

Issues: Group III Written Notice (fraternization), Group III Written Notice (giving false information during investigation), and Termination; Hearing Date: 06/04/12; Decision Issued: 06/19/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9818, 9819; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9818 / 9819

Hearing Date: June 4, 2012
Decision Issued: June 19, 2012

PROCEDURAL HISTORY

On February 9, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternizing with an inmate. On February 9, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for making a false statement to an investigator.

On March 1, 2012, Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On April 18, 2012, the EDR Director issued Ruling No. 2012-3324, 2012-3325 consolidating the two disciplinary actions for hearing. On May 2, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 4, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's 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 had been employed since February 25, 2007. No evidence or prior active disciplinary action was introduced during the hearing.

Inmates at the Facility who are inside their cells can communicate with a Control Booth Officer through an intercom system. Inmates are permitted to use the intercom system only to communicate emergencies. Inmates using the intercom for non-emergency reasons were subject to receiving disciplinary charges. Grievant knew that inmates could not use the intercom for reasons other than communicating emergencies. The Agency records intercom communications.

On February 1, 2012, the Facility security staff purportedly received a written complaint from Inmate C. Inmate C later denied making the complaint. The complaint alleged that the Inmate was talking with a Corrections Officer on the Facility's intercom system and keeping Inmate C awake. The Intelligence Officer listened to the recordings of approximately 90 intercom conversations between the Inmate and Grievant on January 22, 2012 to February 3, 2012. The matter was referred to the Agency's Special Investigations Unit.

As part of the Agency's investigation, the Investigator listened to intercom communications between Grievant and the Inmate from January 11, 2012 through February 3, 2012.

Grievant and the Inmate engaged in several intercom communications that were inappropriate. For example, on January 12, 2012, the Inmate used the intercom to contact Grievant. Grievant asked him what was his emergency. He responded that he needed to take a shower.

On January 16, 2012, Grievant began her conversation with the Inmate by whispering to him and asking him if he was all right. The Inmate said he was all right. In a playful manner, Grievant continued to ask him "what?" He Inmate began laughing.

On January 16, 2012, Grievant told the Inmate that she was about to call "rec". The Inmates said that he was not going to go out. Grievant then asked him if his mother received the card that he sent her. The Inmate said yes. They then discussed the pretty colored flowers that he drew on the card. Grievant said "I will yell at you in a bit."

On January 17, 2012, the Inmate asked Grievant if she was going to get a snack that day. Grievant said that she would probably try because she left her cup back in her vehicle. The Inmate responded "That would be great."

On January 17, 2012, the Inmate asked Grievant "Guess who came back to work last night?" The Inmate then named the lieutenant. Grievant responded that the lieutenant had returned to work the day before and was working from "4 to 12."

On January 17, 2012, the Inmate says, "me and my future wife was missing". Grievant replies "really, where is she at?" The Inmate then says "I can't say where she's at. I'll get in trouble." Grievant says, "I was getting ready for a surprise 50th anniversary party."

On January 17, 2012, the Inmate and Grievant discussed a song that she had suggested the Inmate listen to.

On January 17, 2012, the Inmate asked Grievant "are you exercising?" Grievant replied "no, changing trash and stuff."

On January 20, 2012, Grievant and the Inmate had several conversations about Grievant attempting to catch people in the door including Grievant when she closes the doors. The Inmate joked that he would not be able to live to be 104 years old.

On January 21, 2012, Inmate asked Grievant "Did you eat good?" Grievant replied "Yes, I just had a little bit of chicken noodle soup."

On January 21, 2012, the Inmate asked Grievant "why are you yelling?" Grievant replied that she had the radio on. The Inmate instructed Grievant to turn down the radio. Grievant replied "hold on."

On January 21, 2012, the Inmate asked Grievant "what would you be doing if I had not called you right now?" Grievant said she was listening to a musician at that time. The Inmate replied that he had not heard that artist since he was six years old. Grievant said that was the kind of music she liked, "old music."

On January 21, 2012, the Inmate played music over the intercom for Grievant and asked her if she liked the music. Grievant replied that she not hear it because it was too loud.

On January 22, 2012, the Inmate told Grievant that he hoped her headache went away. Grievant said, "Thanks."

On January 25, 2012, the Inmate asked Grievant where she was working that day. Grievant told the Inmate that she would probably take a late lunch and then she would come back on the floor.

On January 26, 2012, Grievant told the Inmate, "When I don't answer you, somebody is up here with me." The Inmate said, "When it is good, you call me." Grievant replied, "Okay".

Sometime in January 2012, the Inmate was cleaning an office where security staff were reviewing monitors showing different locations of the Facility. The Inmate observed a security employee use the video camera to watch Grievant in the parking lot near her vehicle. Grievant learned of this and complain to Facility managers that inmate should not be viewing staff through security monitors.

On January 26, 2012, Grievant told the Inmate that she was looking for him because "I was going to give you a warning". She was referring to the possibility that a corrections supervisor expressed the desire to put the Inmate in a holding cell. When Grievant asked who made the comment, Grievant told him Captain W made the comment but that she thought he was just "trying to be smart."

On January 26, 2012, Grievant discussed with the Inmate a complaint she had about the actions of other employees. She explained the nature of her complaint and why she believed she was correct.

On January 26, 2012, Grievant told the Inmate that during formation her supervisors were talking to staff about fraternization and that employees should not be "talking to inmates". Grievant had asked a question during formation and a supervisor said that they might bring the Inmate in for questioning. Grievant told the Inmate that Captain W said he might put the Inmate in a holding cell. Grievant told the Inmate that she was trying to catch him to tell him if they carried him down there not to worry about

it. Grievant then told the Inmate that she told Mr. P but they were about to take the Inmate to a holding cell for something they had done. Grievant told the Inmate that Sergeant J agreed that they were in the wrong.

On January 26, 2012, Grievant told the Inmate that Lieutenant Q was entering the building.

On January 26, 2012, the Inmate joked with Grievant that he might be going to a holding cell. Grievant responded that she would come visit him.

On January 26, 2012, the Inmate asked Grievant what three lottery numbers she would pick. Grievant replied with three numbers.

On January 30, 2012, Grievant tells the Inmate "Lieutenant [Q] is coming around. Make sure you have your towels down." The Inmate asked, "Where is he at?" Grievant replied "1 pod". The Inmate jokingly says, "My towels? I'm putting them up. What's he going to do to me?" Grievant said, "Hang them up and see what he does!" Grievant said, "Good. They will carry you to [segregation], then you can't mash no buttons." The Inmates stated that he would be leaving next week. Grievant joked that she would come and pack his bags for him and call him a cab.

On January 30, 2012, the Inmate asked Grievant why she was by the mailbox. Grievant replied that she had to go to her car. The Inmate asked, "What, to go to sleep?"

On January 30, 2012, the Inmate told Grievant if she intended to "put paperwork in" to wait until he had left the facility. Grievant replied that she was going to do so and for him not to worry and that that was what she had told her mother last night. She said she would not do so until after the Inmate was gone.

On January 30, 2012, the Inmate used his intercom to contact Grievant and then asked when Grievant was returning from vacation. The Inmate knew that his intercom was working and that he was speaking with Grievant. Grievant knew that the Inmate was presenting his intercom did not work and that he was speaking with someone other than Grievant. Grievant said she knew the intercom was not working and that she would fix it by ripping out. She said that Grievant would probably never return from vacation.

On January 31, 2012, the Inmate asked Grievant if she was familiar with a particular song. Grievant replied "yea."

On January 31, 2012, the Inmate told Grievant that he was leaving. Grievant replied that his name was not on the list. The Inmate asked Grievant if she would come down this weekend to see him. Grievant indicated that she would try to do so.

On February 3, 2012, the Inmate asked Grievant if she was working hard. Grievant replied that her head felt like it was trying to hurt. The Inmate told her he hoped she felt better. The Inmate asked Grievant if she heard about the accident that occurred Thursday. Grievant indicated she knew about an accident with a tractor trailer that had driven into an embankment. Grievant added that she was aware of other vehicle accidents that had occurred that week.

On February 3, 2012, the Special Agent met with Grievant. Grievant signed a "Statement of Intent" indicating that "Before We Ask You Any Questions, You Should Be Advised that: ***

3. Any answer you give may be used in disciplinary proceedings that could result in administrative action, including dismissal, against you.
4. If you refuse to answer fully and truthfully questions relating to the performance of your official duties, you could be subject to disciplinary action, including dismissal.

The Special Agent interviewed Grievant regarding her conversations with the Inmate. The Special Agent asked Grievant if she had ever warned the offender to take down his towel because a supervisor was coming. Grievant replied, "No." The Special Agent then played the recording of Grievant's conversation with the Inmate in which she warned the Inmate that Lieutenant Q was coming to the building and he should take down his towels. Grievant told the Special Agent she had forgotten about her conversation with the Inmate.

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

Group III Written Notice for Fraternalization.

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).

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, 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.⁴

Black's Law Dictionary (6th edition) defines "associate", in part, "Signifies confederacy or union for a particular purpose, good or ill." Webster's New Universal Unabridged Dictionary defines "associate", in part:

2. to join as a companion, partner, or ally: *to associate oneself with a clause*. *** 5. To keep company, as a friend, companion, or ally: *He was accused of associating with known criminals*. 6. to join together as partners or colleagues. *** 8. a companion or comrade: *my most intimate associates*. 9. a confederate; an accomplice or ally: criminal associates.

Grievant engaged in fraternization with the Inmate as demonstrated by her behavior on numerous occasions in January and February 2012. None of the Inmate's communications with Grievant were emergencies, yet Grievant took no action to stop the Inmate from using the intercom to interrupt her work duties. Grievant's tone of voice during her conversations with the Inmate reflected friendship with the Inmate. She often joked and laughed with the Inmate. Grievant sometimes whispered to the Inmate at his request. Grievant discussed other employees with the Inmate and presented her opinions regarding their actions. Grievant told the Inmate what activities she was engaged in while she was working in the Control Booth. Grievant discussed what she had eaten with the Inmate. Grievant discussed her musical preferences with the Inmate. Grievant discussed a complaint she filed with Agency supervisors. She discussed how employees reacted to that complaint and her opinion of those employees and their actions. Grievant talked to the Inmate about her headache. Grievant warned the Inmate that he might be placed in a segregation cell. On January 26, 2012, Grievant told the Inmate that Lieutenant Q had entered the building. On January 30, 2012, she warned the Inmate that Lieutenant Q had entered the building

⁴ Virginia Department of Corrections Operating Procedure 130.1(III), *Rules of Conduct Governing Employees’ Relationships with Offenders*.

and that he should take the towels down from his door. Grievant was attempting to enable the Inmate to avoid getting in trouble with Lieutenant Q.

Grievant knew that her conversations with the Inmate were inappropriate. On January 26, 2012, she told the Inmate that when other people were in the Control Booth with her, she could not speak with him. She agreed to call the Inmate "when it is good".

Most of Grievant's conversations with the Inmate were not consistent with a need to supervise the Inmate. Grievant's interactions with the Inmate reflected a friendship. By warning the Inmate about the arrival of Lieutenant Q, Grievant was acting on the side of the Inmate and not as someone responsible for supervising an offender. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an employee may be removed. Accordingly, the Agency's issuance of a Group III Written Notice for fraternization must be upheld.

Grievant argued that the offender who purportedly complained about Grievant's conversations with the Inmate denied making the complaint. This fact does not affect the outcome of this case. Agency investigators believed the complaint was valid at the time it was first received by the Agency and initiated an investigation. There is no reason to believe that the Agency's investigation was initiated for an improper purpose such as to retaliate or discriminate against Grievant.

Grievant asserted that the agency permitted male officers to speak with inmates regarding ball games, racing, etc. but they are not disciplined; but because she is female, she was disciplined. No credible evidence was presented to support this allegation.

Group III Written Notice for Making a False Statement.

DOC Operating Procedure 030.4 governs the Special Investigations Unit. Section D(5) provides that, "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 signed a Statement of Intent notifying her that if she answered the Special Agent's questions untruthfully, she could be subject to disciplinary action including dismissal.

The Agency has presented sufficient evidence to show that Grievant was untruthful to the Special Agent on February 3, 2012. On January 30, 2012, Grievant warned the Inmate that Lieutenant Q was entering the area and that the Inmate should remove the towel from his window. The Inmate questioned Grievant about Lieutenant Q's location and asked what Lieutenant Q was going to do to the Inmate. Grievant answered the Inmate. On February 3, 2012, the Special Agent asked Grievant if she had warned the offender to take down his towel because a supervisor was

coming. Grievant denied doing so. Grievant knew or should have known that her denial was untruthful. Grievant claimed she forgot what she had said to the Inmate. The nature of the exchange was not so brief that Grievant would likely have forgotten the discussion. Grievant was asked about her conversation with the Inmate four days after it occurred. That length of time is not so great that Grievant would likely have forgotten a conversation of such significance.

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 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 Group III Written Notice with removal for making a false statement to an investigator 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.