

Issue: Two Group III Written Notices (fraternization, obstruction of justice/failure to report, falsifying records) and termination; Hearing Date: 06/19/07; Decision Issued: 08/13/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8512; Outcome: Partial Relief – (Fraternization – Full Relief [Written Notice rescinded], Obstruction of Justice/Failure to Report – No Relief [Agency Upheld], Falsifying Records – No Relief [Agency Upheld], Termination – No Relief [Termination Upheld]).



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8512

Hearing Date: June 19, 2007
Decision Issued: August 13, 2007

PROCEDURAL HISTORY

On October 10, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to report sexual advances from an inmate and fraternization. Grievant also received a Group III Written Notice of disciplinary action with removal for obstructing justice, failure to report, and falsifying records.

On November 6, 2006, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 17, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 19, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 October 10, 2006. He had been employed by the Agency for over 21 years. The purpose of his position was to, "provide security and supervision of adult offenders at this facility."¹ He consistently had been a contributor to the Agency as reflected by his prior evaluations. No evidence of other disciplinary action against Grievant was introduced during the hearing.

The Agency discovered that a female inmate had been impregnated by a corrections officer. Agency investigators began speaking with employees and inmates at the Facility. As a result of these conversations, additional allegations of sexual misbehavior arose. Agency investigators began a series of investigations focusing on different corrections officers at the Facility.

¹ Grievant Exhibit 1.

Inmate M worked with Grievant in the tool room for approximately one and a half years. Inmate M was in charge of distributing supplies.

In 2005, Inmate M was aware of a rumor that Corrections Officer M and an Inmate G were having a sexual relationship. On one day in 2005, Inmate M observed Corrections Officer M enter the mailroom where Inmate G was assigned. Inmate M went to the door of the mail room and looked inside. She observed Inmate G and Corrections Officer M with their pants down engaged in sexual intercourse. Inmate M immediately reported this information to Grievant. Grievant did not believe her allegation and did not report it up his chain of command. Grievant did not ask Inmate M to submit a written report regarding her observation.

Inmate M believed that Grievant informed Corrections Officer M of her observation because Corrections Officer M later spoke with her about it. Inmate M also learned that Corrections Officer M had spoken with Grievant and attempted to have Grievant fire Inmate M in order to remove her from working in the mailroom. Grievant did not comply with Corrections Officer M's request.

Inmate M also told Grievant that a Corrections Officer H had exposed himself and repeatedly sexually harassed an inmate. Grievant did not report this to his supervisor.

Special Agent F was investigating Corrections Officer M and Corrections Officer H regarding allegations that they were having sexual relations with female inmates. On March 1, 2005, Special Agent F interviewed Grievant regarding Corrections Officer M. Grievant said he had seen Inmate G in the mailroom with Corrections Officer M on two or three occasions but he did not witness any interaction between them. Grievant did not tell Special Agent F that Inmate M told him she observed Corrections Officer M having sex with an inmate.

Agency investigators spoke with Inmate M in 2006 after she had been released from the Facility but remained on parole. The investigators concluded Grievant may have information necessary for the investigation. On June 15, 2006, Special Agent D and Special Agent M contacted Grievant regarding their conversations with Inmate M. Grievant admitted that Inmate M told him about Corrections Officer H exposing himself to an inmate and about Corrections Officer M having sex with an inmate. Grievant confirmed that Corrections Officer M approached Grievant and ask that Inmate M be terminated from her job because he was tired of Inmate M "dipping into his business." Grievant told the investigators he did not fire Inmate M because he had no reason to do so.

On June 15, 2006, an investigator asked Grievant if he had been interviewed by Special Agent F in April 2005 regarding Corrections Officer M. Grievant told the investigator he had never been interviewed by Internal Affairs regarding the investigation of Corrections Officer M.

Agency investigators later realized that Grievant had spoken with Special Agent F in March 2005. On July 7, 2006, they met with Grievant again. Grievant admitted that the statement he rendered on June 15, 2006 was not completely accurate. He admitted he was interviewed by Special Agent F in April 2005² but did not tell Special Agent F about Inmate M's statement to him that she observed Corrections Officer M having sex with an inmate in the mailroom. Grievant said he had forgotten about being interviewed by Special Agent F and only remembered the interview shortly after Grievant's interview on June 15, 2006. Grievant said he did not contact the investigators about his inaccurate statement because he thought the investigators already knew that Grievant had been interviewed in 2005 and the investigators already knew what Grievant had said during that interview.

Grievant was later given a polygraph examination. During the pre-test interview, Grievant admitted that Inmate M had flirted with him on occasion. After that examination, Grievant was interviewed again. Grievant said that Inmate M had opened her legs³ to sexually entice him. Grievant said Inmate M had fondled herself and attempted to fondle him.⁴

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."⁵ 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."⁶ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁷

Group III Written Notice for Fraternalization

Virginia Department of Corrections Operating Procedure 135.1(XII)(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*.

² The actual date was March 1, 2005.

³ Inmate M was wearing pants at the time.

⁴ Inmate M tried to touch Grievant's penis but he told her to stop.

⁵ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁶ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

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

Fraternization is defined as:

The act of, or giving the appearance of, association with offenders, or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include excessive time and attention given to one offender over others, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.⁸

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.

The Agency has not established that Grievant fraternized with Inmate M because the Agency has not established an association between Grievant and Inmate M. Grievant failed to report the information Inmate M told him about Corrections Officer M. His failure to report was not in order to protect Inmate M. Inmate M attempted to entice Grievant by opening her legs and by attempting to touch his penis. Grievant told Inmate M to stop and she did so. The Agency has not established why Grievant failed to report this interaction with Inmate M. It may be the case that Grievant failed to report the information because he had resolved the incident rather than because he intended to protect or associate with Inmate M. The Group III Written Notice issued to Grievant for fraternization must be reversed.

Obstructing Justice/Failure to Report and Falsifying Records

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."

⁸ Virginia Department of Corrections Operating Procedure 130.1(III), *Rules of Conduct Governing Employees' Relationships with Offenders*.

The Agency contends Grievant obstructed justice. Agency policy does not define obstruction of justice. Black's Law Dictionary (6th edition) defines "obstructing justice" as, "impeding or obstructing those who seek justice in a court, or those who have duties or powers of administering justice therein. The act by which one or more persons attempt to prevent, or do prevent, the execution of lawful process." ****

Grievant obstructed justice by impeding the Agency's 2005 investigation of Corrections Officer M. Grievant knew that Special Agent F was investigating Corrections Officer M regarding that officer's sexual behavior with inmates. Grievant knew or should have known to have disclosed to Special Agent F that he learned from Inmate M that she observed Corrections Officer M having sex with an inmate.

Grievant obstructed justice by impeding the Agency's 2006 investigation of sexual behavior at the Facility. On June 15, 2006, Grievant denied being interviewed by Special Agent F in 2005. In fact, Grievant had been interviewed by Special Agent F on March 1, 2005. Being interviewed by Internal Affairs is not normally something one would forget.⁹ Grievant should not have falsely denied being interviewed by Special Agent F. Assuming Grievant's assertion is true that he forgot about his interview by Special Agent F when he was interviewed on June 15, 2006, Grievant admitted to remembering the interview shortly after June 15, 2006. Grievant should have contacted the Agency investigators to correct his statement, but he failed to do so. His argument that the Agency already knew he had been interviewed by Special Agent F is not persuasive.

Grievant obstructed justice during the Agency's 2006 investigation because he failed to fully disclose his interactions with Inmate M. For example, only after the polygraph process did Grievant admit that Inmate M opened her legs to sexually entice him, fondle herself, and attempt to fondle Grievant.

An important function of the Agency is to house and supervise convicted felons. It is essential to the Agency's mission that its employees do not engage in criminal behavior in the workplace. Employees who prevent the Agency from fully investigating allegations of criminal behavior are undermining the effectiveness of the Agency. Accordingly, the Agency has established that obstruction of justice is a Group III offense.

Virginia Department of Corrections Operating Procedure 130.1(IV)(G)(1) prohibits any "behavior of a sexual nature between employees and offenders" Section VIII states that, "employees are required to report to their supervisors or other management officials any conduct by other employees that violates this procedure"¹⁰

⁹ This is especially true given that Grievant wrote a statement at the investigator's request.

¹⁰ See also, *Department of Corrections Procedures Manual Procedure Number 10-1*. Section 10-1.12 provides:

- A. Any employee of the Department becoming aware of any criminal activity, waste, fraud, mismanagement, security breach, improper financial practices, escapes or attempted escapes,

Failure to comply with Virginia Department of Corrections Operating Procedure 130.1 is a Group III offense.¹¹

Inmate M told Grievant that Corrections Officer M had engaged in behavior of a sexual nature with an inmate. Grievant did not report that information to his supervisor or Facility managers thereby violating Virginia Department of Corrections Operating Procedure 130.1.

The Agency has presented sufficient evidence to support its issuance to Grievant of a Group III Written Notice for obstruction of justice and failure to comply with Virginia Department of Corrections Operating Procedure 130.1.¹² An agency may remove an employee upon the issuance of a Group III Written Notice.

Mitigation

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....”¹³ 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.

Grievant argues he was treated differently from other employees because several other employees who engaged in inappropriate behavior were permitted to

and in the other questionable illegal activity shall report saying to the Office of Inspector General.

- B. ***
- C. Employees may follow the established chain of command in reporting suspected violations in lieu of reporting directly to the Office of Inspector General.
- D. Willful failure to report known questionable illegal activities shall be deemed cause for disciplinary action.

¹¹ See, Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(25).

¹² It is not clear that Grievant falsified any State documents. It is not necessary to resolve the question of whether Grievant falsified State records, because if the Hearing Officer assumes for the sake of argument that Grievant did not falsify any State records, there remains sufficient evidence to support the issuance of a Group III Written Notice for obstructing justice and failure to report.

¹³ *Va. Code § 2.2-3005.*

resign in lieu of receiving disciplinary action. Grievant is correct that he was treated differently from other employees. That different treatment, however, is not a basis to alter the disciplinary action against Grievant. In particular, the Agency changed its policy regarding how to settle possible disciplinary action. That change in policy applied to all employees at the Facility. Grievant's disciplinary action, however, had not been resolved prior to the change in policy. A change in policy that applies to all employees at the Facility is not unequal treatment of employees such that disciplinary action should be mitigated.

Grievant argues that the Agency inconsistently disciplined employees. Grievant has not presented evidence of other employees who obstructed justice and failed to report to the same degree as Grievant. The evidence is clear that Grievant participated in the Agency's investigation reluctantly and divulged significant information only once left without a choice but to do so. The Agency did not inconsistently discipline its employees.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for fraternization is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for obstruction of justice and failure to report 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.¹⁴

[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

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.