

Issues: Group III Written Notice (fraternization) and Termination; Hearing Date: 10/09/08; Decision Issued: 10/10/08; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 8949; 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 No: 8949

Hearing Date: October 9, 2008
Decision Issued: October 10, 2008

PROCEDURAL HISTORY

The Grievant received a Group III Written Notice on June 9, 2008 for:

On May 28, 2008, you accepted at your home telephone (555) 555-5555 a collect telephone call from inmate N # *****, who is assigned to the facility. A review of the telephone conversation indicated that it was personal. This constitutes fraternization with an inmate which is prohibited by departmental policy.

Pursuant to the Group III Written Notice, the Grievant was terminated on June 9, 2008. On June 20, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. On September 17, 2008, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On October 9, 2008, a hearing was held at the Agency's location.

APPEARANCES

Agency Party
Agency Representative

ISSUE

1. Whether or not the Grievant's acceptance of a phone call at her home from an inmate violated departmental policy and justified termination.

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before

the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a “super personnel officer” and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency’s decision.

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 Agency provided the Hearing Officer with a notebook containing nine (9) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant did not appear at this hearing. The Grievant did not respond to letters mailed to her address from the Hearing Officer dated September 18, 2008, September 23, 2008 and September 26, 2008. Further, the Grievant did not respond to several phone calls with messages left on the answering machine at the number provided for the Grievant.

On May 28, 2008, the Grievant accepted a collect phone call at her home from an inmate of the Agency and had a personal conversation with that inmate. ¹

The Grievant was interviewed by a Departmental Special Agent regarding this matter. On June 3, 2008, the Grievant admitted that the inmate telephoned her residence and that she spoke to him for a few minutes. ²

¹ Agency Exhibit 1, Tab 1, Page 4

² Agency Exhibit 1, Tab 2, Page 1

Virginia Department of Corrections Operating Procedure 130.1(3) defines fraternization as follows:

The act of, or giving the appearance of, association with offenders, or their family members, that extends to unacceptable, unprofessional, and prohibited behavior...³

Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(25) states in part as follows:

Group III Written offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal and include violation of DOC Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships with Offenders.⁴

A first offense of a Group III offense normally results in termination. The Grievant in this matter admits that she took the phone call from an inmate and talked to him in clear violation of DOC Operating Procedure 130.1 regarding Fraternization.

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...”⁵ 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. The Hearing Officer, after considering the above-referenced examples, finds no basis for mitigation in this matter.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency acted properly in terminating the Grievant.

³ Agency Exhibit 1, Tab 4, Page 1

⁴ Agency Exhibit 1, Tab 8, Page 10

⁵ Va. Code § 2.2-3005

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 Street, 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 Street, 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 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.⁶ 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

⁶An 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).

⁷Agencies 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]

William S. Davidson
Hearing Officer