

Issue: Group III Written Notice with Termination (failure to report fraternization);
Hearing Date: 11/02/18; Decision Issued: 11/26/18; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11265; Outcome: No Relief – Agency Upheld;
**Administrative Review Ruling Request received 12/11/18; EDR Ruling No. 2019-
4825 issued 01/03/19; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11265

Hearing Date: November 2, 2018
Decision Issued: November 26, 2018

PROCEDURAL HISTORY

On August 7, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to report fraternization.

On August 31, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 11, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On November 2, 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 Lieutenant at one of its facilities. He had been employed by the Agency for approximately 19 years.

Grievant had prior active disciplinary action. On February 8, 2016, Grievant received a Group II Written Notice.

Grievant supervised Officer P in the Housing Unit until Officer P moved to a Transportation post.

Officer P was fraternizing with Inmate B. She did not disclose this information to others but others at the Facility noticed Officer P's behavior.

On May 7, 2018, Investigator C learned from another employee that Officer P may have been fraternizing with Inmate B.

Inmate B's cell was in the Housing Unit. After finishing a transportation run, Officer P would sometimes enter the Housing Unit and speak with Inmate B.

Grievant learned from several offenders that Officer P was being watched. He gave Officer P a "heads up" that offenders told him she was being watched.

Grievant and Officer P communicated by text message. On May 14, 2018 at 6:42 p.m., Officer P sent Grievant a text:

Thanks for the heads up.

Grievant responded, "Cool."

Officer P said:

Do you honestly think it's just best for me to just stay out of the building for a while now? Or what do you think.

Grievant said:

Just to be safe ... I would

Officer P responded "Yo".

Grievant wrote:

U good?

Officer P wrote:

I'll be ok job searching.

Grievant wrote:

Don't leave thou cuz u are pretty go at what u do ... plus I like u

Officer P wrote:

LOL my ass f'k around and get walk out then what

Grievant wrote:

Why would u thou
U ain't did s—t

Officer P wrote:

Just saying ... I mean I ain't gone lie I guess we do kinda talk a lot but that's it

At 9:50 p.m., Grievant wrote:

Well if that's it then that's nothing

At 9:50 p.m., Officer P wrote:

Yea, you're right

On May 15, 2018, Officer P sent Grievant a text message at 2:32 p.m.:

Wyd? Why you not at work

Grievant wrote:

Went to [location]

Officer P wrote:

Oh ok how was that

Grievant wrote:

It was cool ... way

Officer P wrote:

Home

Grievant wrote:

No work [Person S] asked about u

Officer P wrote:

I did my room and brought my ass home ... [Person S] know about that bs too?

Grievant wrote:

Idk ... I didn't say nothing to her

Officer P wrote:

Oh ok ... way

At 2:40 p.m., Grievant wrote:

On my way home

On May 16, 2018 at 7:59 a.m., Grievant sent Officer P a text message:

Wtfyd

Officer P wrote:

Chillin lol come here

At 4:23 p.m., Grievant wrote:

Ima fight u

At 4:37 p.m., Officer P wrote:

What I do

At 4:45 p.m., Officer P wrote:

Hello

At 7:13 p.m., Officer P wrote:

Are we going to ever get back

At 7:24 p.m., Grievant wrote:

Yeah ... your situation got me shook

Officer P wrote:

I understand

I'll leave you alone until things calm down I guess

Cool?¹

On May 17, 2018 at 9:20 a.m., Investigator C interviewed Officer P about her relationship with Inmate B. Officer P said she was not having any type of communication with Inmate B or anyone in his family. She said she never brought Inmate B any contraband, nor had she had any kind of relationship with him other than a professional one. At Investigator C's request, Officer P showed him her cell phone text messages including those with Grievant.

¹ Agency Exhibit 6.

Shortly after her interview with Investigator C, Officer P met with the Major and told the Major that she would be resigning effective immediately. She admitted to the Major that she had lied to Investigator C.

Officer P resigned from the Agency on May 17, 2018.

The Agency presented evidence of Inmate B's telephone conversations. The Hearing Officer gives zero weight to that evidence.

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

DOC Operating Procedure 135.2 governs Rules of Conduct Governing Employees Relationships with Offenders. Section (IV)(E) provides:

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 comply 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 other community and any staff or offender boundary violations.⁵

The Agency has presented sufficient evidence to show that Grievant was aware that Officer P and Inmate B were fraternizing. Prior to May 14, 2018, Grievant knew that Officer P was being watched. "Being watched" means someone suspected Officer P of engaging in inappropriate behavior. Grievant gave Officer P a "heads up" about being watched. Officer P lied to Grievant about not fraternizing with Inmate B. As of

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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁵ Agency Exhibit 3.

9:50 p.m. on May 14, 2018, Grievant knew Officer P “kinda talk a lot but that’s it” with Inmate B. He was not aware yet that Officer P and Inmate B were fraternizing because he wrote, “Well if that’s it then that’s nothing.” The tone of Grievant’s text messages to Officer P changed on May 16, 2018. At 4:23 p.m. Grievant wrote “Ima fight u.” At 7:24 a.m., Grievant wrote, “your situation got me shook.”

A situation that “got me shook” is consistent with a situation where Officer P was fraternizing with Inmate B and Grievant was aware of that fraternization. Grievant knew that fraternization was strictly prohibited and was “shook” upon learning of Officer P’s situation. If Grievant was aware of fact that “shook” him, he should have reported that fact to Agency managers. Because Grievant failed to report possible fraternization to Agency managers, he acted contrary to DOC policy thereby justifying 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 is upheld.⁶

Grievant argued that he was not obligated to report a suspicion of fraternization or rumors of fraternization. It is clear that as of 9:50 p.m. on May 14, 2018, Grievant believed Officer P had done “nothing.” He would have no reason to report “nothing” to Agency manager. As of 7:24 p.m. on May 16, 2018, Grievant’s perception of Officer P had changed sufficiently that he was “shook” by her actions. It was reasonable to conclude that Grievant was aware of Officer P’s fraternization by that time. Grievant did not report what he knew to Agency managers and did not assert that he had any plans to report Officer P in the next few days. By the time Officer P resigned on the following day, Grievant had not reported his concerns about Officer P.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁶ The Agency’s policy requires disclosure of fraternization but it also requires disclosure of “behavior that is inappropriate”. Even if the Hearing Officer assumes Grievant was not sufficiently aware of Officer P’s fraternization, Grievant was aware Officer P engaged in inappropriate behavior of some sort.

⁷ *Va. Code § 2.2-3005.*

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]

[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].

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

Carl Wilson Schmidt, Esq.
Hearing Officer