

Issue: Group III Written Notice with termination (fraternization); Hearing Date: 03/17/06; Decision Issued: 03/27/06; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 8291; Outcome: Employee granted partial relief; **Administrative Review**: **HO Reconsideration Request received 04/10/06; Reconsideration Decision issued 04/14/06; Outcome: Original decision reversed. Agency upheld in full.**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8291**

Hearing Date: March 17, 2006  
Decision Issued: March 27, 2006

**PROCEDURAL HISTORY**

On November 9, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal based on an investigation of the Special Investigations Unit that Grievant fraternized with a current or ex-offender. On December 7, 2005, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 21, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 17, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUE**

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. 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 until his removal effective November 11, 2005. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

In the fall of 2004, Grievant began a romantic and sexual relationship with Mrs. R. Mrs. R was married to an Inmate at another correctional facility. The relationship ended some time after June 2005. Within a few days or months of their relationship beginning, Grievant learned from Mrs. R that she was married to an Inmate who was or would become incarcerated at a Department of Corrections' facility. Grievant continued to have a romantic and sexual relationship with Mrs. R even though he knew she was married to an Inmate. The Agency discovered the relationship and began an investigation. As part of the investigation, Grievant admitted "she was staying overnight at my residence and we were sexually involved."

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which

require correction in the interest of maintaining a productive and well-managed work force.” Department of Corrections Procedure Manual “(DOCPM”) § 5-10.15. Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

DOC Operating Procedure 130.1(III)<sup>1</sup> defines fraternization as:

The act of, or giving the appearance of, association with offenders, and/or their family members that extends to unacceptable, unprofessional and prohibited behavior. Examples include ... non-work related relationships with family members of offenders ....

Mrs. R was a family member of the Inmate because she was married to him. Grievant fraternized with Mrs. R because he had a romantic and sexual relationship with her.

DOC Operating Procedure 130.1(V)(B) states,

Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and ... families of offenders is prohibited.

“Failure to ... otherwise comply with established written policy” is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant failed to comply with DOC Operating Procedure 130.1 because he fraternized with a family member of an offender. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. A suspension of up to ten workdays is permitted upon the issuance of a Group II Written Notice.

The Agency took disciplinary action against Grievant for two reasons. First, because he was having a non—professional relationship with a family member of an inmate. Second, because Mrs. R was a parolee. Thus, even if she was not married to an Inmate, Grievant’s relationship with her would have been inappropriate under the second reason.

The Agency has presented facts supporting the first reason for taking disciplinary action. Neither DOC Operating Procedure 130.1, nor DOC Procedures Manual 5-10 states that the Agency may issue a Group III Written Notice to an employee engaged in a non-professional relationship with a family member of an inmate. Thus, there is no basis to issue a Group III Written Notice instead of a Group II Written Notice to Grievant for having a non-professional relationship with an inmate’s family member.

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<sup>1</sup> DOC Procedures Manual 5-22 preceded DOC Operating Procedure 130.1. Grievant received training regarding the rules governing relationships with inmates, probationers, or parolees. See, Agency Exhibit 4.

With respect to the second reason, the Agency issued Grievant a Group III Written Notice with the assumption that Mrs. R was a parolee under the supervision of the Department of Corrections. DOC Operating Procedure 130.1(IV) states, “[a]ssociations between staff and **offenders** that may compromise security, or undermine the effectiveness to carry out the employee’s responsibilities may be treated as a Group III offense ....” (Emphasis added). DOC Procedures Manual 5-10.17(B)(26) states, “[f]raternalization or non-professional relationships with **offenders** ...” is a Group III offense. (Emphasis added). Thus, if Mrs. R is an offender within the meaning of these policies, then the Agency may issue Grievant a Group III Written Notice with removal.

DOC Operating Procedure 130.1(III) defines offenders as:

Inmates, Probationers and Parolees under the supervision of the Department.

The evidence in this case showed that Mrs. R had been convicted of a crime as a juvenile and was a parolee under the **local** community corrections system. Her parole officer was Mr. H. Mr. H was not an employee of the Virginia Department of Corrections. The local community corrections agency was not a part of the Virginia Department of Corrections. Although Mrs. R was a parolee, she was not a parolee **under the supervision of the Department** as required by DOC Operating Procedure 130.1(III). In other words, the Agency’s assumption that Mrs. R was an offender is false. The Agency has not presented evidence to show that Grievant engaged in a non-professional relationship with an offender (as DOC defines the term “offender”). Thus, there is no basis to support the Agency’s issuance of a Group III Written Notice (instead of a Group II Written Notice).

*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 Employment Dispute Resolution....”<sup>2</sup> Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.”

Grievant contends the disciplinary action should be mitigated. He argues that Mrs. R and the Inmate were separated and Mrs. R intended to file for divorce.

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<sup>2</sup> *Va. Code § 2.2-3005.*

Grievant's argument is not supported by the evidence. Although Mrs. R and the Inmate were physically separated, separation occurs as a matter of course any time an individual is incarcerated. If Mrs. R and the Inmate separated prior to the Inmate entering a correctional facility, that separation would be insufficient to reverse the legal obligation of marriage. Thus, Mrs. R would remain a family member of the Inmate. No evidence was presented of a written separation agreement between Mrs. R and the Inmate. No evidence was presented that Mrs. R had filed pleadings in a court to seek divorce. Based on the evidence presented, Mrs. R was legally married to the Inmate during her relationship with Grievant. In light of the standard set forth in the *Rules for Conducting Grievance Hearings*, 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 is **reduced** to a Group II Written Notice with a ten workday suspension. The Agency is ordered to reinstate Grievant to his former position or, if occupied, to an objectively similar position. The Agency is ordered to provide Grievant with full back pay less any interim earnings and restore his benefits and seniority. Back pay should begin after the ten workday suspension.

### APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

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>3</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>3</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8291-R**

Reconsideration Decision Issued: April 14, 2006

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request. The Hearing Officer grants the Agency’s request for reconsideration.

The *Rules for Conducting Grievance Hearings* state:

In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

In support of this principal, the *Rules* cite O’Keefe v. USPS, 318 F.3d 1310 (Fed. Cir. 2002). In O’Keefe, the agency removed an employee with the general charge of “improper conduct/fraudulent use of personal identifiers.” The Court reversed the agency’s action because the facts and reasons for the removal were not written in the Notice of Proposed Removal given to the employee.

The first question to be addressed in this reconsideration is whether the Department of Corrections’ Written Notice issued to Grievant should be reversed because it is poorly worded.

Agencies are expected to issue Written Notices that properly place employees on notice of the supporting facts and reasons for the agency’s disciplinary actions. The difficulty with this case begins with the Agency’s Written Notice. It provides:



**[Part 1]** Based on an Investigation by the Special Investigations Unit, they have founded an allegation **[Part 2]** that you have fraternized with either a current or ex-offender. (Bold language added by the Hearing Officer.)

Under the *Rules for Conducting Grievance Hearings*, the first issue in every disciplinary grievance is:

Whether Grievant engaged in the behavior described in the Written Notice?

Grievant did not fraternize with a current or ex-offender. Grievant had a romantic relationship with Mrs. R. Mrs. R was a parolee but not a parolee within the Department of Corrections. Mrs. R's status as a parolee is irrelevant. Part 2 of the Written Notice has not been established by the Agency. If only Part 2 of the charge is considered, the Agency has not presented any basis upon which to take disciplinary action.

Part 1 of the charge addresses a founded allegation in the Investigation report conducted by the Special Investigations Unit. No evidence was presented to suggest the report was attached to the Written Notice. The report was presented to the Grievant at least four work days prior to the hearing as part of the parties' exchange of documents.

The investigative report is somewhat contradictory. In the synopsis, the report states:

[Major P] reported he had received information that [Grievant] was in violation of the fraternization policy. [Major P] stated this information was that [Grievant] was having a relationship with [Mrs. R] the wife of an [Inmate] housed at [another Facility].

Based on the information gained in this investigation, the allegation [Grievant] violated the fraternization policy is **FOUNDED**.

This part of the report suggests the Agency concluded Grievant violated the fraternization policy by having a relationship with Mrs. R, the wife of an Inmate.

Part 6 of the report discusses, Applicable Policy. The report says:

Fraternization or non-professional relationships between employees and offenders is prohibited, including when the offender is within 180 days of the date following his/her discharge from Department custody .... This action may be treated as a Group III under DOC procedure 5-10 [Standards of Conduct].

Part 6 of the report suggests the Agency concluded Grievant violated the fraternization policy by dating an offender. Part 6 does not mention violating the fraternization policy

by dating a woman who is married to an offender. Instead, the alleged violation of policy is dating an offender.

In short, the investigative report presents a confusing description of the Agency's basis for taking disciplinary action, but it mentions the impropriety of dating and inmate's wife.

Once Grievant received the Written Notice, he initiated a Grievance which provided him an opportunity to present evidence in support of his position and provided the Agency with an opportunity to further clarify the charges against Grievant. Grievant defended his grievance by stating that "my friend [is] not [an] offender as defined in the Virginia Department of Corrections [policy]." Thus, Grievant replied to the specific language of the Written Notice.

The First Step Respondent replied:

Based on an Investigation by the Special Investigation Unit the allegation of your fraternizing with the legal wife of a convicted felon was founded. You admitted to have a relationship with this woman. Policy indicates that this is grounds for termination.

In other words, the First Step Respondent described the basis of termination not as dating an offender, but as fraternizing with the wife of an inmate. The First Step response informs Grievant of another reason for disciplining him.

If the standard set forth in O'Keefe is applied strictly, then the disciplinary action against Grievant must be reversed. The Hearing Officer, however, finds that the Agency cured its defective Written Notice by stating in the First Step response that Grievant was terminated for dating the wife of an inmate. This conclusion was confirmed by the Investigative report which concluded Grievant acted contrary to policy by dating the wife of an inmate. The report was provided to Grievant at least four work days prior to the hearing. During the hearing, Grievant argued his defenses against the charge he was dating the wife of an inmate. For example, he argued the wife and Inmate were separated, thus, he believed he was free to date her. There is no reason to believe Grievant was prejudiced by the Agency's defective Written Notice.

As part of the original hearing decision, the Hearing Officer found Grievant failed to comply with DOC Operating Procedure 130.1<sup>4</sup> because he fraternized with a family member of an offender. DOCPM § 5-10.17(B)(25) includes as a Group III offense,

*Violation of DOC Procedure 5-22 Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees.*

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<sup>4</sup> Formerly, DOC Procedure 5-22.

By violating DOC Operating Procedure 130.1, Grievant acted contrary to DOCPM § 5-10.17(B)(25). The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice with removal. The original hearing decision must be modified. Accordingly, the Group III Written Notice of disciplinary action with removal issued to Grievant is **upheld**.

### **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer