

Issues: Group II Written Notice (fraternization) and Suspension; Hearing Date: 09/04/08; Decision Issued: 09/05/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8928; Outcome: No Relief – Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8928

Hearing Date: September 4, 2008
Decision Issued: September 5, 2008

PROCEDURAL HISTORY

On April 24, 2008, Grievant was issued a Group III Written Notice of disciplinary action with a 10 workday suspension for violating DOC Operating Procedure 130.1.

On May 20, 2008, 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 July 31, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 4, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
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 employs Grievant as a Corrections Officer at one of its Facilities. She has been employed by the Agency for approximately 21 years. The purpose of her position is to, "provide security, custody and control of adult offenders resulting in a safe and secure environment for staff, inmates and citizens of the Commonwealth of Virginia." No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

As part of the Agency's investigation into certain matters at the Facility, Grievant was interviewed. Grievant told Agency investigators that she had known the Inmate for several years at the Facility. She had engaged in conversations with the Inmate but those conversations were about the Inmate, his wife, and family. The Inmate told Grievant how he became incarcerated and how and what he did sexually with his wife and his girlfriends and other women when he was on the street that led up to him being incarcerated. He would talk about sex and he would tell Grievant what he liked to do with women. The conversations were not about Grievant and the Inmate or about any type of relationship between them. Grievant and the Inmate were never involved in any type of sexual relationship. The Inmate had received a "Dear John" letter from his wife. This upset the Inmate and he talked to Grievant about this problem. They talked about the letter and how the Inmate's wife wanted to move on with her life and how he was not going to get out of prison.

The Inmate called Grievant "Mama". Grievant allowed the Inmate to refer to her by this nickname. Grievant had conversations with the Inmate about her son who was incarcerated in a Regional Jail. Grievant had conversations with the Inmate about her son's behavioral problems.

On one occasion, the Inmate tried to touch Grievant's buttocks. She realized what the Inmate was trying to do so she put up her hand and told him to stop. She told him he could not do that and told him to move on. The Inmate said "okay Mama" and never tried it again. Although Grievant had received training at the Academy and on-the-job informing her to report such actions, Grievant did not report the Inmate's attempt to touch her.

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

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, 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, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing staffs' personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.⁴

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

² Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁴ Virginia Department of Corrections Operating Procedure 130.1(III), *Rules of Conduct Governing Employees' Relationships with Offenders*.

Fraternization or non-professional relationships between employees and offenders is prohibited. In addition, "[i]mproprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited" by DOC Operating Procedure 130.1(V)(B).

In this case, Grievant created the appearance of fraternization based on several factors. First, Grievant permitted the Inmate to give her the nickname "Mama". By permitting the Inmate to give Grievant a nickname, Grievant created the appearance of a friendship. By permitting the Inmate to select the name "Mama" as Grievant's nickname, Grievant created the appearance of some elements of a familial relationship. Second, Grievant informed the Inmate of personal information about her. In particular, she told the Inmate that her son was incarcerated at a Regional Jail. The status of Grievant's son had no relationship to Grievant's responsibilities at the Facility and was not information necessary for the Inmate to know.⁵ Third, Grievant had been taught to report inappropriate behavior by inmates. The Inmate's attempt to touch her bottom was inappropriate behavior that should have been reported. By failing to report that information, Grievant created the appearance of favoritism towards the Inmate. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may suspend Grievant for up to 30 workdays in lieu of termination. Because the Agency suspended Grievant for 10 workdays, that suspension must be upheld.

Following this incident, Grievant was transferred to another facility closer to her home. Based on the evidence presented, it does not appear that the Agency transferred Grievant in order to punish her. It appears that the Agency transferred Grievant because it concluded her ability to provide competent security at the Facility may have been compromised. Thus, it was not necessary for the Agency to include the transfer as part of the 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..."⁶ 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

⁵ The Inmate's discussions of his sexual behavior appears to be personal in nature, however, it is unclear to what degree Grievant actively participated in those discussions.

⁶ *Va. Code § 2.2-3005.*

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 contends the disciplinary action should be mitigated because it is too harsh, she was honest throughout the process, and she is a long-term employee. The Hearing Officer is not a super personnel officer who can impose his personal preference for discipline on the Agency. Once the Agency has met its burden of proof to show a Group III offense, the Hearing Officer is obligated under the *Rules* to give deference to the Agency's selection of discipline so long as the Agency's decision does not exceed the limits of reasonableness. Under the facts of this case, the Agency's decision is authorized by the Standards of Conduct and does not exceed the limits of reasonableness. 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 10 workdays suspension 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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.