

Issues: Group II Written Notice (failure to follow policy), Group III Written Notice with Termination (fraternization); Hearing Date: 12/06/12; Decision Issued: 12/07/12; Agency: DOC; AHO: Cecil H. Creasey, Jr.; Case No. 9977; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution
Department of Human Resource Management

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9977

Hearing Date: December 6, 2012
Decision Issued: December 7, 2012

PROCEDURAL HISTORY

Grievant was a security officer for the Department of Corrections (“the Agency”), with fifteen years of service with the Agency as of the offense date. On September 25, 2012, the Grievant was charged with a Group II Written Notice and a Group III Written Notice, with job termination, for violation of the Agency’s contraband and fraternization policies. The Grievant had no prior, active disciplinary notices.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On November 14, 2012, the Office of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. Through pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, December 6, 2012, on which date the grievance hearing was held at the Agency’s facility.

The Agency submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency’s Exhibits.

APPEARANCES

Grievant
Advocate for Agency
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?

The Grievant requests rescission or reduction of the Group III Written Notice and applicable relief.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee’s ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth’s grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on its *Standards of Conduct*, Operating Procedure 135.1, which defines Group III offenses to include acts of misconduct of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 6. An example of a Group III offense is any violation of Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*, and fraternization or non-professional relationships with offenders. Also, gambling on state property during work hours and introducing or attempting to introduce contraband into a facility are considered Group III offenses. Group II offenses include acts of

misconduct at a level that an accumulation of two or more offenses normally should warrant removal. *Id.*

Among prohibited conduct under OP 130.1 are the fraternization or non-professional relationships between employees and offenders. Agency Exh. 3.

The Offenses

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a security officer, with approximately 15 years of service with the Agency. The Grievant admitted that she possessed lottery tickets and that she had a co-worker purchase the tickets and bring them to her at work.¹ The Grievant admitted she was aware of the ban on such activity and contraband. Based on the Grievant's admission, I find the Agency has proved the Group II Written Notice. The Agency's warden testified that he mitigated the discipline from what would normally be a Group III offense down to the Group II, without suspension, because of mitigating deference to the Grievant's work tenure and history.

As for the Group III Written Notice, it states:

Investigation by Special Agent [M] disclosed that [the Grievant] was involved in inappropriate relationships with offenders and offender family members at [the facility]. This investigation was initiated based upon information that [the Grievant] was involved in inappropriate relationships with offenders [B., J., and W.]. Upon search of the cellular phone of [the Grievant], it was discovered that she had an incoming call from [the mother] of [offender B.]. Offender [B.] lives in the same housing unit as [the Grievant] and has worked for [the Grievant] for the past 5 years. [The Grievant] was unable to explain how [Offender B.'s mother] was able to obtain her cellular number.

On August 20, 2012, [the Grievant] was found to be in possession of a lottery ticket with the name [P.B.] written on it. [P.B.] is a friend of offender [J.] and has visited him here at [the facility] in the past. Offender [J.] used to be assigned to the same housing unit as [the Grievant]. Telephone contact was made with [P.B.] who advised that on August 20, 2012 she received a frantic call from a phone number in [the facility location]. The caller advised that they had just searched her vehicle and cell phone and that she needed her to cover for her. [P.B.] advised that she asked the caller to identify herself and the person on the other end of the line refused. [P.B.] advised that if she would not give her name then she would not cover for her. Research indicates that the originating number to the phone call to [P.B.] was from [a store close to the facility]. Interview with staff from [the store] verified that on 8/20/12 [the Grievant] came in and asked to utilize the phone at approximately the same time as reported by [P.B.].

¹ The co-worker was also similarly disciplined for this infraction.

On August 20, 2012, [the Grievant] was observed at Housing Unit 8 entry talking with offender [W.]. After speaking with offender [W.] for an extended period of time (app. 10 minutes), [the Grievant] entered Housing Unit 8 with offender [W.] and entered the elevator for Housing Unit 8. [The Grievant] advised that she went to Housing Unit 8 to get some coffee and she was not sure why offender [W.] was in Housing Unit 8. She did not charge offender [W.] up for being in an unauthorized area nor did she request that he return to Housing Unit 7. Offender [W.] advised that [the Grievant] had asked him to walk with her to Housing Unit 8. [The Grievant] was observed walking with Offender [W.] back to Housing Unit 7 after [the Grievant] had been in Housing Unit 8 for 27 minutes.

The Agency investigator, warden, and witnesses testified consistently with the allegations contained in the Group III Written Notice. The investigator's report is in the record as Agency Exh. 2. The Grievant's supervising lieutenant testified that the Grievant was not authorized to leave her assigned post in Housing Unit 7, and she did not request such authorization. Such employees must request authorization for such activity away from the assignment. The warden testified that the seriousness of fraternization and the security risk it poses to the facility and the public renders mitigation to less than termination inappropriate, especially when viewed with the Group II Written Notice for contraband that was already mitigated down from the normal Group III level.

Testifying for the Grievant were three witnesses, Agency employees, who vouched for her good work and character. While not all of the suspicions stated in the investigator's report were proved, the Grievant did not have credible explanations for the telephone number in her cell phone, the lottery play slip with the offender's family member's name, and the inordinate amount of time spent with certain offenders. "Fraternization" is defined by policy to include excessive time and attention given to one offender over others and non-work related visits with offenders. The Grievant testified that she was familiar with the offenders because of their assigned work for her, however, these meetings, conversations, and time spent were not shown to be work-related. Improprieties, by policy, include the "appearance of improprieties," and behavior that favors certain offenders violates policy. Agency Exh. 3. The Agency's evidence preponderates in proving that the Grievant's behavior met these criteria of fraternization.

The warden testified that the Agency is required to terminate an employee who is shown to have violated OP 130.1, because the security risk is simply too great.

The Grievant testified and argued that she did not engage in any level of inappropriate relationship with offenders or members of offenders' families. Her testimony, however, did not credibly rebut the Agency's presentation of facts and circumstances or explain them away as coincidence or minimal. Based on the evidence, I find that the Agency proved, by a preponderance of the evidence, that the Grievant had some level of inappropriate relationship with offenders. Policy dictates that such behavior falls within the level of a Group III offense.

Job termination is necessarily a harsh result. Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have

a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, *even if he would levy lesser discipline*, a hearing officer is not a “super-personnel officer” and must be careful not to succumb to the temptation to substitute his judgment for that of an agency’s management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.* A hearing officer does not have the same discretion for applying mitigation as management does.

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...” Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution.” 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.

As previously stated, the agency’s burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth’s employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding the security of the facility. The Grievant’s conduct put the Agency at risk, and, while strict in its application, warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency’s important role in safeguarding the public and offenders in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable standards of conduct provide stringent expectations of corrections officers. Accordingly, I find no mitigating circumstances that permit the hearing officer to reduce the Agency’s action regarding the Group III Written Notice as outside the bounds of reasonableness.

DECISION

For the reasons stated herein, the Agency’s issuance of the Group II Written Notice and the Group III Written Notice, with termination, 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.²

² Agencies must request and receive prior approval from EDR before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

A handwritten signature in blue ink, appearing to read "Cecil H. Creasey, Jr.", written in a cursive style.

Cecil H. Creasey, Jr.
Hearing Officer