

Issue: Group III Written Notice with termination (fraternization); Hearing Date: 12/07/07; Decision Issued: 12/10/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8739; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 12/14/07; Reconsideration Decision issued 01/02/08; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8739

Hearing Date: December 7, 2007
Decision Issued: December 10, 2007

PROCEDURAL HISTORY

On August 29, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for the appearance of fraternization and/or a professional relationship with and Offender. On August 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 she requested a hearing. On October 25, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 7, 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 Corrections Officer for approximately 17 years until her removal effective August 29, 2007.¹ Grievant was highly regarded by her coworkers as a dedicated and valuable employee. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Offender was on parole in another state.² He wanted to transfer the supervision of his parole to Virginia so he could move to Virginia and be closer to his mother. Grievant maintained a long-standing friendship with the Offender's mother. Grievant also knew the Offender because of her friendship with the Offender's mother.

Grievant experienced health problems that sometimes caused her to be hospitalized and dependent on others for assistance. On May 14, 2007, Grievant was hospitalized. The Offender stayed with Grievant in the hospital overnight until May 17, 2007 when Grievant was discharged from the hospital. Grievant returned to her home. The Offender stayed with Grievant at her home overnight on May 17, 2007. On May 18, 2007, the Offender left Grievant's home.

¹ A typographical error appeared on the Written Notice given to Grievant which showed her date of removal as August 27, 2007. The Agency issued a corrected Written Notice indicating that Grievant was removed from employment effective August 29, 2007.

² The Offender was convicted of theft by shoplifting, a felony. He was sentenced to five years in prison with three years to serve.

On May 28, 2007, Grievant became ill and had to go to the hospital emergency room. On May 29, 2007, Grievant had surgery. The Offender and his sister came to visit Grievant at the hospital. The Offender stayed with Grievant overnight at the hospital from May 29, 2007 until June 4, 2007 when Grievant was discharged from the hospital. Before Grievant was discharged, she was advised she should have someone stay with her during her recovery. Grievant asked the Offender if he would stay with her for a while until she "got herself together." He agreed. The Offender stayed with Grievant at her house from the night of June 4, 2007 through the night of August 8, 2007. At Grievant's insistence, the Offender moved out of Grievant's house on August 9, 2007.

Grievant drafted a letter dated June 15, 2007 to the Warden as follows:

I've been friends with a guy [the Offender] for about 12 years. [The Offender] had been living in Georgia and was on probation.

[The Offender's] mother had been sick a lot this year (she passed in May) and [the Offender] kept traveling to Va. Because of this, he applied for a transfer of probation through interstate compact. This will allow him to do his probation in VA if accepted. He was accepted in April (?) and will begin probation in VA sometime in July or June.

I'm not sure about the fraternization policy in regards to [he Offender's] situation. This letter was written to receive permission (if necessary) to continue our friendship, (as I'm close to the entire family).

Please advise me of the status of this request.³

The Warden received Grievant's letter and was inclined to view her request favorably because he believed she was asking to maintain a friendship with an offender and his family. The Warden did not know that the offender was living in Grievant's house and that she intended to continue permitting the offender to live with her.

On June 26, 2007, the Warden sent Grievant a memorandum stating, "Please let me know the Probation and Parole District that [the Offender] is assigned to and I will request permission for you to keep in contact with him."⁴ Grievant informed the Warden of the name of the Offender's probation officer and location.

On July 12, 2007, the Warden sent an email to several people including the Chief Probation and Parole Officer, the Offender's probation officer, and the Regional Director indicating the Grievant was seeking permission to continue her friendship with the Offender and his family. The Chief Probation and Parole Officer responded:

³ Agency Exhibit 2.

⁴ Agency Exhibit 2.

We have some concerns about the situation. They are residing together at this time, and we have neither seen nor heard of any other family, and this is my concern. We need to check further, to make sure what the situation is.

The Warden learned from this email for the first time that the Offender was residing at Grievant's home.

On August 2, 2007, the Warden spoke with Grievant and told her that the Offender could not remain in the same house with her. He told her that when she returned to work after her illness, she would probably receive a Group III Written Notice. Grievant testified at the hearing that the Warden also told her that he thought he could save her job if she forced the Offender out of her house prior to her return to work date. The Warden testified he made no such guarantee.

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

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*.

Fraternalization 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

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).

(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.

Virginia Department of Corrections Operating Procedure 135.1(III, *Standards of Conduct* defines "Offender" as an "individual sentenced by a court who is under the supervision of a Department of Corrections as an inmate, probationer or parolee."

The Offender was under the supervision of the Department of Corrections and, thus, he was an offender within the definition of DOC policy. Grievant engaged in a non-professional relationship with the Offender by permitting him to live in her home from June 4, 2007 through August 8, 2007. Grievant's non-professional relationship with the Offender constituted fraternization contrary to DOC Procedure 130.1, *Rules of Conduct Governing Employees' Relationships with Offenders*. The Agency's decision to issue Grievant a Group III Written Notice must be upheld. Upon the issuance of a Group III Written Notice, the Agency is authorized by policy to remove Grievant from employment.

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...."⁹ 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.

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

⁹ *Va. Code § 2.2-3005*.

Grievant contends the disciplinary action should be mitigated because she complied with the Warden's instruction to remove the Offender from her home prior to her return date to work. Since the Warden told her on August 2, 2007 that he thought he could save her job if she removed the Offender from her home, Grievant believes the removal should be mitigated. This argument fails. Under the DOC Procedure 130.1, *Rules of Conduct Governing Employees' Relationships with Offenders*, only the Regional Director had authority to grant exceptions on a case-by-case basis. There is no reason to believe that the Warden had the authority or the desire to circumvent the Agency's customary fact-finding process prior to initiating disciplinary action.

Grievant argues that her length of service and prior satisfactory work performance justify mitigation of the discipline against her. This argument fails. Length of service and satisfactory work performance standing alone, are insufficient to mitigate disciplinary action under the *Rules*.

Grievant argues that had she not been honest and brought this matter to the Agency's attention, the Agency would never have learned of her relationship with the Offender. She believes her honesty is a mitigating factor. Although Grievant acted properly when she brought her relationship with the Offender to the Agency's attention, she failed to do so timely and completely. She first sought approval from the Agency on June 15, 2007. This is after the Offender had already begun living in her house on June 4, 2007. Grievant had breached the Agency's policy prior to seeking an exception from the Agency. Grievant's request for approval dated June 15, 2007 did not disclose significant detail about her relationship with the Offender, namely that the Offender was already living with her in her home.

In light of the standard set forth in the *Rules*, 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 with removal 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.¹⁰

[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

¹⁰ 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: 8739-R

Reconsideration Decision Issued: January 2, 2008

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.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material; and
- (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant contends she was out of work at the time she was removed from employment. Grievant was not removed from employment due to any illness. Grievant was removed from employment because she fraternized with an offender. Grievant was at work on the date she received the Written Notice. Grievant has not identified any policy that would prohibit her removal for fraternization even though she may have been absent from work due to illness.

Grievant argues that the Regional Director stated that Grievant did not get the offender out of her home quick enough to avoid disciplinary action. Grievant argues

that the Warden mistakenly believed that she did not care about her job because she did not immediately remove the offender from her home. These arguments do not support a basis to reduce the disciplinary action against her. They are not mitigating circumstances under the Rules for Conducting Grievance Hearings.

Grievant questions whether she had notice of the existence of the rule that she was accused of violating. Grievant was accused of “[v]iolation of DOC Procedure 130.1, *Rules of Conduct Governing Employees’ Relationships with Offenders*. Agency Exhibit 6 contains a document dated February 25, 2004 stating, “By my signature below, I acknowledge receipt of the following Virginia Department of Corrections Directive policies ... Rules of Conduct Governing Employee Relationships with Offenders #130.1” Grievant signed the document and dated it February 25, 2004. Thus, Grievant had adequate notice of the rule she was accused of violating.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

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

Carl Wilson Schmidt, Esq.
Hearing Officer