

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 09/06/17; Decision Issued: 09/28/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11005; 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: 11005

Hearing Date: September 6, 2017
Decision Issued: September 28, 2017

PROCEDURAL HISTORY

On March 13, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for granting special privileges to an inmate.

On April 4, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 24, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. The grievance was originally scheduled for July 6, 2017. At Grievant's request, the Hearing Officer found just cause to reschedule the hearing for September 6, 2017. On September 6, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Operations Supervisor at one of its facilities. She had been employed by the Agency for approximately five years. Grievant had prior active disciplinary action. On July 28, 2016, Grievant received a Group III Written Notice for fraternization.

Inmates in the Infirmary were entitled to receive extra food only if a nurse or doctor authorized the inmate to receive additional food. For example, if an inmate had diabetes, a doctor might order that the inmate receive additional food to enhance his blood sugar level.

Grievant knew the Inmate because he worked in the kitchen where Grievant also worked. The Inmate was in the Infirmary because he was sick with the flu. Grievant wanted the Inmate to get better.

On February 18, 2017, Grievant entered the Infirmary and spoke with Officer B. Grievant was holding a cup of coffee and holding a bag. Officer B asked, "What's that and who's it for?" Grievant placed her extended finger against her lips and said "shush". Officer B understood her gesture to mean "be quiet or keep quiet". Grievant said the items were for the Inmate. Officer B could see that Grievant was holding coffee

but did not inspect the contents of the bag. Officer B opened the door to the Inmate's room. Grievant entered the Inmate's room and gave him the coffee and bag.

Officer B notified the Watch Commander who sent a Sergeant to the Infirmary. The Sergeant confiscated the coffee and items in the bag. The bag contained food including an apple, plumb, cookies and carrots.

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

DOC Operating Procedure 135.2 governs Rules of Conduct Governing Employee Relationships with Offenders. Fraternalization 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.

Section C addresses "Improprieties: Non-Professional Association" including:

3. Special Privileges – Employees shall not extend or promise an offender special privileges or favors not available to all persons similarly supervised, except as provided for through official DOC channels.

On February 18, 2017, Grievant entered the Infirmary and gave an Inmate coffee and some food items in a bag. These items were special privileges because an inmate in Infirmary was not entitled to additional food unless authorized by a medical professional. By providing the Inmate with special privileges, Grievant engaged in a non-professional association with the Inmate. A non-professional relationship is the same as a unprofessional association. An employee association with an inmate that is unprofessional is fraternization. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for fraternization. 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 the food she gave to the Inmate did not constitute a special privilege. The evidence showed to the contrary. Inmates in the Infirmary were not entitled to extra food unless ordered by a medical provider. By providing the Inmate with extra food, Grievant afforded that inmate a special privilege.

Grievant argued that other food service workers received extra food. The evidence showed that sometimes the Facility permitted food service workers to have special meals and that sometimes offenders removed food from pots or pans as the food was being discarded. In this case, however, Grievant provided special food to one food service inmate. It does not appear that the other food service inmates received coffee and the same food items given to the Inmate in the Infirmary. It appears that the Inmate was treated differently from other inmates including food service inmates.

Grievant argued that if Officer B had told her she could not give the Inmate food, she would not have done so. Officer B was not obligated to prevent Grievant from delivering food to the Inmate.

Grievant argued that fraternization and special privileges were specified as separate items under Section C Non-Professional Association and thus a special

privilege could not be fraternization. The policy is not artfully written. Fraternization is also written in the definition section of the policy. That definition refers to employee associations with offenders that extend to unprofessional behavior. Since special privileges constitute unprofessional behavior, they meet the definition of fraternization.

Grievant argued that the Written Notice was not factually or procedurally correct. The Written Notice provided sufficient notice of the Agency's allegations against Grievant and permitted her a sufficient opportunity to present her defenses.

Grievant argued that the Agency took disciplinary action against Grievant in part because of her race. No credible evidence was presented to support this allegation. Grievant's opinion that she was being discriminated against because of her race is not sufficient evidence of racial discrimination.

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. 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:

⁶ Va. Code § 2.2-3005.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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