

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 09/25/17; Decision Issued: 11/13/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11065; Outcome: No Relief – Agency Upheld.



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11065**

Hearing Date: September 25, 2017  
Decision Issued: November 13, 2017

**PROCEDURAL HISTORY**

On June 15, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On July 10, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 26, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On September 25, 2017, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant Representative  
Agency Party Designees  
Agency Representative  
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 Food Service Production Worker at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On May 19, 2017, the Strike Force team was conducting a search throughout the Facility. They were looking for cell phones. The Agency wanted to make sure that any cell phones found could be linked with a specific employee and, thus, the Facility would not have any unclaimed cell phones which might be used by inmates.

Inmates are not permitted to pass notes to other inmates or to Agency employees. Agency employees are not permitted to transfer notes from one inmate to another.

Inmate C worked in the dining hall at the Facility. He was interested in pursuing a relationship with a Female Corrections Officer who worked at the Facility. Inmate C drafted three notes. The first note was one and a half pages long and addressed to "Beautiful." The second note was five pages long and addressed to "My Angel". The third note was four pages long and addressed to "Hey Gorgeous."

The Female Corrections Officer was unaware of Inmate C's interest in her.

Grievant was sitting at a table in the Dining Hall while Strike Force officers were searching the Dining Hall. Inmate C approached Grievant and handed Grievant a cup with several notes inside and told Grievant to take the cup. Grievant took the notes out of the cup.

The Manager and Supervisor approached Grievant. The Manager asked Grievant if he had a cell phone. Grievant said, "No." Grievant was told he could refuse being searched. Grievant emptied the contents of pants pockets into his hands and turned his pants pockets inside out. He held items in his hands with his palms facing towards him and away from the Manager and Supervisor. The Manager concluded Grievant was concealing items. Grievant was asked to reveal the contents in his hands. Grievant opened his left hand, but not his right hand. The Manager realized that Grievant was concealing something in his right hand. The Manager asked Grievant what was in his right hand. Grievant said "trash." The Manager again asked Grievant what was in his right hand. Grievant opened his right hand to reveal three neatly folded hand written notes. Each note was numbered from 1 to 3.

The Manager called the Leader of the Strike Force operation to witness his questioning of Grievant. They moved to the Food Service Supervisor's Office. The Manager asked Grievant about the source of the notes. Grievant initially said the notes were trash he found behind a microwave. Then Grievant admitted that Inmate C handed the notes to him while he sat at a table. The Manager concluded Grievant was assisting Inmate C by holding notes for him instead of reporting Inmate C immediately upon receipt of the notes.

### **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>1</sup> 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."<sup>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

Group III offenses include, "[f]raternalization or non-professional relationships 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

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

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

and approved by the respective Regional Operations Chief or Deputy Director of Administration on a case by case basis.”<sup>4</sup>

Fraternization 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.<sup>5</sup>

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.

Holding notes for an inmate without the intent of transferring them to a supervisor is fraternization. Grievant knew that holding notes for an inmate was contrary to the Agency's policies because he was resistant to opening his hand which held the notes. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that he took the notes from the inmate and intended to turn them in when he had the opportunity to do so. Grievant's defense is not persuasive because he was evasive when confronted by the Manager and the Supervisor. For example, Grievant held the notes in his right hand. Grievant opened his left hand immediately, but continued to keep his right hand closed. Grievant knew that he was holding an inmate's notes. When asked what he was holding, he said he was holding "trash" rather than saying he was holding notes from Inmate C. When asked where he found the notes, Grievant said behind a microwave when, in fact, Inmate C had handed the notes to him. Grievant's failure to immediately disclose the notes undermines his argument that he intended to disclose those notes. The evidence is insufficient for the Hearing

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<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D)(2)(ee).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.2, Rules of Conduct Governing Employees' Relationships with Offenders.

Officer to conclude that Grievant formed an intent to give the notes to a supervisor and report the inmate's inappropriate behavior.

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>6</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 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 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.

Please address your request to:

Office of Equal Employment and 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.

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<sup>6</sup> Va. Code § 2.2-3005.

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>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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