

Issue: Group III Written Notice with demotion and pay reduction (fraternization with inmate); Hearing Date: 09/18/06; Decision Issued: 09/29/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8413; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8413

Hearing Date: September 18, 2006
Decision Issued: September 29, 2006

PROCEDURAL HISTORY

On May 24, 2006, Grievant was issued a Group III Written Notice of disciplinary action with role change to a lower pay band and disciplinary pay reduction for fraternizing with an inmate. On June 19, 2006, 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 August 17, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 18, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
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 Lieutenant until his demotion to a Corrections Officer Senior with 15% disciplinary pay reduction effective May 24, 2006. The purpose of his position was:

Monitors and guides the overall operations of the institution during shift to ensure that all policies and procedures are strictly followed. Ensure through personal observation that all staff are familiar with post functions. Address employee/inmate problems promptly reporting same through chain of command when needed.¹

One of Grievant's Core Responsibilities was:

Supervise the Audit Folders and ensure all departments are completing their folders with mandates standards documentations. Revise post orders annually and submit them to the Major for review by October of

¹ Grievant Exhibit 3.

each year. Provide the Major with a written report regarding the progress and areas of concern each month.²

Grievant's work performance was satisfactory to the Agency for the past several years. He consistently received overall performance ratings of "Contributor."³ No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Grievant needed a clerk to assist him with organizing and maintaining approximately 521 folders.⁴ He advertised to inmates for the position. He selected the Inmate because she had a Master's degree and she had maintained folders at another institution prior being transferred to Grievant's institution. The Inmate began working for Grievant sometime in February 2005.

Grievant's office was outside the housing security perimeter. In order to work for Grievant, the Inmate had to leave her housing unit and walk outside to Grievant's office. In August 2005, the Inmate received a detainer originated by a locality. Under the Facility's procedures, an inmate with a detainer could not work outside the housing unit security perimeter. On August 17, 2005, the Agency prohibited the Inmate from leaving the housing unit and going to Grievant's office to work. The Inmate could not work for Grievant any longer and she had to remain in the housing unit.

The Major asked Grievant if he wanted to replace the Inmate as his clerk. Grievant said no because he was willing to wait until the detainer was lifted so that the Inmate could return to work even though it was unknown how long the detainer would last.

Even though the Inmate no longer worked for Grievant, he frequently would leave his office and make rounds in Grievant's housing unit. While there, he would stop to talk to the Inmate for five to fifteen minutes. He did not regularly stop to talk to any other inmates for five to fifteen minutes. The number of times and the amount of time Grievant spent talking to the Inmate was noticed by other security personnel and by many inmates. For example, the Food Manager at the Facility had a large office window and could view employee movement. He noticed Grievant frequently visiting the Inmate and talking to her for five to ten minutes at a time. The Food Manager concluded Grievant was infatuated with the Inmate based on of Grievant's "body language" when he spoke with the Inmate.

The Lieutenant noticed Grievant's visits to the housing unit increased after the Inmate was brought there. In a written statement, the Lieutenant told an Agency Investigator, "[w]hen [Grievant] came to the landing he would call [the Inmate] to the

² Grievant Exhibit 3.

³ Grievant Exhibit 3.

⁴ The skills necessary to assist Grievant were clerical in nature and did not require advanced educational degrees.

landing where he would engage in conversation with her once or twice a day for approximately ten minutes at a time, but this varied.”⁵ In October or November 2005, the Lieutenant told Grievant that there were rumors among people in the Facility that he and the Inmate were having a relationship. The Lieutenant asked Grievant if Grievant thought it was good idea to keep seeing the Inmate. The Lieutenant pointed out that the Agency had recently discovered a scandal involving a sexual relationship between an inmate and an employee. Grievant “just brushed it off.”⁶

On December 8, 2005, the Inmate was transferred to another institution. Several employees noticed that Grievant stopped going to the “landing” as often as he did when the Inmate was at the Facility.

The Agency began an investigation. An Investigator interviewed numerous employees and inmates at the Facility and obtain written statements from them. At least ten employees gave written statements indicating they have observed Grievant engaging in behavior that would cause them to believe he was fraternizing with the Inmate.

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.”⁷ 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.”⁸ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁹

Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(25), *Standards of Conduct*, states that Group III offenses include “[v]iolation of DOC Procedure 130.1, *Rules of Conduct Governing Employees’ Relationships with Offenders*.

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

⁵ Agency Exhibit 3.

⁶ Agency Exhibit 3.

⁷ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁸ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁹ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited. Associations between staff and offenders that may compromise security, or undermine the effectiveness to carry out the employee's responsibility may be treated as a Group III offense under the Department's *Standards of Conduct and Performance*.

DOC Operating Procedure 130.1(III) 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 excessive time and attention given to one offender over others. *** (Emphasis added).

DOC Operating Procedure 130.1(III) defines offenders as:

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

Grievant was well-aware that others perceived him as being too close to the Inmate. Grievant wrote in his statement, "[p]rior to [the Inmate] receiving the Detainer and not allowed to work outside, a counselor approached me and said it was rumored among inmates that [the Inmate] and I were involved with one another."¹⁰ On October or November 2005, the Lieutenant also advised Grievant that rumors existed about a relationship between him and the Inmate and the Lieutenant questioned if it was a good idea for Grievant to continue seeing the Inmate. Grievant ignored all of these warnings that his behavior was giving rise to the appearance of fraternization and he continued to visit the Inmate and speak with her at length.

There is little evidence to show that Grievant and the Inmate were in a romantic or intimate relationship. The Agency, however, has presented sufficient eyewitness testimony at the hearing to show that Grievant focused his attention on the Inmate to the exclusion of other inmates and staff. Grievant engaged in lengthy conversations with the Inmate while not engaging in similar conversations with other inmates or staff. Grievant frequently met with the Inmate while not meeting as frequently with other inmates. The perception that Grievant was having a relationship with the Inmate was widespread. The Agency presented evidence of approximately ten employees who observed Grievant and believed he was acting inappropriately with respect to the Inmate.¹¹ There is ample evidence to show that Grievant created the appearance among others at the Facility that he was particularly interested in the Inmate.

¹⁰ Agency Exhibit 2.

¹¹ Grievant argued some of the witnesses may have had motives to speak against him. Based on the Hearing Officer's observation of these witnesses, their testimony was credible.

Under DOC Operating Procedure 130.1 is it not necessary for the Agency to show Grievant had an unprofessional association with the Inmate, it is only necessary that the Agency show Grievant gave the appearance of having such a relationship. The Agency has presented sufficient evidence to support its conclusion that Grievant fraternized with the Inmate by giving the appearance of an unprofessional relationship with the Inmate. The Agency's issuance of a Group III Written Notice must be upheld.

Upon the issuance of a Group III Written Notice, the Agency may demote Grievant and impose a salary reduction of at least 5%.¹² Accordingly, Grievant's role change with pay reduction is upheld.¹³

Grievant contends he needed to stop to talk to the Inmate in order to obtain her assistance regarding maintaining the folders. Grievant's assertion is partially contradicted by his written statement to the Investigator. Grievant told the Investigator he did not see the need to immediately replace the Inmate because "I felt at the time that it wasn't necessary because we weren't working on anything **that couldn't wait** until she was released from the Detainer."¹⁴ (Emphasis added). Assuming for sake of argument that Grievant needed to frequently meet with the Inmate in order to perform his duties, his actions nevertheless created the appearance of a relationship with the Inmate.

Grievant contends the disciplinary action should be mitigated. *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...."¹⁵ 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." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

¹² DOC Operating Procedure 135.1(III).

¹³ The Hearing Officer must give deference to the Agency's decision to demote Grievant from the rank of a Lieutenant down to the rank of a Corrections Officer Senior even though the Agency could have demoted him to a Sergeant instead. The degree of demotion is within the Agency's right to manage.

¹⁴ Agency Exhibit 2.

¹⁵ *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 demotion and pay reduction is **upheld**.

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 14th St., 12th 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 all of your appeals to the other party and to the EDR Director. 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.¹⁶

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.