

Issues: Group I Written Notice (violation of security policy), Group III Written Notice (refusal to obey instructions resulting in weakening of security), Group III Written Notice (fraternization) and Termination; Hearing Date: 04/01/11; Decision Issued: 04/12/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9534, 9535, 9536; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9534 / 9535 / 9536

Hearing Date: April 1, 2011
Decision Issued: April 12, 2011

PROCEDURAL HISTORY

On August 27, 2010, Grievant was issued a Group I Written Notice of disciplinary action for violation of security policy. On October 22, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for refusing to obey an instruction that could result in a weakening of security. Also on October 22, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Step were not satisfactory to the Grievant and she requested a hearing. On February 2, 2011, the EDR Director issued Ruling Number 2011-2852, 2011-2853, 2011-2854 consolidating the grievances for hearing. On March 14, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 1, 2011, 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 Notices?
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 at one of its Facilities. She began working for the Agency in June 2002. No evidence of prior act of disciplinary action against Grievant was introduced during the hearing.

On July 29, 2010, Grievant was working as a Control Booth Officer at the Facility. She was responsible for working inside a secured control room and observing inmate activity in two inmate living areas referred to as pods 100 and 200. She was responsible for opening and closing the secure doors enabling individuals to enter and exit each pod.

During a mass movement, inmates residing in one pod leave that pod and go to another location at the Facility.

The Inmate was assigned to pod 400. On July 29, 2010, the Inmate left pod 400 to deliver forms from the fourth floor of the Housing Unit to Grievant on the first floor.¹

¹ Officer Ma opened the gate to pod 400 to let the Inmate leave.

Grievant let the Inmate enter pod 100. She spoke with the Inmate for several minutes. She became distracted and failed to monitor the Inmate's location. The Inmate remained in pod 100 for several hours. He was found hiding in cell 104.

On July 29, 2010, Officer Ma went to the employee restroom on the third floor. After she left, Officer Mc went to be restroom on the third floor and found a note. It appeared that someone had attempted to flush the note down the toilet. She gave the note to the Lieutenant. The Agency believed that the note was written by Grievant and supposed to be delivered by Officer Ma to the Inmate. On August 12, 2010, the note was given to a Forensic Scientist for evaluation. The Forensic Scientist concluded that due to the water and chemical agents used to clean the toilet the probability of identifying any latent impressions on the note would be very low.

The Special Agent wanted to interview Grievant. He presented her with a Statement of Intent advising her that, "the purpose of this interview is to obtain information that assists Department management in determining whether Department rules or regulations have been violated and if disciplinary action is warranted." She was also advised that any information she gave "may be used in administrative proceedings that could result in disciplinary action against you, up to and including dismissal." In addition, she was informed that if, "you refuse to answer fully and truthfully any questions related to the performance of your official duties, you could be subject to disciplinary action, including dismissal." She was advised that any answer she gave could not be used against her in a criminal proceeding. Grievant signed a Statement of Understanding providing:

I have had the above "Statement of Intent" read and explained to me. I understand that I am required to answer fully and truthfully questions specifically, directly and narrowly related to the performance of my official duties. I further understand that if I refuse to answer fully and truthfully a question relating to the performance of my official duties, I could be subject to disciplinary action, including dismissal from employment, based upon such refusal.

Grievant answered the questions of the Special Agent. Grievant also signed a "Consent to Search" stating, "I consent freely and voluntarily to the search of my person and vehicle and authorize any Special Agents, Office of the Inspector General, Department of Corrections, Commonwealth of Virginia and/or their representatives to search my ... person ... by trained, certified personnel of the same sex as myself."

On August 19, 2010, Grievant was administered a polygraph examination in conjunction with allegations that she was fraternizing with the Inmate.² Grievant denied that she provided the Inmate any contraband or a written note that had been recovered from the third floor bathroom. Grievant was truthful.

² Neither party objected to the introduction of the results of the polygraph examination.

The Special Agent concluded that it would be necessary to obtain handwriting exemplars and fingerprints from Grievant and compare them to the note the Agency believed Grievant may have written to the Inmate.

On September 23, 2010, the Special Agent told Grievant that pursuant to an administrative investigation, she could be compelled to provide fingerprints, palm prints, and exemplars of her handwriting. The Special Agent asked Grievant if she would consent to providing fingerprints, palm prints, and exemplars of her handwriting for comparison with the evidence collected in the investigation. Grievant declined.

The Special Agent informed the Warden that Grievant had declined his request. The Warden told the Special Agent to tell Grievant that the Warden was instructing Grievant to comply with the request.

On September 28, 2010, the Special Agent met with Grievant and informed her that the Warden was ordering her to provide fingerprints, palm prints, and handwriting exemplars. Grievant told the Special Agent that she understood it was an order from the Warden and she said that she didn't care. The Special Agent wrote a statement and asked Grievant to check the appropriate box and sign the statement. The statement read:

I, [Grievant] have been informed by [Special Agent] that [Warden] has ordered I provide my fingerprints and palm prints for comparison with evidence collected in this investigation. I have also been ordered by [Warden] to provide a total of 75 handwriting or hand printed exemplars on standard bond paper using a ballpoint pen of wording and phrases dictated by [Special Agent].

I consent to this request as ordered by [Warden].

I do not consent to this request as ordered by [Warden]

Grievant checked the box indicating that she did not consent to the request as ordered by the Warden. She signed the document and dated it September 28, 2010. The Special Agent also signed the document.

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."³ 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

³ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

warrant removal.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

Group I Written Notice

Inadequate or unsatisfactory job performance is a Group I offense. Grievant was expected by the Agency to monitor the movement of inmates once they entered a pod under her control. On July 29, 2010, Grievant lost track of the Inmate and he remained in pod 100 for several hours. Grievant’s work performance was unsatisfactory to the agency.

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...”⁶ 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.

Mitigating circumstances exist that make the Agency’s issuance of a Group I Written Notice to Grievant unreasonable. Grievant was supposed to be working with a floor officer. The responsibility of a floor officer would have been to perform cell checks every 30 minutes. To perform a cell check, the floor officer would walk past each cell and observe the activity inside each cell. Grievant was disciplined for the amount of time that the Inmate remained in pod 100 without her noticing that he was there and instructing him to leave. If a floor officer had been working during that time period, the floor officer would have performed cell checks and quickly observed that the Inmate should not have been in pod 100. The floor officer could have instructed the Inmate to leave. The Agency’s failure to provide a floor officer on July 29, 2010 is a mitigating circumstance sufficient to justify reversal of the Group I Written Notice of disciplinary action given to Grievant.

Group III Written Notice for Refusal to Obey Instruction

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁶ Va. Code § 2.2-3005.

“[R]efusal to obey instructions that could result in a weakening of security” is a Group III offense.⁷ The evidence showed that fraternization between corrections officers and inmates served to weaken security at the Facility. Agency managers considered fraternization to be a serious breach of security. Grievant knew that the Agency was investigating possible fraternization between her and the Inmate. Grievant was instructed to provide fingerprints, palm prints, and handwriting exemplars to the Special Agent. Grievant was instructed to provide evidence that pertained to a matter under investigation. Her failure to do so resulted in a weakening of security thereby justifying the Agency’s issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that the Warden did not speak with her directly to give her the order. She argued that had the Warden given her the instruction directly she would have complied with that instruction. The evidence showed that Grievant understood that the Order was coming from the Warden. Even with that understanding, she chose to refuse the order. Nevertheless, the Agency’s Standards of Conduct does not require that the instruction be given by someone within the employee’s chain of command. The Special Agent was authorized by Operating Procedure 030.4 to conduct administrative investigations. Under that policy:

Employees are expected to cooperate fully during the course of administrative investigations and to respond with truthful and complete answers to all proper questions of official interest and provide Special Agents with any and all information or evidence that may pertain to the specific matter under investigation.

Grievant knew that she was being instructed to provide fingerprints, palm prints, and handwriting exemplars. Whether she believed the instruction was coming from the Warden or the Special Agent is not significant. Grievant was obligated to comply with the instruction regardless of which of the two employees was giving her that instruction.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Group III Written Notice for Fraternization

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:

⁷ Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(16).

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.⁸

The Agency contends that Grievant fraternized with the Inmate. The Agency relied upon the testimony of the Office Services Specialist (OSS). The OSS testified that on August 27, 2010, Grievant told her to call the Inmate to her office and tell him "316". The OSS said "what?" Grievant said "just do it for me, I have to go around here to see the Warden", according to the OSS.

The number 316 was a number that appeared on notes in the possession of the Inmate. The Agency believed the Grievant had written the notes to the Inmate.

Grievant denied asking the OSS to communicate with the Inmate. Her denial was credible. In addition, she had a reputation for truthfulness at the Facility. The OSS testified at the hearing. The Hearing Officer had difficulty determining whether the OSS was credible. Given that the Hearing Officer could not determine the credibility of the OSS and that Grievant's denial was credible, there is insufficient evidence for the Agency to show by a preponderance that Grievant fraternize with the Inmate. The Group III Written Notice of disciplinary action for fraternization must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for refusing to obey instructions that could result in a weakening of security is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for fraternization is **rescinded**.

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:

⁸ Virginia Department of Corrections Operating Procedure 130.1(III), Rules of Conduct Governing Employees' Relationships with Offenders.

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.