

Issue: Group III Written Notice with Suspension (fraternization); Hearing Date: 06/11/12; Decision Issued: 06/18/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9828; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9828

Hearing Date: June 11, 2012
Decision Issued: June 18, 2012

PROCEDURAL HISTORY

On December 20, 2011, Grievant was issued a Group III Written Notice of disciplinary action with a five work day suspension for fraternization with an inmate.

On January 19, 2012, 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 May 14, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 11, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
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 employs Grievant as a Case Manager Counselor at one of its Facilities. She has been employed by the Agency for approximately 25 years without receiving prior disciplinary action. The purpose of her position was to "provide comprehensive counseling services and caseload management to a caseload of inmate offenders assigned to [the Facility]."¹

On August 15, 2011, the Inmate was making copies as part of his job as a Dorm Tech. He also made copies of a poem for which he did not have authorization and for which he had not paid ten cents per page. The Captain discovered the Inmate's behavior and issued a charge against the Inmate. Grievant served an Inmate Job Suspension Form on the Inmate on August 17, 2011 which meant the Inmate could no longer hold a job at the Facility until a disciplinary hearing was conducted. A disciplinary hearing was held on August 22, 2011. The Agency did not provide documents showing the outcome of the Inmate's hearing but it appears that he remained on suspension and lost his job as a Dorm Tech. Because he no longer held a job, he was not authorized by the Agency to work and could not be paid.

No evidence was presented to show that Grievant knew the Inmate was making copies for personal use on August 15, 2011.

¹ Agency Exhibit 4.

On September 15, 2011, the Inmate wanted to speak with Grievant. The Control Booth Officer called Grievant to see if the Inmate could be permitted to exit the dorm and speak with her. A conflict arose between the Inmate and the Control Booth Officer. The Sergeant spoke with the Inmate and then spoke with Grievant regarding the Inmate's comments. The Sergeant asked if the Inmate was working for Grievant. Grievant said, "Well, I had to suspend him, but I do have him doing little things for me." The Inmate confirmed to the Sergeant that he did "little things" for Grievant but at no cost to her.

Under the Agency's policies, an offender who has been suspended from his job may not work at all.

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

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.⁵

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

⁵ Virginia Department of Corrections Operating Procedure 130.1(III), *Rules of Conduct Governing Employees' Relationships with Offenders*.

Section V(D) of that policy addresses Special Privileges and states:

Employees shall not extend or promise to an offender special privileges or favors not available to all persons similarly supervised, except as provided or through official channels.

Grievant afforded the Inmate a Special Privilege. Work is a privilege within a Facility. Grievant suspended the Inmate from his job and knew that he did not hold a job with her in October 2011. The Inmate asked Grievant if he could do “little things” for her without compensation and she agreed. No evidence was presented to show that Grievant permitted or had been granted the authority to permit suspended inmates to work for her. The Agency has established that Grievant fraternized with the Inmate by giving him a special privilege not afforded other inmates. 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 agency may remove an employee. In lieu of removal an agency may suspend an employee for up to 30 workdays. Accordingly, Grievant’s five workday suspension must be upheld.

The Agency alleged the Grievant granted the Inmate a Special Privilege by permitting him to make photocopies of a poem he had written. No credible evidence was presented to show the Grievant had authorized the Inmate to make copies of the poem. The Agency’s allegation is unsupported by the evidence. Although the Agency has not established this allegation, there remain sufficient facts to support the issuance of a Group III Written Notice as discussed above.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.⁷

⁶ Va. Code § 2.2-3005.

⁷ Grievant argued that the Inmate’s name should have been removed from the Master List. This would have had the effect of preventing the Inmate from leaving his housing unit to perform volunteer work for Grievant. Although Grievant’s assertion is true, it is not a mitigating factor because it does not change the fact that Grievant knew the Inmate was suspended from his job when she permitted the Inmate to perform work duties for her.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a five workday suspension 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:

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.