations of departmental operating procedures" and his actions could have led to the harm or injury of an offender or employee and could have further compromised security.

The evidence indicates that Grievant's behavior on 12/29/16 was an association with an offender's family member outside of the the employee's job functions, that extends to unacceptable, unprofessional, and prohibited behavior in violation of OP135.2.

***Unauthorized/misuse:***

Grievant knew or should have known offender's access and ability to scan and/or electronically transmit documents is restricted.

Policy provides offenders shall not have direct, unsupervised access to output and storage peripherals such as printers, scanners unless to perform specific educational or job tasks, offenders must be under constant sight supervision of DOD staff when performing such tasks, and DOC staff should inspect printed or copied items to guard against misuse of DOC resources.

Grievant's actions involved using Facility equipment to electronically transmit documents drafted by Inmate and/or obtained by Inmate. The Fraternalization policy prohibited Grievant's contact with an Inmate's mother and Agency policy does not permit the use of Facility electronic equipment for contacting Inmate's mother.

The evidence indicates the attachment labeled "Scan 0026" contained 9 pages of documents (described above) which were, by someone, scanned prior to being e-mailed by Grievant. Inmate stated, in his 1/18/17 written statement, Grievant scanned his complaints and the menus. Inmate stated:

... [Grievant] had been accomodating in communicating with my school [name] and my mother concerning school related materials via e-mail. I asked [Grievant] if he would e-mail the letter to [Director] along with my other school assignments to my mother. He agreed to. He scanned my complaints and menus to attach to the e-mail and sent them. This occurred during the week following Christmas 2016. <sup>28</sup>

Grievant denies knowledge of the Menus and Informal Complaints and denies scanning them. Policy did not permit Inmate to scan the nine documents. Policy did not permit Grievant to use Agency facilities to e-mail unread/un-inspected documents to Inmate's mother. Furthermore,

<sup>28</sup> Tab 9 and 10.

Grievant's contention that he thought the documents were the Inmate's prior school assignments, which he had previously e-mailed to Inmate's distant learning instructor, is not persuasive nor does it act as a defense to his duty to read/inspect the attachments to his 12/29/16 e-mail. Any contention that Inmate, on or about 12/29/16 added to or changed what Grievant thought were the Inmate's assignments is not persuade nor a defense to his not reading or inspecting what was sent to Inmate's mother.

While there is no evidence Grievant's actions resulted in or contribute to the harm or injury of an offender or employee, or the escape of an offender, Grievant's actions violated policy and gave rise to valid Agency concern for safety and security. Grievant's actions could have resulted in the harm, injury or death of an offender or an employee and could have resulted in further violations of security.

***Mitigation or Aggravation.***

§ 2.2-3005 of the Code of Virginia provides Hearing Officers shall have the power and duty to receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management pursuant to § 2.2-1202.1.

The hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determination had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense). If the hearing officer finds that (i) through (iii) above, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the discipline exceeds the limits of reasonableness.

If the agency prevails on all three elements, the hearing officer must then consider whether the Grievant has shown, by a preponderance of the evidence, that there were nevertheless mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether any aggravating circumstances exist which would overcome the mitigating circumstances. Furthermore, in reviewing agency-imposed discipline, the hearing officer must give due consideration to the management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations.

Upon review of all evidence admitted in this cause, as more fully discussed above, the Hearing Officer finds that Grievant engaged in the behavior described in the Group III Written Notice, his behavior constituted misconduct, and Agency's discipline was consistent with law and policy.

Upon consideration of all the evidence presented in this cause, the Hearing Officer does not find, under the record evidence, that the discipline exceeds the limits of reasonableness. Mitigation is not found to be warranted and appropriate under the circumstances.

## **DECISION**

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Hearing Officer finds:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.

3. The disciplinary action taken by the Agency was consistent with law and policy.
4. Mitigating circumstances justifying reduction or removal of the disciplinary action are not found.
5. Agency has met its burden that the action against Grievant was warranted and appropriate under the circumstances.

For the reasons stated above, based upon consideration of all the evidence presented in this cause, the Agency's issuance to Grievant of a Group III Written Notice with termination is **Upheld**.

## APPEAL RIGHTS

As the *Grievance Procedure Manual* (effective date: July 1, 2012) 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.

### **A. Administrative Review:**

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

**1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM.** This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

**2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR.** This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is [edr@dhrm.virginia.gov](mailto:edr@dhrm.virginia.gov)).

### **B. Final Hearing Decisions:**

A hearing officer's 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.

**C. Judicial Review of Final Hearing Decision:**

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.



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Lorin A. Costanzo, Hearing Officer

*copies e-mailed to:* Grievant's Attorney  
Agency's Advocate  
EDR