

Issues: Group III Written Notice (Fraternization), Group III Written Notice (falsifying a document), and Termination; Hearing Date: 04/18/12; Decision Issued: 04/19/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9792; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9792

Hearing Date: April 18, 2012
Decision Issued: April 19, 2012

PROCEDURAL HISTORY

On January 18, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternizing with an offender. On January 18, 2012, Grievant was issued a second Group III Written Notice of disciplinary action with removal for falsifying a state document.

On January 23, 2012, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On March 14, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the timeframe for issuing a decision in this case due to the unavailability of a party. On April 18, 2012, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

APPEARANCES

Agency Party Designee
Agency Advocate
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 Sergeant at one of its Facilities. The purpose of his position was to "[p]rovide first-line supervision to correctional officers."¹ No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On November 30, 2011, Grievant and the Inmate were inside the Housing Unit. The Inmate asked Grievant if Grievant "still had it". The Inmates believed that Grievant had been a former wrestling champion and wanted to know if Grievant retained his wrestling skills. Grievant grabbed the Inmate in a manner consistent with making a wrestling move. The Inmate responded and they began to wrestle. At some point they "went to the floor". Other employees observed the interaction and approached Grievant and the Inmate. Grievant and the Inmate denied that there was any problem or concern for the others to worry about.

Grievant was asked to write an Internal Incident Report regarding his interaction with the Inmate on November 30, 2011. Grievant wrote "there was no horse-playing involved."²

¹ Agency Exhibit 3.

² Agency Exhibit 2.

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 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 III Written Notice for Fraternalization.

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*.

Under DOC Operating Procedure 130.1, 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 employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.⁶

Horseplay with an inmate constitutes fraternization because it involves an association with an inmate contrary to the role of supervising inmates. On November 30, 2011, Grievant engaged in horseplay with the Inmate because the Grievant accepted the Inmate’s challenge to demonstrate his wrestling skills and placed his hands on the Inmate for a reason unrelated to supervising the Inmate. The Agency has presented sufficient evidence to support the issuance for a Group III Written Notice of disciplinary action for fraternizing with an offender. Upon the issuance of a Group III

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

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

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

⁶ Virginia Department of Corrections Operating Procedure 130.1(III), *Rules of Conduct Governing Employees’ Relationships with Offenders*.

Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Group III Written Notice for Falsification of State Document.

Group III offenses include, "[f]alsify any records, including but not limited to all work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports, insurance claims, time records, leave records, or other official state documents."⁷ Internal Incident Reports are official state documents. On November 30, 2011, Grievant engaged in horseplay with the Inmate and was asked to write a report regarding that interaction. Grievant wrote that "there was no horse-playing involved". Grievant knew that his statement was false. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying a state document. Upon the issuance of a Group III Written Notice, an employee may be removed from employment. Accordingly, the Agency's decision to remove Grievant from employment must be upheld.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary actions.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for fraternization is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for falsifying a state document is **upheld**.

⁷ DOC Operating Procedure 135.1(XII)(B)(2).

⁸ Va. Code § 2.2-3005.

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

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

[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