

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 11/15/17; Decision Issued: 11/20/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11100; 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: 11100

Hearing Date: November 15, 2017
Decision Issued: November 20, 2017

PROCEDURAL HISTORY

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

On September 8, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 26, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On November 15, 2017, 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 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. She had been employed by the Agency for approximately two years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received orientation training in July 2015. She was trained that the Agency had a zero tolerance for fraternization with inmates. She received Prison Rape Elimination Act training. Part of PREA training is to discuss professional and non-professional relationships. She was informed that offenders may try to gain favors from employees but it was the response of the employee that carried the consequences.

Grievant received in-service training regarding Agency policies.

On July 17, 2017, Grievant was working in the Building. The Building had two sides with inmates living on each side. Grievant was obligated to conduct security rounds every 30 minutes on each side of the Building.

At approximately 3 p.m. on July 17, 2017, Grievant began a game of dominos with the Inmate. They were on side B of the Building. At approximately 3:26 p.m., Grievant looked at the clock and then proceeded to the recreation yard. She conducted a recreation yard door break for the A and B sides for approximately two minutes until

3:28 p.m. She returned to playing dominos with the Inmate. They continued to play dominos until 3:57 p.m.

The Inmate's property was searched. He possessed a page written by Grievant describing the color of roses and their meaning. The Inmate had asked her to look up the information for him.

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 offenses include, "[f]raternization 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 and approved by the respective Regional Operations Chief or Deputy Director of Administration on a case by case basis."⁴

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.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.

On July 17, 2017, Grievant played dominos with an Inmate for approximately 55 minutes. During that time, Grievant was not supervising the Inmate as she was expected to do. She was acting as his friend and peer. Grievant was supposed to make rounds every 30 minutes on each side of the Building. She did not conduct 30 minute rounds on side A of the Building thereby undermining the Agency's ability to ensure inmate safety and public security. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for fraternization. Her behavior undermined the Agency's operations.

Grievant admitted to playing dominos with the Inmate but argued her behavior was consistent with the Agency's expectations to provide a healing environment for inmates. The evidence showed that Grievant received training regarding maintaining professional boundaries between corrections officers and inmates. Grievant knew or should have known that it was inappropriate to play dominos with inmates.

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"⁶ 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 argued that she was observed playing dominos by a supervisor who did not tell her to stop playing. This fact would not change the conclusion that Grievant fraternized with the Inmate. Grievant argued that a co-worker was also playing board games with inmates yet she was not disciplined. No credible evidence was presented to show that Facility managers were aware of the co-worker's behavior. The Hearing

⁶ Va. Code § 2.2-3005.

Officer cannot conclude that Grievant was singled out for disciplinary action. In light of the standard set forth in the Rules, 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 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]

^[1] 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/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer