

Issue: Group III Written Notice with Termination (fraternization, non-professional association, and conduct unbecoming); Hearing Date: 11/28/18; Decision Issued: 04/03/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11269; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Requests received from both the Agency and the Grievant on 04/17/19; EDR Ruling No. 2019-4909, 2019-4911 issued 05/17/19; Outcome: AHO’s decision affirmed.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11269**

Hearing Date: November 28, 2018  
Decision Issued: April 3, 2019

#### **PROCEDURAL HISTORY**

On August 9, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization, non-professional association, and conduct unbecoming an employee of the Commonwealth.

On September 5, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 18, 2018, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 28, 2018, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Counsel  
Witnesses

#### **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?

### **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 more than six years. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility entered into an agreement with a Vendor for the Vendor to supply food products to inmates through the Facility's commissary. The Vendor supplied a brand of potato chips that inmates thought was especially appealing. The Vendor did not have a contract to supply that brand to the Facility to be placed in vending machines accessible to Agency employees. Employees were not allowed to purchase food from the commissary and, thus, the potato chips were only available to inmates. Employees were not permitted to take or consume food belonging to the inmates.

Ms. E wanted to taste the Vendor's potato chips. The Inmate was aware Ms. E wanted to eat the potato chips.<sup>1</sup> The Inmate used money from his account to purchase a bag of potato chips from the commissary with the objective of giving them to Ms. E.

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<sup>1</sup> The Inmate frequently went to the medical office to check his blood sugar level. He knew Ms. E because she worked in the medical office. Grievant knew the Inmate.

Under the Agency's policies, Ms. E was not permitted to request or receive anything from inmates.

On May 4, 2018, the Inmate attempted to give Ms. E the potato chips. He took the chips to the door of the Medical Office and knocked. Officer W was stationed at the Medical Office post. The Inmate told Officer W that he had chips for Ms. E. Officer W told him the Inmate he could not enter the Medical Office. The Inmate left. The Inmate did not mention Grievant's name.

On May 7, 2018, Grievant was working the Medical Office post. The dental unit was part of the Medical Office. His duties included controlling movement of employees and offenders into and out of the medical office.

Ms. E was working in the dental unit. Officer R entered the Medical Office and went to the back of the office near the dental unit.

The Inmate approached the Medical Office door and sought entry. Grievant observed the Inmate and could tell the Inmate had something hidden under his shirt. Grievant asked the Inmate what he thought he was doing. The Inmate said Ms. E had asked him to bring her a bag of chips. Grievant did not know that the Inmate planned to bring a bag of chips to Ms. E before being informed by the Inmate. Grievant wanted to ask Ms. E if she had asked for chips because the Inmate had shown a pattern of telling lies about staff. Grievant failed to "pat down" the Inmate because he was "so wrapped up on asking [Ms. E] if she had asked for chips." Grievant wanted to take the Inmate to Ms. E to ask her if she had asked the Inmate to bring her chips. Grievant thought that Ms. E would say "no" and then Grievant could charge the Inmate for lying about staff.

Officer R and Ms. E were near the dental office. Grievant and the Inmate walked in. Grievant said, "He's got something for you." The Inmate opened his shirt. Officer R heard Grievant's statement and became angry because he recognized that the Inmate's behavior was inappropriate. Officer R grabbed the chips and said, "You ain't supposed to be doing this." Officer R threw the chips on the ground. The Inmate attempted to pick up the chips and said he brought them for Ms. E. Officer R grabbed the bag of chips again, tried to crush the bag causing it to open partially, and said to the Inmate "You can leave."<sup>2</sup> Grievant escorted the Inmate out. The Inmate left the Medical Office at approximately 12:10 p.m. The bag of chips remained in the dental unit.

Grievant and Officer R walked to the front of the office. Officer R told Grievant that, "This does not look good; you need to handle it." Officer R left the office and went to the segregation unit.

At approximately 12:11 p.m., Grievant and Ms. E stood at the front desk talking. At approximately 12:14 p.m., Grievant walked to the dental unit and obtained the bag of

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<sup>2</sup> Officer R received a Group I Written Notice for telling the Inmate to "get the f—k out of here." Officer R testified he did not say "f—k" but he did not appeal the disciplinary action.

chips. It appears he walked back to the dental unit for the sole purpose of obtaining the chips. He returned to the front desk. Grievant pushed the top of the bag open and turned the top of the bag towards Ms. E to offer her chips. Ms. E reached into the bag and took a potato chip. She ate the potato chip. At approximately 12:14:45 p.m., Grievant ate a potato chip. Grievant handed Ms. E the bag and she continued to eat potato chips. She put the bag on the desk as Grievant and Ms. E stood at the desk.

Officer R went to a post in a booth where there was a camera. The camera showed Grievant and Ms. E next to each other eating chips. Grievant ate more than one chip but not all of the chips. Officer R called Grievant and asked what he was doing. Grievant said he was sitting there. Officer R asked are you eating chips? Grievant did not respond.

Approximately ten minutes after Officer R called Grievant, Grievant called Officer R and asked Officer R to come to Grievant's location to sign a confiscation form for the potato chips. Approximately 30 minutes later, Officer R signed the confiscation form even though he knew the potato chip bag had been opened. Officer R took the potato chip bag and any remaining chips back to the segregation unit.

Approximately one or two hours after the incident, Grievant and Officer B spoke with the Inmate. Grievant told the Inmate he did not appreciate the Inmate mistaking his kindness for weakness.

The Major told Grievant to write a charge against the Inmate. Grievant charged the Inmate with stating false information about a staff member.

The Inmate did not know that Grievant and Ms. E ate his potato chips.

During the Agency's investigation, Grievant provided several different accounts of the incident. In Grievant's first account, he said he conducted a "pat down" search of the Inmate. In his fourth account, Grievant did not say he conducted a pat down search because he did not know what was under the Inmate's shirt. The Warden laid out all four of Grievant's statements and asked Grievant which one was true. Grievant said there was a little bit of truth in all of them.

The Agency removed Ms. E from employment.

## **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."<sup>3</sup> Group II offenses "include acts and behavior that are more severe in

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<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

nature and are such that an accumulation of two Group II offenses normally should warrant removal.”<sup>4</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>5</sup>

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, “[t]he list of offenses in this procedure is illustrative, 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 considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”

In the Agency’s judgment, Grievant should receive a Group III Written Notice with removal. The Agency has presented sufficient evidence to support its decision to issue Grievant a Group III Written Notice with removal. When Grievant first encountered the Inmate, he realized or should have realized the Inmate was in possession of contraband. The potato chips were not items a staff member could purchase or possess for his or her own consumption. The Inmate was attempting to use the chip to gain favor with Ms. E. If Ms. E had asked for the chips as claimed by the Inmate, Ms. E would have engaged in an impropriety. In other words, she would have associated with the Inmate and compromised security because the Inmate would be in a position to report Ms. E’s inappropriate acceptance of the chips. Grievant should have immediately searched the Inmate, removed the contraband chips from the Inmate and sent the Inmate away from the Medical Offices. Instead, Grievant escorted the Inmate to Ms. E enabling him to present contraband to Ms. E. Officer R recognized the Inmate’s inappropriate behavior, confronted the Inmate, and initiated the process of removing the Inmate from the Medical Office. Within five minutes of the Inmate leaving the Medical Office, Grievant went to obtain the contraband, ate some of the chips, and offered contraband to Ms. E. In essence, Grievant completed the delivery of contraband to Ms. E.

The difficulty with this case is that the Agency’s expressed reasons for issuing the Group III Written Notice are not supported by the evidence.<sup>6</sup> The Agency alleged Grievant fraternized with the Inmate because he knew the Inmate intended to bring the chips to Ms. E. The Agency asserted that Ms. E and Grievant colluded to have the Inmate bring in the chips. This argument is not persuasive. There is no evidence showing that Grievant knew the Inmate intended to bring chips to Ms. E. Grievant did not fraternize with the Inmate.

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<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>6</sup> The Agency’s conclusion that Grievant should receive a Group III Written Notice with removal is supported by the evidence.

The Agency argued that Grievant engaged in improprieties with the Inmate. Forming an association is essential to establish an impropriety. Grievant did not associate with the Inmate. Grievant failed to search the Inmate and prevent what could have been an impropriety between the Inmate and Ms. E.

The Agency argued that Grievant failed to meet the Agency's standards of ethics and conflicts of interest under Operating Procedure 135.3. Section B(1) provides:

Employees of the Department of Corrections shall conduct themselves by the highest standards of ethics so that their actions will not be construed as a conflict of interest or conduct unbecoming an employee of the Commonwealth.

Under this policy, a "conflict of interest" is a "set of circumstances that creates a risk that professional judgment or actions regarding official duties will be unduly influenced by personal interests." Grievant's personal interests were not a factor in Grievant's interaction with the Inmate. The policy does not define "conduct unbecoming". Typically this phrase addresses conduct involving an ethical mishap or moral deficit by an employee. In this case, Grievant's failure was neither one of ethics nor one of morality.<sup>7</sup> Grievant did not violate the Operating Procedure 135.3.

Grievant asserted that when he got the chips from the back and returned to the front desk he forgot whose chips they were. This argument is unpersuasive. Within five minutes of the Inmate leaving the Medical Office, Grievant walked from the front desk to the dental unit to obtain the chips. He walked back to the front desk. Grievant and Ms. E immediately began eating the chips. When Grievant was eating the chips, he knew those chips belonged to the Inmate.

*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 ...."<sup>8</sup> 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

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<sup>7</sup> In addition, Grievant presented evidence showing that the Agency issued only Group II Written Notices for other cases of conduct unbecoming an employee.

<sup>8</sup> *Va. Code § 2.2-3005.*

disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce 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 is **upheld**.

## APPEAL RIGHTS

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

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 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.<sup>[1]</sup>

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.



[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer