

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 10/23/17; Decision Issued: 11/08/17; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 11078; Outcome: No Relief – Agency Upheld; **Administrative Review: Ruling Request received 11/23/18; EEDR Ruling No. 2018-4650 issued 12/13/17; Outcome: AHO's decision affirmed.**

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

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 11078

**Hearing Date: October 23, 2017
Decision Issued: November 8, 2017**

PROCEDURAL HISTORY

Grievant was issued a Group II Written Notice on May 11, 2017 for failure to follow instructions and/or policy (Written Notice Offense Code "13") alleging she failed to report fraternization in violation of OP 135.2.

Grievant grieved issuance of the Group II Written Notice and matters were ultimately qualified for a hearing. Undersigned was appointed Hearing Officer effective August 18, 2017. A pre-hearing telephone conference was held on August 21, 2017 and the parties waived their right to have a hearing within 35 days of the hearing officer's appointment. Agency, by e-mail of August 21, 2017, and Grievant, by e-mail of August 22, 2017, confirmed such waiver in writing. By agreement of the parties, the hearing in this cause was held on October 23, 2017 at Facility.

At the conclusion of hearing Grievant requested to submit a written closing statement and, by agreement, the parties had until 5:00 P.M. on October 27, 2017 to e-mail written closing statement to Hearing Officer. Both parties timely e-mailed written closing statements.

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.¹

HEARING and EXHIBITS

The following appeared at the October 23, 2017 grievance hearing:

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

Exhibits were admitted *en masse* without objection.

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. Grievant has been employed approximately three and one half years by Agency at Facility, a correctional center operated by Agency. Grievant is a Manager/Supervisor at Facility.²

02. Offender had been incarcerated at Facility but was released and placed under the supervision of District Probation and Parole.³

03. On December 5, 2016 an anonymous complaint was received by Agency that C/O, a correctional officer at Facility, engaged in a non-professional relationship with Offender.⁴

04. On January 19, 2017 Grievant reported to Agency that, from around August 2016 to late November 2016 C/O engaged in a non-professional relationship with Offender.⁵

¹ Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

² A. Ex. 1 and Testimony.

³ A. Ex. 5 and 5C.

⁴ A. Ex. 5.

⁵ A. Ex. 5.

05. Special Investigations Unit initiated an investigation into the allegations of a non-professional relationship between C/O and Offender. As a part of such investigation Investigator interviewed Grievant on January 31, 2017. During her interview Grievant informed Investigator:

- a. She had a romantic relationship with C/O from December 2015 to around Thanksgiving 2016 when C/O ended the relationship. Grievant indicated she was upset and still get upset about this.
- b. Sometime in August 2016 C/O told her he ran into Offender a bank and gave Offender a ride home.
- c. Over the period of from August 2016 to Thanksgiving 2016 C/O told her he had given Offender a watch valued at \$250.00 and that he had given Offender money. She didn't know how many times or how much money C/O gave Offender.
- d. C/O and Offender, on at least one occasion, met for a meal.
- e. Offender sent some pictures to C/O's cell phone of himself.⁶

06. At the 1/31/17 interview, Investigator asked Grievant why she didn't report matters earlier and Grievant stated she didn't want to damage the relationship that she and C/O had at the time.⁷

07. Investigator interviewed Offender on 1/31/17. At such interview Offender stated he had seen C/O on two occasions, once while working at a restaurant where C/O was a customer and once when C/O and his family were leaving a restaurant and he and his family were entering the restaurant. Offender stated to Investigator he had not seen C/O at any other time, C/O never called him, never gave him any gifts, or gave him any rides.⁸

08. Investigator did not interview C/O as C/O was on extended short term disability at the time of the investigation and then was on long term disability.⁹

CONCLUSIONS

OP 135.1¹⁰

⁶ A. Ex. 5 and 5b.

⁷ A. Ex. 5b and Testimony.

⁸ A. Ex. 5c.

⁹ A. Ex. 5 and Testimony.

¹⁰ A. Tab 3.

The Department of Corrections, pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards of Conduct, 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 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 termination. Examples of Group II offenses include failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy.

§ V. C. 3 of OP 135.1 provides discipline for a Group II offense shall normally take the form of the notice and up to 10 workdays maximum suspension without pay. Absent mitigating circumstances, an additional Group II offense should normally result in termination. Furthermore, a single Group II offense coupled with three "Active" Group I offenses should normally result in termination.

OP 135.2¹¹

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

The term "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; examples include non-work related visits between offenders and employees ...".

The term "Offender" is defined in OP 135.2 as "An inmate, probationer, parolee, post release supervisee, or other person placed under the supervision (conditional release) or investigation of the Department of Corrections."

§ IV. B. of OP 135.2 provides that 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 violations of departmental operating procedures.

§ IV. (C.)(1.) OP 135.2 provides that fraternization or non-professional relationships between employees and offenders are prohibited, including when the offender is within 180 days of the date following discharge from DOC custody or termination from supervision, whichever occurs last. Furthermore, it provides that "This action should normally be treated as a Group III offense under

¹¹ A. Tab 4.

Operating Procedure 135.1, *Standards of Conduct*, unless surrounding circumstances and mitigating factors are present that warrant a reduction in the disciplinary action.”

§ IV E. of OP 135.2 sets forth Employees and Supervisory Reporting Responsibilities and provides, in pertinent part:

1. Failure to comply with the reporting requirements outlined below will be considered a violation of Operating Procedure 135.1, *Employee Standards of Conduct*, and may be subject to disciplinary action up to and including termination.
2. Employee Responsibilities - In addition to complying with the above procedures, employees have a continuing affirmative duty to disclose to their supervisors or other management officials any conduct that violates this procedure or behavior that is inappropriate or compromises safety of staff, offenders, or the community and any staff or offender boundary violations. (4-APPFS-3E-05)

Fraternization/non-professional conduct:

Grievant first notified Agency on January 19, 2017 that C/O and Offender had engaged in non-professional conduct/fraternization. Grievant’s allegations were investigated by Agency. As a part of the Agency investigation, Grievant was interviewed on 1/31/17. Grievant’s statements to Investigator ultimately gave rise to her being issued a Group II Written Notice for her failure to report the fraternization/non-professional conduct between C/O and Offender as is required by OP 135.2.

Investigator interviewed Grievant on January 31, 2017 and an Investigative Interview form was signed by Grievant. The Investigative Interview form provided a handwritten statement of the interview. Grievant signed the Investigative Interview form indicating, by her signature, she had read, or had read to her, the written statement and agreed she gave this statement without threat or promise.¹²

Grievant told Investigator she was in a romantic relationship with C/O from December 2015 until around Thanksgiving of 2016, C/O ended their relationship around Thanksgiving of 2016, and she was aware of the non-professional conduct no later than on or about Thanksgiving of 2016, when C/O ended the relationship.¹³

Grievant stated the information she reported to Investigator on 1/31/17 was told to her by C/O himself. Over the period from around August 2016 to Thanksgiving 2016 C/O told Grievant he had given Offender a watch valued at \$250.00, gave Offender some money, and on at least one occasion C/O and Offender met for a meal. Additionally, Grievant reported Offender sent some pictures to C/O’s cell phone of himself.¹⁴

¹² A. Ex. 5b.

¹³ A. Ex. 5, 5b, and Testimony.

¹⁴ A. Tab 5, 5B, and Testimony.
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Grievant does not contest she chose not to report the non-professional conduct until 1/19/17 even though she was aware of the non-professional conduct no later than on or about Thanksgiving of 2016. She said she did not report matters when she first became aware of the non-professional conduct because she did not want to damage her romantic relationship with C/O.¹⁵

Grievant:

Grievant does not contest she knew of fraternization between C/O and Offender. She admits she and C/O were in a relationship and he told her about what he was doing for the offender.¹⁶ However, Grievant contends she did not report it as she and C/O were in a romantic relationship and any matters discussed by C/O and her were “pillow talk” and could not legally hold up or come out in a court of law. No authority was presented in support of this contention and Hearing Officer is not persuaded by this argument. “Pillow talk” between Agency employees in a romantic relationship does not act to bar or exempt Grievant from compliance with the requirements OP 135.2 places on Agency employees.

Grievant contends basic fairness was violated and it was improper to not interview or discipline C/O. At the time of the investigation C/O was on an extended short term disability, subsequently transitioned to long term disability, and has not come back to work. The evidence indicates an investigator is not allowed to interview any individual on short term disability unless conducting a criminal investigation. The evidence further indicates while C/O is no longer an employee of Agency, the Agency investigation remains open. Thus, if C/O returns to work, he would be interviewed and Agency’s investigation of fraternization could proceed forward, possibly leading to disciplinary action if allegations were founded.

Grievant contends the Agency investigation was not proper or sufficient as she could have been lying in the statement she gave to Investigator, her statements were hearsay, and it is improper to give her a Written Notice merely based upon statements she gave the Investigator. Grievant also indicated she told the truth but what she said has been twisted and she raised that speaking out gets an employee into trouble.

Grievant was issued this Group II Written Notice for her failure report non-professional conduct or fraternization between an employee and an offender as was required by OP 135.2. The evidence indicates, and Grievant does not contest, that she was aware of the non-professional conduct between C/O and Offender no later than Thanksgiving of 2016. She did not report the non-professional conduct until 1/19/17.

The Agency investigation was related to charges of fraternization between C/O and Offender. During Agency’s investigation, with Investigator and HRO present, Grievant made statements which

¹⁵ A. Ex. 5B.

¹⁶ A. Tab 1.

gave rise to Agency concerns of Grievant not reporting fraternization. Grievant's statements ultimately led to her being issued a Group II. She told Investigator that sometime from August to Thanksgiving 2016 C/O told her, among other matters, he gave money to Offender, he gave a watch to Offender, and had a meal with Offender. She also stated Offender sent some pictures to C/O's cell phone of himself.

OP 135.2 prohibits fraternization and non-professional conduct/relationships between employees and offenders. Actions such as an employee giving money to an offender, giving a watch to an offender, and meeting with an offender for a meal meet OP 135.2 definitions of fraternization and/or non-professional conduct/relationship between employees and offenders.

Agency was proper in investigating the allegations made. Agency was proper in taking into consideration any statements Grievant made to Investigator and issuing discipline based on those statements. Policy requires employees be truthful in statements given during an Agency investigation and Grievant also testified she was truthful.¹⁷ Grievant signed her Investigative Interview form detailing the 1/31/17 interview and the statements she made during the interview.

Grievant was aware of or should have been aware of OP 135.2 which imposes a continuing affirmative duty on employees to report non-professional conduct and staff or offender boundary violations. This OP provides failure to comply with reporting requirements is considered a violation of OP 135.1, *Employee Standards of Conduct*, and the employee may be subject to disciplinary action up to and including termination.

There is insufficient evidence to support Grievant's contentions she was not required to comply with the reporting requirements of 135.2, basic fairness was violated, the investigation was improper/insufficient, or what Grievant had said was "twisted".

Grievant further raised a number of concerns including statements made to her by C/O, that someone broke into her car and stole personal effects including her state identification around January 3, 2017, and C/O brought two trespassing charges against her (one she indicated as being dropped and one she indicated was pending).

The evidence indicates on or about Thanksgiving/late November of 2016 C/O ended the romantic relationship he had with Grievant. Grievant, as she told Investigator, was upset and still gets upset about the relationship ending. Grievant stated she did not report the unprofessional conduct/fraternization between C/O and Offender because she did not want to damage the relationship she and C/O had. However, even though the relationship ended around Thanksgiving of 2016 the fraternization/non-professional conduct was not reported until 1/19/17.

¹⁷ Testimony.

There is insufficient evidence to find Grievant was justified in not complying with the requirements of OP 135.2 or there was an unfair or misapplication of policy. Grievant, until 1/19/17, intentionally did not report the non-professional conduct/fraternization between C/O and Offender of which she was aware.

Upon consideration of the evidence in this cause, Agency, by a preponderance, has met its burden of proof.

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.

Consideration is given to Grievant being employed for approximately three and one half years and her being a Manager/Supervisor at Facility. No other Written Notice is addressed in the Group II Written Notice. While it was raised at hearing that Grievant received a Group I Written Notice after

the Group II Written Notice was issued on 5/11/17, this is not a proper consideration in this cause. Hearing Officer disregards all matters related to any Written Notice issued after 5/11/17.

Grievant raised concern that issuance of a Group II is to harsh a discipline. Consideration it taken that OP 135.2 provides the failure to comply with reporting requirements is considered a violation of OP 135.1 and the employee may be subject to disciplinary action up to and including termination. Additionally, OP 135.1 provides discipline for a first Group II offense normally takes the form of notice and up to 10 workdays maximum suspension without pay. Agency issued a Group II Written Notice with no suspension and did not seek to terminate or issue a Group III.

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 II Written Notice, her behavior constituted misconduct, and Agency's discipline was consistent with law and policy. Furthermore, the Hearing Officer does not find, under the record evidence, that the discipline exceeds the limits of reasonableness and 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 II Written Notice 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 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. (Agencies must request and receive prior approval from EEDR 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

S/Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

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