

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 08/18/10; Decision Issued: 08/26/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9386; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 09/08/10; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9386

Hearing Date: August 18, 2010
Decision Issued: August 26, 2010

PROCEDURAL HISTORY

On February 19, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On March 17, 2010, 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 August 4, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 18, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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 Senior Corrections Officer at one of its Facilities until her removal effective February 18, 2010. She had been employed by the Agency for approximately 17 years and three months. Grievant was a valuable and capable employee of the Agency. She received evaluations with an overall rating of "Exceeds Contributor." She was member of the Facility's strikeforce, an emergency response team, based on her capabilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Lieutenant introduced Grievant and Ms. Z in 2007. At the time he introduced Ms. Z to Grievant, he did not know that Ms. Z was a former felon. Grievant and Ms. Z began a romantic relationship. They began living in the same house and sharing financial obligations. Grievant and Ms. Z did not hide their relationship.

In March 2009, Ms. Z's Probation and Parole Officer called the home where Grievant and Ms. Z were living and informed Grievant that Ms. Z was on probation with the Department of Corrections. On March 10, 2009, Grievant spoke with the Warden to advise him that she had just learned that Ms. Z was a probationer. The Warden told Grievant that the relationship was a serious violation of policy. Grievant understood this.

Grievant moved in with her mother for two or three weeks in response to the Warden's discussion with her. Ms. Z later called Grievant to say she was having financial problems. Grievant decided to move back in with Ms. Z and they would try to avoid being seen in public and avoid being caught.

In February 2010, staff working at a Correctional Center informed the investigator at that Correctional Center that Grievant was living with Ms. Z. The investigator notified a Sergeant at Grievant's Facility of the relationship and an investigation began. On February 11, 2010, Grievant was interviewed by a Special Agent and admitted that she had been living with Ms. Z for the past three years.

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*. Section 135.1(XII)(B)(26) states that Group III offense include:

Fraternization or non-professional relationships with offenders who are within 180 days of the date following their discharge from Department custody or termination from supervision, whichever occurs last. Exceptions to this section must be reviewed and approved by the respective Regional Director on a case by case basis (see Operating Procedure 130.1, *Rules for Conduct Governing Employees Relationships with Offenders*.)

Fraternization 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 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*.

Offender is defined as:

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

Ms. Z was a probationer and, thus, an offender under Operating Procedure 130.1. Grievant learned that Ms. Z was a probationer in March 2009. Grievant moved out of the house with Ms. Z after speaking with the Warden but then a few weeks later moved back in to resume her romantic and financial relationship with Ms. Z. Grievant fraternized with an offender contrary to Operating Procedure 130.1.

Group III offenses include:

Fraternization or non-professional relationships with offenders who are within 180 days of the date following their discharge from the Department custody or termination from supervision, whichever occurs last. Exceptions to this section must be reviewed and approved by the respective Regional Director on a case-by-case basis (see Operating Procedure 130.1, Rules of conduct Governing Employees Relationships with Offenders).

The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action with removal.

Grievant argues that her actions had no impact on her work performance and no impact on the Agency's operations. The Agency did not establish that Grievant's work performance was adversely affected by her relationship with Ms. Z or that the relationship had a material impact on the Agency's operations. Operating Procedure 130.1 is drafted broadly to address as many circumstances involving interaction with Agency employees and offenders. It is clear that the Agency intended its fraternization policy to establish a prophylactic rule so that it would not have to look behind the circumstances of each case to determine whether an employee's actions actually had an adverse impact on the Agency's operations. If the Hearing Officer were to reverse the disciplinary action because Grievant's actions did not adversely affect her work performance or the Agency's operations, the Hearing Officer would essentially be rewriting the Agency's policy. Under the Rules for Conducting Grievance Hearings, Hearing Officers are not permitted to disregard or circumvent Agency policy.

Grievant argued that the Warden instructed her she could continue the relationship as long as it was not in public. The Warden denies giving such an instruction and insisted he informed Grievant that her actions were contrary to the Agency's policies and should cease. If the Hearing Officer assumes for the sake of argument that the Warden gave such an instruction and that the Warden had sufficient authority to modify the Agency's fraternization policy, they would not be a basis to change the outcome of this case. Grievant was unable to keep her relationship with Ms.

Z hidden as evidenced by the fact that there was a complaint that ultimately led to disciplinary action against her. If Grievant had been successful in keeping her relationship hidden, no disciplinary action would have been taken.

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, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

This case is unfortunate. Grievant was a good and valuable employee of the Agency. She performed her duties well. She was dedicated to the Agency and successful in her career. Her relationship with Ms. Z did not influence her work performance. She entered a relationship with Ms. Z without knowing that Ms. Z was a former felon. The Agency's policy, however, prohibits an employee from having a relationship with a probationer.

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:

⁵ *Va. Code § 2.2-3005.*

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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.