

Issues: Group III Written Notice (fraternization), Suspension and Termination; Hearing Date: 05/05/09; Decision Issued: 05/11/09; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9068; 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: 9068

Hearing Date: May 5, 2009
Decision Issued: May 11, 2009

PROCEDURAL HISTORY

The Grievant received a Group III Written Notice on February 5, 2009 for:

Act of fraternization or the appearance of, association with offenders, that extends to unacceptable; unprofessional and prohibited behavior by an employee. On January 14, 2009, at approximately 4:25 pm, it was reported by eyewitnesses entering the Flash Freeze processing plant that you were sitting on a bench in close proximity of female offenders smoking a cigarette.¹

Pursuant to the Group III Written Notice, the Grievant was suspended from February 1, 2009 through February 11, 2009 pending the Regional Director's approval of a termination. The Regional Director approved the Request for Termination and the Grievant was terminated from state service effective February 6, 2009.² On February 11, 2009, the Grievant timely filed a grievance to challenge the Agency's actions. On April 13, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On May 5, 2009, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Grievant
Advocate for Grievant
Witnesses

¹ Agency Exhibit 1, Tab B, Page 1

² Agency Exhibit 1, Tab B, Page 18

ISSUE

1. Did the Grievant act in such a way as to appear to be committing an act of fraternization or to actually fraternize with offenders and thereby justify the Group III Written Notice and subsequent dismissal?

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 seven (7) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant stated that he would rely on the documentation contained in the Agency's notebook.

The Grievant, on January 14, 2009, was employed by the Agency and worked in the Flash Freeze Plant. The Agency presented several witnesses that testified that, on that day, the Grievant was observed sitting on a bench with several female inmates. All of the witnesses testified that the Grievant was sitting in close proximity to these female inmates. A witness testified that one (1) female offender was sitting on the Grievant's left side and the other females were to his right. Other witnesses testified that all of the female offenders were sitting to the right of the Grievant. All of the witnesses testified that they were sitting in such close proximity that their shoulders and hips were either touching or could very easily be touching. All of the Agency's witnesses testified that the Grievant and the female offenders were smoking and at least one (1) of the Agency witnesses testified that the Grievant and the female offenders were talking to one another.

The Grievant had no witnesses other than himself. The Grievant testified that he sat down on the bench to rest his feet and to smoke a cigarette. When he sat down on the bench, he was the only person on the bench. The Grievant testified that the female offenders came and sat down on the bench and that he did not either tell them to leave or leave himself. The Grievant testified that he paid no attention to the female offenders. The Grievant demonstrated how close they were sitting by leaning close to his representative at the hearing. It appeared to the Hearing Officer he was indicating that he was sitting within one (1) or two (2) inches of the female offenders. The Grievant stated that even if what he was doing was against policy, he did not see that there was anything wrong with it.

Virginia Department of Corrections Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships With Offenders 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. 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.³ (Emphasis added)

This same policy defines Offender as follows:

An inmate, probationer, parolee or post release supervisee or other person placed under the supervision or investigation of the Department of Corrections.⁴

³ Agency Exhibit 1, Tab D, Page 1

⁴ Agency Exhibit 1, Tab D, Page 1

Operating Procedure 130.1 also provides as follows:

Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited. Associations between staff and offenders that may compromise security, or undermine the effectiveness to carry out the employee's responsibilities may be treated as a Group III offense under the Operating Procedure 135.1, *Standards of Conduct and Performance*. (dated September 1, 2005, updated August 29, 2006). A "fraternization" brochure has been developed that provides information about indicators of inappropriate relationships between employees and offenders and prevention strategies...⁵ (Emphasis added)

In February of 2008, the Grievant was present at a Department of Corrections program to bring its employees current regarding the law and operating procedures for the Agency. On the third day of that update, the Grievant was present when the topic was covered on interpersonal relationships with offenders and supervision of offenders.⁶

While this Grievant may not have intended to fraternize with these female offenders, it is clear that by sitting in such close proximity with them and smoking with them and perhaps talking with them, that he gave the appearance of fraternization. That is all that he need do in order to violate the aforementioned policies.

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..."⁷ 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 Grievant received a Group II Written Notice on March 26, 2008 which has an active life until March 26, 2011. This Group II Written

⁵ Agency Exhibit 1, Tab D, Page 3

⁶ Agency Exhibit 1, Tab E, Page 3

⁷ Va. Code § 2.2-3005

Notice concerned the Grievant sitting in the Flash Freeze office with his eyes closed. During the course of that matter, the Grievant admitted that he was sitting in this particular office with his eyes closed. He admitted that that behavior constituted failure to be alert. The Agency considered the employee's long term service and this active Group II Written Notice. While this Hearing Officer finds that it certainly was within the Agency's ability to simply counsel the Grievant regarding fraternization and inappropriate behavior, it was also completely within the Agency's authority and prerogative to issue a Group III Written Notice and terminate solely based on the Group III Written Notice. When coupled with an existing active Group II Written Notice, termination was not excessive.

DECISION

For reasons stated herein, the Hearing Officer finds that the Grievant did create the appearance of fraternization and therefore the Group III Written Notice and termination were justified.

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
600 East Main Street, Suite 301
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.⁸ 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.⁹

[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

⁸An 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).

⁹Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.