

Issue: Group III Written Notice with termination (fraternization); Hearing Date: 12/18/06; Decision Issued: 12/19/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8464; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA  
*Department of Employment Dispute Resolution*

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8464

Hearing Date: December 18, 2006  
Decision Issued: December 19, 2006

APPEARANCES

Grievant  
Warden  
Two witnesses for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice issued for sexual misconduct with an inmate.<sup>1</sup> As part of the disciplinary action, grievant was removed from state employment effective September 27, 2006.

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<sup>1</sup> Agency Exhibit 1. Group III Written Notice, issued September 29, 2006.

Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> The Department of Corrections (DOC) (Hereinafter referred to as “agency”) has employed grievant as an electrician for five years.

Agency policy prohibits improprieties or the appearance of improprieties, fraternization, or other nonprofessional association by and between employees and offenders. Associations between staff and offenders that may compromise security or undermine the employee’s effectiveness to carry out his responsibilities may be treated as a Group III offense.<sup>3</sup> When grievant was employed at his current facility, he signed a Conditions of Employment agreement in which he accepted conditions of employment including requirements that he read and comply with institution operating procedures and follow supervisory instructions.<sup>4</sup> Grievant understood the fraternization policy and knew that kissing an inmate is considered a form of fraternization. In March 2005, grievant received a copy of the Employee Orientation Handbook which addresses the fraternization policy.<sup>5</sup> He most recently received training about sexual misconduct in April 2005.<sup>6</sup> During that training, he was instructed that any behavior of a sexual nature, conversations or correspondence of an emotional, romantic, or intimate nature are subject to disciplinary action.

Grievant had known inmate H since her arrival at the facility in late 2005. At some point, grievant learned in conversation with the inmate that her brother was having problems. During the early summer of 2006, grievant was repairing lights in a dayroom where inmate H was sitting watching television. Grievant had some casual conversation with her and then, as he was leaving, he stopped at the sofa and gave the inmate a “peck on the cheek” kiss. A few weeks later, inmate H gave grievant a personal letter which he destroyed. In August 2006, grievant was repairing lights in the chapel; inmate H was performing cleaning chores in the chapel. Inmate H gave grievant a letter and told him it was her birthday. Grievant kissed her on the cheek and left the chapel. He also destroyed the second letter because he did not want the inmate to get into trouble. Grievant averred that he kissed the inmate on two occasions because he was sympathetic to the problems her brother was having.

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<sup>2</sup> Agency Exhibit 2. Grievance Form A, filed October 4, 2006.

<sup>3</sup> Agency Exhibit 4. Section V.B, Agency Operating Procedure Number 130.1, *Rules of Conduct Governing Employees’ Relationships with Inmates, Probationers, or Parolees*, February 15, 2004, states: Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and inmates, probationers, or parolees or families of inmates, probationers, or parolees is prohibited. Associations between staff and inmates, probationers, or parolees which may compromise security or which undermine the employee’s effective to carry out his responsibilities may be treated as a Group III offense under the Department’s *Standards of Conduct and Performance*.

<sup>4</sup> Agency Exhibit 3. Conditions of Employment, July 25, 2001.

<sup>5</sup> Agency Exhibit 4. Receipt for Handbook, March 28, 2005.

<sup>6</sup> Agency Exhibit 5. Outline of training, April 22, 2005.

Someone reported the chapel incident to the assistant warden. The Assistant warden notified the Office of Inspector General which assigned an investigator to look into the matter. The investigator interviewed both grievant and inmate H. Both admitted that the kisses had occurred as described above.

#### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions the employee must present his evidence first and must prove his claim by a preponderance of the evidence<sup>7</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or

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<sup>7</sup> § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section V.B.3 of Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.<sup>8</sup> The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section XII.A of the DOC *Standards of Conduct* addresses Group III offenses, which are defined identically to the DHRM *Standards of Conduct*.<sup>9</sup> Procedure 135.1 specifies that sexual misconduct with offenders including conversations or correspondence of an emotional, romantic, or intimate nature is a Group III offense.

The facts in this case are undisputed. Grievant admits that he kissed the same inmate on two different occasions – once in a dayroom and once in the chapel. He also admits that the same inmate had on two occasions given him personal letters which he subsequently destroyed without notifying his supervisor or anyone else in management. Grievant also acknowledges that in conversations with this inmate he had learned about her brother's personal problems. As a result, grievant became sympathetic to the inmate and demonstrated his compassion by twice kissing her. Grievant further admitted that he had destroyed the personal letters he received from the inmate so that she would not get into trouble. Grievant knew that kissing an inmate is fraternization and prohibited by policy. He also knew that he had a duty and responsibility to report and turn over to facility management letters written to him by the inmate. Grievant acknowledges his violations of policy but argues that the discipline was too harsh for the offenses.

Fraternization can be a major problem in correctional facilities. When an inmate establishes a personal relationship with an employee, the inmate can use that relationship to persuade the employee to violate rules. It does not matter whether the relationship involves physical intimacy. In this case, grievant had made physical contact with the inmate and had concealed from authorities that the inmate gave him personal letters. Both the inmate and grievant knew that he had violated policy by not reporting the correspondence and by kissing her. Although the inmate had not yet asked grievant to violate any rules for her, the possibility exists that she could begin to do so. The rules prohibiting fraternization are designed to prevent an employee from getting into situations where the inmate can use the relationship against the employee. For this reason, the agency has taken a very firm stand on disciplining fraternization infractions.

### Mitigation

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<sup>8</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>9</sup> Agency Exhibit 3. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has a moderate length of service and an otherwise satisfactory performance record. The agency considered these factors but felt they were not sufficiently mitigating to reduce the disciplinary action. Based on the totality of the evidence, the hearing officer concludes that the agency's disciplinary action was within the limits of reasonableness.

### DECISION

The decision of the agency is affirmed.

The Group III Written Notice and removal from state employment effective September 27, 2006 are hereby AFFIRMED.

### 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. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> floor  
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director

Department of Employment Dispute Resolution  
830 E Main St, Suite 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.<sup>10</sup> 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>11</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]

*S/David J. Latham*

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David J. Latham, Esq.  
Hearing Officer

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<sup>10</sup> An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>11</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.