

Issue: Group II Written Notice (fraternization); Hearing Date: 08/09/07; Decision Issued: 08/30/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8627; Outcome: Partial Relief – reduced to Group I



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8627

Hearing Date: August 9, 2007
Decision Issued: August 30, 2007

PROCEDURAL HISTORY

On January 30, 2007, Grievant was issued a Group II Written Notice of disciplinary action for fraternization by not reporting to management that he had met an inmate prior to her incarceration at the Facility. On January 30, 2007, 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 July 12, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 9, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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. 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 Clinical Social Worker at one of its facilities.¹ The purpose of his position was:

Day to day provision of direct substance abuse treatment programming by serving as a credible role model, ensuring therapeutic community structure, facilitating the inmate peer community as the therapeutic agent of change, and overseeing or delivering program services.²

Prior to her incarceration, Ms. B approached Grievant and Grievant's cousin at a gas station and asked them for \$20 for gas or her car. Ms. B was given \$20 and offered a ride to her car. Ms. B did not have a car, contrary to her assertion. When Grievant and his cousin concluded that Ms. B did not have a car, they realized that she had lied and falsely obtained the \$20.

Ms. B was later incarcerated and became Inmate B at the Facility. Grievant walked to Inmate B's door. Grievant looked at Inmate B and told her that he had seen

¹ Grievant was not employed by the Agency at the time of the hearing.

² Agency Exhibit 4.

the tattoo on her arm before. Grievant asked if she had a tattoo somewhere else on her chest. Inmate B said "yes". Grievant then told Inmate B to come to his office.

Later that day, Inmate B met Grievant in his office. Also in Grievant's office were two other inmates. Grievant asked Inmate B if she remembered being at a gas station one day and walking up to two guys and asking for \$20 for gas for her car. Inmate B said she remembered, but she was embarrassed because she realized she had taken \$20 off of him.³ Grievant said he wanted Inmate B to work on her recovery.

After Inmate B finished speaking with Grievant and left his office, she told another inmate that she was scared because Grievant remembered her from the streets. One of the other inmates in the room who heard Grievant's discussion also believed that Grievant's comments were inappropriate.

Grievant had a conflict with another employee, Ms. W. During the week of January 9, 2006, Ms. W told Inmate C and another inmate that while she was absent they should be careful around Grievant because he was a "man first" before being a Clinical Social Worker, meaning that Grievant would look at Inmate C sexually rather than as a client. Inmate C told Grievant about Ms. W's comments. Grievant told Inmate C to "put it in writing". Inmate C wrote down what Ms. W. said and gave the written document to Grievant. Grievant placed the document in the drawer of his desk. Grievant did not report the matter to Agency managers because he intended to present it to Ms. W once she returned to work. She remained out of work for an extended period of time, yet Grievant continued to believe that she would return. He believed this because Agency managers did not inform him that it would be unlikely that Ms. W would return. Ms. W did not return to the facility. On February 24, 2006, Grievant's Supervisor learned about the document when she spoke with Inmate C.

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."⁴ 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."⁵ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁶

³ It is not clear that Inmate B recalled meeting Grievant. Because of her drug addiction and prostitution she told investigators she could not recall meeting Grievant.

⁴ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

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*.

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.⁷

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 contends Grievant fraternized with Inmate B because he failed to report to Agency managers that he knew Inmate B prior to her incarceration at the Facility. This argument fails. Grievant's failure to disclose was not for the purpose of associating with Inmate B.

The Agency contends Grievant fraternized because he did not reveal to Agency managers that he had obtained a document from Inmate C regarding Ms. W's comment about Grievant. This argument fails. Grievant withheld the document because he expected Ms. W to return. Grievant practiced what he taught as part of his duties as a Clinical Social Worker. Based on his training involving the therapeutic community, the appropriate behavior for him to follow would be to present the document to Ms. W and permit her to verify and discuss her comment. Grievant did not wish to report the accusation, unless the accusation actually had been made by Ms. W. Grievant's

⁷ Virginia Department of Corrections Operating Procedure 130.1(III), *Rules of Conduct Governing Employees’ Relationships with Offenders*.

objective was not to associate with an inmate. Grievant did not fraternize with any inmate by retaining Inmate C's note.⁸

Grievant did not become a partner or ally of any inmate. He did not join with an inmate to pursue a particular purpose or objective. In short, Grievant did not fraternize with an inmate. He did not act contrary to Operating Procedure 130.1.

"[I]nadequate or unsatisfactory job performance" is a Group I offense.⁹ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant received training at the Academy and on the job informing him to advise his superiors of matters that may affect the Agency's operations. Interaction between an employee and an individual prior to that individual's incarceration could affect how that individual was treated by the employee after incarceration. This information is something Agency managers would need to know in order to choose the appropriate facility for the inmate.¹⁰ The Agency has presented sufficient evidence to support the issuance of a Group I 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...."¹¹ 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

⁸ The Agency argued that Grievant "crossed major boundaries." The evidence does not support this conclusion. To the extent he protected anyone, that person was Ms. W and not an inmate.

⁹ DOCPM § 5-10.15(B)(4).

¹⁰ Grievant admitted during the hearing that his prior knowledge of Inmate B is information he should have reported to Agency managers.

¹¹ *Va. Code § 2.2-3005.*

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

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.¹²

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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