

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 12/08/09; Decision Issued: 12/16/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9230; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: DHRM Ruling Request received 12/30/09; DHRM Ruling issued 03/10/10; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9230

Hearing Date: December 8, 2009
Decision Issued: December 16, 2009

PROCEDURAL HISTORY

On August 24, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for being in a locked room with an inmate for an extended period of time.

On August 30, 2009, 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 November 18, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 8, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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 until her removal effective August 19, 2009. She had been working at the Facility for approximately 4.5 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On August 19, 2009, Grievant was working in the lower floor of housing unit 4. The Inmate approached Grievant and said he needed an extension cord to operate a floor polishing equipment. In actuality, his shift had ended and he did not need an extension cord. Grievant did not know the Inmate had finished his duties. She believed he needed an extension cord. She thought that there might be an extension cord inside a large utility closet. The utility closet was a relatively large room with a half wall. It contained plumbing equipment and a hydraulic lift. The utility closet was off limits to inmates but it was not marked to indicate that it was off limits to inmates. Grievant had no reason to know that the closet was off limits to the Inmate. Grievant and the Inmate went to the Control Booth Officer and asked for the keys to get inside the closet. The Control Booth Officer gave Grievant the keys and Grievant and the Inmate went to the closet. Grievant unlocked the door and pushed the door open. The Inmate walked inside the closet. Grievant positioned the back of her body against the door to keep the door from closing while the Inmate looked at the far corner of the closet for the extension cord. The Inmate could not find the cord. Grievant said to "look behind the wall" but after doing so the Inmate could not find a cord. Grievant attempted to help the Inmate find the cord and moved away from the door. The door closed and locked

automatically. The Control Booth Officer became concerned that Grievant was inside a small room with an inmate and he did not have anyway to enter the room because he had given his key to Grievant. The Control Booth Officer called the Sergeant who called Officer H and told him to go to the utility closet. Officer H went to the utility closet and stood in front of the door and tried to hear what was going on inside the closet. He heard voices but could not distinguish what was being said. He did not take any action (such as knocking) to indicate to Grievant that he was standing outside. Grievant unlocked the door and opened the door. She was surprised to see Officer H.

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

Section V(B) of the policy prohibits employees from engaging in creating the appearance of fraternization. An employee who creates the appearance of

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 may be removed from employment. During safety meetings at the beginning of each shift, employees are often reminded that indicators of inappropriate relationships with inmates include meeting in isolated places. Grievant attended a “muster” on January 2, 2009⁵ in which the supervisor discussed fraternization. Grievant was reminded that meeting in isolated places was an indicator of an inappropriate relationship and should be avoided. Grievant was reminded to “Watch for vulnerability to inappropriate relationships in your own actions and in the actions of others.”⁶ When Grievant was hired she received a brochure on preventing fraternization in which it indicated she should avoid meeting inmates in isolated places.⁷

Grievant had adequate notice that the Agency would construe as fraternization instances where she met with an inmate in an isolated place. The utility closet was isolated from the view of other security staff and would lock to prevent entry of other security staff. The Agency also presented evidence that on some occasions Grievant would engage in lengthy and friendly conversations with the Inmate. In addition, the Inmate briefly held Grievant’s hand as she passed over a slippery part of the floor after the Inmate had shined the floor making it dangerous for employees to pass. The Agency has presented sufficient evidence to show that Grievant created the appearance of fraternization thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency was authorized 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...”⁸ 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.

Grievant admits she made an error in judgment but argues that the punishment she received was excessive. The Hearing Officer finds that although Grievant may have created the appearance of fraternization, there is no credible evidence whatsoever

⁵ Grievant was also advised on December 28, 2008 not to meet in isolated places with inmates.

⁶ Agency Exhibit 5.

⁷ Agency Exhibit 6.

⁸ *Va. Code § 2.2-3005.*

that Grievant was engaged in fraternization on August 19, 2009 while in the utility closet. Grievant's denial that she engaged in any inappropriate behavior with the Inmate was credible. The evidence is clear that Grievant was helping the Inmate look for an extension cord and was not engaging in an inappropriate interaction with the Inmate at that time. The question is whether this is a mitigating circumstance. If the Hearing Office mitigates the disciplinary action in this case because there was no actual fraternization, it would appear to re-write the Agency's policy to require evidence of actual fraternization instead of merely creating the appearance of fraternization. The Hearing Officer will not do so. 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
600 East Main St. STE 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 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.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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department Corrections
March 10, 2010

The grievant has requested an administrative review of the hearing decision in Grievance Case No. 9230. The grievant is challenging the decision because she feels the Department of Corrections has failed to prove beyond a preponderance of the evidence that the grievant's individual actions gave the appearance of fraternization with an inmate. For the reasons stated below, the Department of Human Resource Management (DHRM) will not disturb the hearing decision. The agency head, Ms. Sara R. Wilson, has requested that I respond to this appeal.

FACTS

In his **Findings of Fact**, the hearing officer stated, in part, the following:

The Department of Corrections employed Grievant as a Corrections Officer until her removal effective August 19, 2009. She had been working at the Facility for approximately 4.5 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On August 19, 2009, Grievant was working in the lower floor of housing unit 4. The Inmate approached Grievant and said he needed an extension cord to operate a floor polishing equipment. In actuality, his shift had ended and he did not need an extension cord. Grievant did not know the Inmate had finished his duties. She believed he needed an extension cord. She thought that there might be an extension cord inside a large utility closet. The utility closet was a relatively large room with a half wall. It contained plumbing equipment and a hydraulic lift. The utility closet was off limits to inmates but it was not marked to indicate that it was off limits to inmates. Grievant had no reason to know that the closet was off limits to the Inmate. Grievant and the Inmate went to the Control Booth Officer and asked for the keys to get inside the closet. The Control Booth Officer gave Grievant the keys and Grievant and the Inmate went to the closet. Grievant unlocked the door and pushed the door open. The Inmate walked inside the closet. Grievant positioned the back of her body against the door to keep the door from closing while the Inmate looked at the far corner of the closet for the extension cord. The Inmate could not find the cord. Grievant said to "look behind the wall"

but after doing so the Inmate could not find a cord. Grievant attempted to help the Inmate find the cord and moved away from the door. The door closed and locked automatically. The Control Booth Officer became concerned that Grievant was inside a small room with an inmate and he did not have any way to enter the room because he had given his key to Grievant. The Control Booth Officer called the Sergeant who called Officer H and told him to go to the utility closet. Officer H went to the utility closet and stood in front of the door and tried to hear what was going on inside the closet. He heard voices but could not distinguish what was being said. He did not take any action (such as knocking) to indicate to Grievant that he was standing outside. Grievant unlocked the door and opened the door. She was surprised to see Officer H.

In his **Conclusions of Policy**, in part the hearing officer stated the following:

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:

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Section V(B) of the policy prohibits employees from engaging in creating the appearance of fraternization. An employee who creates the appearance of fraternization may be removed from employment. During safety meetings at the beginning of each shift, employees are often reminded that indicators of inappropriate relationships with inmates include meeting in isolated places. Grievant attended a “muster” on January 2, 2009 in which the supervisor discussed fraternization. Grievant was reminded that meeting in isolated places was an indicator of an inappropriate relationship and should be avoided. Grievant was reminded to “Watch for vulnerability to inappropriate relationships in your own actions and in the actions of others.” When Grievant was hired, she received a brochure on preventing fraternization in which it indicated she should avoid meeting inmates in isolated places.

Grievant had adequate notice that the Agency would construe as fraternization instances where she met with an inmate in an isolated place. The utility closet was isolated from the view of other security staff and would lock to prevent entry of other security staff. The Agency also presented evidence that on some occasions

Grievant would engage in lengthy and friendly conversations with the Inmate. In addition, the Inmate briefly held Grievant's hand as she passed over a slippery part of the floor after the Inmate had shined the floor making it dangerous for employees to pass. The Agency has presented sufficient evidence to show that Grievant created the appearance of fraternization thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency was authorized 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..." 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.

Grievant admits she made an error in judgment but argues that the punishment she received was excessive. The Hearing Officer finds that although Grievant may have created the appearance of fraternization, there is no credible evidence whatsoever that Grievant was engaged in fraternization on August 19, 2009 while in the utility closet. Grievant's denial that she engaged in any inappropriate behavior with the Inmate was credible. The evidence is clear that Grievant was helping the Inmate look for an extension cord and was not engaging in an inappropriate interaction with the Inmate at that time. The question is whether this is a mitigating circumstance. If the Hearing Office mitigates the disciplinary action in this case because there was no actual fraternization, it would appear to re-write the Agency's policy to require evidence of actual fraternization instead of merely creating the appearance of fraternization. The Hearing Officer will not do so. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DISCUSSION

The Department of Human Resource Management offers the following in response to the grievant's request for an administrative review. Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is beyond the limit of reasonableness, he may

reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness." Attachment A, Unacceptable Standards of Conduct, of this policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive. In addition, the Department of Corrections has promulgated DOC Operating Procedure 135.1, Standards of Conduct, to suit specific business needs of the agency.

Concerning mitigating circumstances as related to disciplinary action, DHRM Policy No. 1.60, Standards of Conduct, provides the following:

- a. Agencies may reduce the level of a corrective action if there are mitigating circumstances, such as conditions that compel a reduction to the interests of fairness and objectivity, or based on an employee's otherwise satisfactory work performance.
- b. Mitigating circumstances for a Group III offense may support, as an alternative to termination, an employee's demotion or transfer to a position with reduced responsibilities and a disciplinary salary action with a minimum 5% reduction in salary; transfer to an equivalent position in a different work area; and/or suspension of up to 30 workdays.
- c. An employee who is issued a Written Notice that would normally warrant termination but who is not terminated due to mitigating circumstance should be notified that any subsequent Written Notice for any level offense during the life of the Written Notice may result in termination.

Applying the principle of mitigation, please note that there are two points in the grievance procedure where mitigating and/or aggravating circumstances may be considered: (1) during the management steps, and (2) at the hearing level.

This Department has long held that agencies are not mandated to but *may* consider mitigating circumstances when deciding on or ameliorating disciplinary action. The DOC had the discretion as to whether or not to consider mitigating circumstances.

The other point at which mitigating and/or aggravating circumstances may be considered is at the hearing stage. The standards for consideration of mitigating and/or aggravating circumstances at this stage may differ from those considered by management and are outlined in the *Rules for Conducting Grievance Hearings*. Only the Director of the Department of Employment Dispute Resolution (EDR) is authorized to determine the appropriateness of the mitigating and/or aggravating circumstances considered by the hearing officer.

Concerning the DOC proving by a preponderance of the evidence that the grievant committed the violation, based on the evidence, the hearing officer determined that the grievant's behavior gave the appearance of fraternization, punishable by a Group III Written Notice and termination. Therefore, this Agency has no bases to disturb the hearing decision.

Ernest G. Spratley