

Issues: Group III Written Notice (fraternization), Group III Written Notice (gross negligence that could have resulted in escape, serious injury or death), and Termination; Hearing Date: 04/30/18; Decision Issued: 05/01/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11179; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11179

Hearing Date: April 30, 2018
Decision Issued: May 1, 2018

PROCEDURAL HISTORY

On January 29, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization. On January 29, 2018, Grievant was issued a Group III Written Notice of disciplinary action for gross negligence on the job that could have resulted in escape, death, or serious injury.

On February 8, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 12, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On April 30, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 had been employed by the Agency for approximately 18 years. No evidence of prior active disciplinary action was introduced during the hearing.

On December 27, 2017, Grievant was supervising five inmates working at a job site away from the Facility. He transported the offenders in a non-security van. The van was marked with the Agency's name. Offenders in the van could access the driver's seat and open the door if they wanted to overpower the corrections officer.

Grievant drove the van to a parking lot away from the job site and away from the Facility. He was required to obtain permission to go to that location but failed to do so.

At approximately 11:40 a.m., Grievant used his state issued cell phone to order two pizzas and a 2-liter bottled drink. He used her personal cell phone to check on the order status. The cost was \$26.80. A delivery woman drove her pickup truck to the parking lot. She took a red package containing the pizzas from her pickup truck and walked to the driver's side window and spoke with Grievant who was seated in the van. The offenders were inside the van. Grievant paid the woman and received the food. As Grievant was paying the woman, the Captain drove his vehicle into the parking lot and spoke with Grievant. The Captain said, "since when do we get pizzas delivered when

offenders are in the van?” Grievant said he had paid for the pizzas. The Captain drove away and then contacted the Sergeant at the Facility. Grievant ate one of the pizzas and gave the other pizza to the offenders. They ate the pizzas as they travelled back to the Facility.

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.”¹ 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.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

Group III Written Notice - Fraternization

Group III offenses include, “[f]raternization or non-professional relationships with offenders who are within 180 days of the date following their discharge from DOC custody or termination from supervision, whichever occurs last. Exceptions to this section must be reviewed and approved by the respective Regional Operations Chief or Deputy Director of Administration on a case by case basis.”⁴

Fraternalization is defined as:

Employee association with offenders, or their family members, outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior; examples include non-work related visits between offenders and employees, non-work related relationships with family members of offenders, discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.⁵

¹ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

² Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D)(2)(ee).

⁵ Virginia Department of Corrections Operating Procedure 135.2, Rules of Conduct Governing Employees’ Relationships with Offenders.

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.

Improprieties and non-professional relationships include affording inmates Special Privileges. Section C(3) provides:

Special Privileges – Employees shall not extend or promise an offender special privileges or favors not available to all persons similarly supervised, except as provided for thorough official DOC channels.

On December 27, 2017, Grievant afforded inmates the special privilege of eating pizza from a private vendor. Inmates were permitted to eat food only if it was prepared at the Facility.⁶ By allowing the five offenders to each pizza, Grievant gave those offenders a special privilege not available to the inmates remaining at the Facility. He did so after he was approached by the Captain and questioned about the appropriateness of ordering pizza. Grievant engaged in an inappropriate association with the five offenders. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for fraternizing with inmates by affording them special privileges. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Group III – Gross Neglect

DOC Operating Procedure 425.1 governs Outside Work Assignments. Section IV limited work crews to being on Agency property or project sites specifically approved by the Facility Unit Head. On December 27 2017, Grievant parked the van with offenders in a parking lot that was not an approved project site. In the event of an emergency, the Agency would not have known where to find Grievant. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

The Agency argued that Grievant should receive a Group III Written Notice for gross neglect on the job that could result in escape, death, or serious injury. The evidence showed that the five inmates were in a non-security van and not behind a cage in the van. Thus, if the inmates wished to overpower Grievant they could have done so at any time regardless of whether the van was parked in a parking lot away

⁶ DOC Operating Procedure 425.1(C)(5) provides, "Food and drink consumed by outside work crews should be provided by DOC Food Service as determined by the institutional administration."

from the job site. The inmates could have overpowered Grievant and then driven the van to escape. The fact that a pizza delivery person approached the van and drove a pickup truck near the van did not materially alter the risk of escape, death, or serious injury to Grievant or the pizza delivery person. Thus, the Agency has not established a basis to issue a Group III Written Notice.

Mitigation

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 Human Resource Management”⁷ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to 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.

Grievant contends the disciplinary action should be mitigated. He points to the fact that he has served the Agency for over 18 years and has no prior active disciplinary action. Grievant was honest throughout the investigation and admits he made a mistake. Although these are factors the Agency could have considered to lower the level of disciplinary action, they are not factors sufficient to allow the Hearing Officer to mitigate the disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for fraternization is **upheld**. The Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action for gross neglect is **reduced** to a Group II Written Notice.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

⁷ Va. Code § 2.2-3005.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.