

Issue: Group III Written Notice with Termination (Fraternization); Hearing Date: 01/19/11; Decision Issued: 03/22/11; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 9473; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER
IN RE: CASE NO. 9473
HEARING DATE: January 19, 2011
DECISION ISSUED: March 22, 2011

PROCEDURAL HISTORY

Grievant was issued a Group III Written Notice on April 12, 2010. There was an EDR ruling on June 30, 2010 regarding the form used for the First Step Resolution. The matter was heard for First Step Resolution on July 16, 2010 and opinion issued on July 19, 2010. The Second Step was expedited and the Third Step Resolution was heard on September 20, 2010 and opinion issued on September 28, 2010. The matter was qualified for hearing on November 9, 2010. There was a pre-hearing telephone conference on December 7, 2010 and the matter was set for hearing on January 19, 2011.

APPEARANCES

Agency Advocate
2 Witnesses for Agency, which included the Agency Representative
Grievant
3 Witness for Grievant
1 Witness for Grievant via telephone conference

ISSUES

1. Did Grievant violate Virginia Department of Corrections Rules of Conduct #130.1 effective 12-15-06?¹
2. Did Grievant violate Virginia Department of Corrections Standards of Conduct, #135.1, effective 4-15-08 sufficient to be a Group III Disciplinary Action?²

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 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.

APPLICABLE LAW AND POLICY

Unacceptable behavior is divided into three (3) types of offenses according to their severity.

¹ Agency Exhibit B

² Agency Exhibit E

Group I: First Group offenses include type of behavior less severe in nature, but require correction in the interest of maintaining a productive and well-managed work force.³

Group II: These 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,⁴

Group III offenses include acts and behavior of such a serious nature that a first occurrence should warrant removal.⁵

Rules of Conduct that govern employees relationships with offenders include by definition:

"Fraternization: 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".⁶

Group III unacceptable conduct includes:

"16. refusal to obey instructions that could result in a weakening of security;"⁷

" 22. any behavior of a sexual nature between employees and offenders if under the Department of Corrections supervision is prohibited. This includes behavior of a sexual nature, such as, but not limited to, sexual abuse, sexual assault, sexual harassment, physical conduct of a sexual nature, sexual obscenity and conversations or correspondence of an emotional, romantic or intimate nature."⁸

"25. violation of DOC Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationship with Offenders*."⁹

FINDING OF FACTS

Grievant had been an employee of the Virginia Department of Corrections for five (5) years prior to her termination. She had been described as a good employee who had

³ Standards of Conduct, effective 4-15-08, IX (A), page 6.

⁴ Standards of Conduct, effective 4-15-08, XI (A), page 8.

⁵ Standards of Conduct, effective 4-15-08, XII(A), page 9

⁶ Rules of Conduct, effective 12-15-06, II, page 1

⁷ Standards of Conduct, effective 4-15-08, page 9

⁸ Standards of Conduct, effective 4-15-08, page 10

⁹ Standards of Conduct, page 10

taken advantage of educational opportunities to further her position with the department. In the spring of 2009, Grievant began a relationship with a person she claimed to have known since high school. By that summer, he ("A.H.") moved in with Grievant. Grievant stated, and all witnessed including the warden agreed, that Grievant discussed her new relationship with them. However, the witnesses denied knowing Grievant's friend was an "offender" as described in the Rules of Conduct.¹⁰

Grievant planned to marry on February 14, 2010. Approximately one week before the scheduled wedding, the warden became aware by a "tip" that Grievant planned to marry A.H. and that A.H. was an offender. The warden confronted Grievant and she confirmed A.H.'s status, although Grievant contended since the offender had not been in a state facility, but rather a regional facility, that the prohibition in place would not relate to her job. The warden asked Grievant to put off the wedding until he could confirm whether A.H.'s status would interfere with Grievant's position at the Department of Corrections. Grievant claims the warden assured her that he would then "take care of it". Both Agency and Grievant agree the warden advised Grievant to put off the wedding due to the policy concern.

Grievant married A.H. on February 14, 2010. There was an investigation of the offense. Grievant was given an opportunity to resign, which she declined to do. Grievant was terminated on April 12, 2010.

In her defense, Grievant proffered evidence as to the good character of A.H., the fact she believed all her co-workers were aware of A.H.'s status, that several co-workers attended the wedding and that she believed the warden was looking into making an exception to the policy. Even if all of the above defenses of Grievant were true, it is not a co-worker's duty to give Grievant advice to protect Grievant's job, attendance at her wedding had nothing to do with her infraction and it was Grievant's duty to request an exception that would save her job. In any case, it was not the warden's call to grant an exception. It was the regional director's authority that would grant an exception and he did not do so.

Grievant has proffered no evidence that contradicts her violation of Standards of Conduct and Rules of Conduct that would apply to her. It is regrettable the Agency no longer has this good employee and further regrettable that Grievant did not follow rules required for her employment.

Grievant's actions clearly fall within conduct prohibited by employees of the Virginia Department of Corrections.

DECISION

For the above stated reasons, the Agency's action of issuing a Group III Written Notice and Termination are **upheld**.

¹⁰ Rules of Conduct, page 1

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
01 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 Street, Suite 301
Richmond, VA 23219

You may request more than one type of review. Your request must be made in writing and received by the administrative reviewer, within **15 calendar days** of the original hearing decision. 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 with **30 days** of the date when the decision becomes final.¹¹

Sondra K. Alan, Hearing Officer

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.