

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 12/10/12; Decision Issued: 12/11/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9969; Outcome: No Relief – Agency Upheld; **Administrative Review: DHRM Ruling Request received 12/20/13; DHRM Ruling issued 01/17/13; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9969

Hearing Date: December 10, 2012

Decision Issued: December 11, 2012

PROCEDURAL HISTORY

On September 21, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating DOC Procedure 130.1.

On October 4, 2012, Grievant timely filed a grievance to challenge the Agency's action. The grievant proceeded to hearing. On November 5, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 10, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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 employed Grievant as a Corrections Sergeant at one of its facilities. She had been employed for approximately 14 years prior to her removal effective September 21, 2012. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant supervised approximately 20 employees and 200 offenders on a work farm. She served as the watch commander for the unit.

Grievant received training regarding the Agency's fraternization policy. Grievant was aware of rumors at the Facility that she had some relationship with the Inmate. She advised Facility managers that any such rumors were untrue. The Assistant Warden advised her to be careful about what she says, what she does, and where she goes. At one point in 2011, Grievant was instructed not to go into the greenhouse by herself alone with the Inmate.

Inmate can send money from their accounts to individuals outside of the Facility. They fill out forms called Inmate Trust System Withdrawal Request. The form specifies (1) the amount to be paid up to \$300 per request (2) the name and address of the recipient, and (3) the person witnessing the signature and (4) the person approving the transaction.

On April 7, 2012, the Inmate filled out five Inmate Trust System Withdrawal Requests. Each request was in the amount of \$300 to be paid with a money order to

Grievant's sister. The Inmate wrote that the reason for the transfer was "Gift". Grievant signed and dated each form.

On April 13, 2012, the Inmate filled out six Inmate Trust System Withdrawal Requests. Each request was in the amount of \$300 to be paid with a money order to Grievant's sister. The Inmate wrote that the reason for the transfer was "Gift." Grievant signed and dated each form.

Grievant did not notify anyone at the Facility that she was signing a withdrawal request for an offender who was sending money to Grievant's sister.

Grievant did not present any evidence to establish that the transaction did not create the appearance of impropriety.

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

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

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).

(marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.⁴

This policy addresses improprieties:

Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited. Associations between staff and offenders that may compromise security, or undermine the effectiveness to carry out the employee's responsibilities may be treated as a Group III offense under the Operating Procedure 135.1, Standards of Conduct and Performance.

Most employees would favor their siblings receiving money. They would view the receipt of money by a sibling as being positive for that sibling. In some cases an offender might send money to the sibling of a corrections employee so that the sibling would transfer that money to the corrections employee.

Grievant witnessed the Inmate sending over \$3,000 to her sister. This would likely have made Grievant view the Inmate in a favorable light and view him differently from other inmates. Grievant knew or should have known that the transfer would have raised suspicion regarding the reasons for the transfer and if any of the funds would end up going to Grievant. Grievant received training regarding her obligation to notify Facility managers of situations that might raise questions about her relationship with Inmates. Grievant had been advised by the Assistant Warden to be cautious regarding how she interacted with the Inmate. The Agency has established that Grievant created the appearance of impropriety by signing eleven transfer forms so that the Inmate could transfer money to Grievant's sister. Accordingly, the Agency's issuance to Grievant of a Group III with removal must be upheld.

Grievant argued that she did not violate the Agency's policy because it does not address fraternization between offenders and an employee's family members. This argument fails. The policy addresses the appearance of improprieties. Such improprieties can include circumstances where offenders take actions that can benefit employees directly (e.g. giving an employee money) or indirectly through an employee's family member (e.g. giving an employee's sister money that may benefit the employee).

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 Human Resource Management"⁵ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

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

⁵ Va. Code § 2.2-3005.

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.

DECISION

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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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 EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections
January 17, 2013

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9969. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer stated the following in the *PROCEDURAL HISTORY*:

On September 21, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating DOC Procedure 130.1.

On October 4, 2012, Grievant timely filed a grievance to challenge the Agency's action. The grievant proceeded to hearing. On November 5, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 10, 2012, a hearing was held at the Agency's office.

The relevant *FINDINGS OF FACT*, as per the hearing officer, are as follows:

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. She had been employed for approximately 14 years prior to her removal effective September 21, 2012. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant supervised approximately 20 employees and 200 offenders on a work farm. She served as the watch commander for the unit.

Grievant received training regarding the Agency's fraternization policy.

Grievant was aware of rumors at the Facility that she had some relationship with the Inmate. She advised Facility managers that any such rumors were untrue. The Assistant Warden advised her to be careful about what she says, what she does, and where she goes. At one point in 2011, Grievant was instructed not to go into the greenhouse by herself alone with the Inmate.

Inmate can send money from their accounts to individuals outside of the Facility. They fill out forms called Inmate Trust System Withdrawal Request. The form specifies (1) the amount to be paid up to \$300 per request (2) the name and address of the recipient, and (3) the person witnessing the signature and (4) the person approving the transaction.

On April 7, 2012, the Inmate filled out five Inmate Trust System Withdrawal Requests. Each request was in the amount of \$300 to be paid with a money order to Grievant's sister.

The Inmate wrote that the reason for the transfer was "Gift." Grievant signed and dated each form.

On April 13, 2012, the Inmate filled out six Inmate Trust System Withdrawal Requests. Each request was in the amount of \$300 to be paid with a money order to Grievant's sister. The Inmate wrote that the reason for the transfer was "Gift." Grievant signed and dated each form.

Grievant did not notify anyone at the Facility that she was signing a withdrawal request for an offender who was sending money to Grievant's sister.

Grievant did not present any evidence to establish that the transaction did not create the appearance of impropriety.

The *CONCLUSIONS OF POLICY* of this case are as follows:

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

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*."

Fraternalization 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.”

This policy addresses improprieties:

Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited. Associations between staff and offenders that may compromise security, or undermine the effectiveness to carry out the employee's responsibilities may be treated as a Group III offense under the Operating Procedure 135.1, Standards of Conduct and Performance.

Most employees would favor their siblings receiving money. They would view the receipt of money by a sibling as being positive for that sibling. In some cases an offender might send money to the sibling of a corrections employee so that the sibling would transfer that money to the corrections employee.

Grievant witnessed the Inmate sending over \$3,000 to her sister. This would likely have made Grievant view the Inmate in a favorable light and view him differently from other inmates. Grievant knew or should have known that the transfer would have raised suspicion regarding the reasons for the transfer and if any of the funds would end up going to Grievant. Grievant received training regarding her obligation to notify Facility managers of situations that might raise questions about her relationship with Inmates. Grievant had been advised by the Assistant Warden to be cautious regarding how she interacted with the Inmate. The Agency has established that Grievant created the appearance of impropriety by signing eleven transfer forms so that the Inmate could transfer money to Grievant's sister. Accordingly, the Agency's issuance to Grievant of a Group III with removal must be upheld.

Grievant argued that she did not violate the Agency's policy because it does not address fraternization between offenders and an employee's family members. This argument fails. The policy addresses the appearance of improprieties. Such improprieties can include circumstances where offenders take actions that can benefit employees directly (e.g., giving an employee money) or indirectly through an employee's family member (e.g. giving an employee's sister money that may benefit the employee).

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 Human Resource ManagementUnder 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 nonexclusive 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.

The hearing officer made the final *DECISION*:

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

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In her request for an administrative review of a policy violation by the hearing officer in making his decision, the grievant stated that the hearing officer introduced additional information in his decision that was not a part of the facts presented during the hearing. Namely, the grievant implied that because Virginia Department of Corrections Operating Procedure 135.1 (XII)(B)(25), *Standards of Conduct*, was not introduced during the hearing, it was improper for the hearing officer to apply that policy in making his decision. Also, she raised an issue with the hearing officer's application and interpretation of that same policy. Finally, she contends that all money request funds were approved by the Assistant Warden, thus management officials were aware of the money distributed through the Inmate Trust Fund.

While the grievant was not charged with violating DOC Operating Procedure 135.1 (XII)(B)(25), it is clear that policy applies to corrections personnel and their relationships with inmates. The policy does not spell out whether this policy applies to the families of the corrections personnel and the inmates. In the instant case, however, the grievant had control and custody of an inmate who apparently had a close relationship with the grievant's sister, so much so that the inmate sent to her sister at least \$3,000.00. Fraternization with inmates is punishable by issuance of a Group III Written Notice with termination. The hearing officer concluded while there was no proof that the grievant received any of the funds or granted any special favors to the inmate, it certainly gave the appearance of fraternization, and in accordance with DOC Operating Procedure 135.1 (XII) (25), the DOC properly issued a Group III Written Notice. Therefore, DHRM will not disturb this decision on the basis of application of incorrect policy.

Concerning the hearing officer's failure to quote provisions of the Inmate Trust Fund order stating that any request over \$300.00 has to be approved by the Warden, Assistant Warden, a major or the Property Officer, appears to be an issue that is evidentiary in nature and will not be addressed in this ruling.

Given that real issue in this case is fraternization, DHRM feels that the hearing officer did not misapply or misinterpret policy. Therefore, this Agency will not interfere with the application of this decision.

Ernest G. Spratley
Assistant Director
Office of Equal Employment Services