



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11637

Hearing Date: April 6, 2021
Decision Issued: April 7, 2021

PROCEDURAL HISTORY

On October 27, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternizing with an offender.

On November 24, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 14, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 6, 2021, a hearing was held by remote conference. Grievant was notified of the hearing date and time but did not participate.

APPEARANCES

Agency Party Designee
Agency Representative
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant interacted with inmates but devoted extra attention to the Inmate. A supervisor observed Grievant interacting with the Inmate and informed her that it did not look good for her to be talking to the Inmate for lengthy periods of time.

On August 9, 2020, Grievant was working as the Control Booth Officer at the Facility. The Inmate approached the tray slot which was open and allowed him to speak with Grievant. Grievant and the Inmate had a conversation lasting approximately one hour. On September 9, 2020, Grievant was working as the Control Booth Officer at the Facility. She spoke with the Inmate through the tray slot for approximately 45 minutes. They discussed personal interests such as music and games.

On September 29, 2020, Grievant entered the Facility and was subject to a body scan. The body scan showed that Grievant had an object inside her body that appeared to be a tied bag. The Agency prevented her from entering the Facility because Facility managers believe she may have been trying to bring contraband into the Facility.

The Agency continued to investigate Grievant's relationship with the Inmate after Grievant was removed from employment. Grievant created an account with a service allowing her to send emails to the Inmate. She used a different name but sent pictures of herself to the Inmate. She told the Inmate she loved him.

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." 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."¹

Operating Procedure 135.2 governs Rules of Conduct Governing Employees' Relationships with Offenders. Section IV(A) provides, "fraternization or non-professional relationships between employees and offenders are prohibited. *** This action should normally be treated as a Group III offense under Operating Procedure 135.1, Standards of Conduct.

Fraternalization is defined as:

Employee association with offenders, or their family members, or close friends of offenders outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior; examples include non-work related visits between offenders and employees, non-work related relationships with family members or close friends of offenders, connections on social media, discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.²

Grievant fraternized with the Inmate because she engaged in a relationship with him that involved unusually lengthy conversations about personal matters such as music and games. She was warned not to have such conversations but disregarded that instruction. She attempted to bring contraband into the Facility. 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. Accordingly, the Agency's decision to remove Grievant must be upheld.

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

² Virginia Department of Corrections Operating Procedure 135.2, Rules of Conduct Governing Employees' Relationships with Offenders.

Grievant asserted she was wrongfully terminated. She did not present any evidence to support this claim. The Agency removed Grievant from employment in accordance with the Standards of Conduct.

Grievant asserted the abnormal body image scan showed an image of her IUD. The Agency took a second body scan several weeks later that produced a normal body image leading the Agency to conclude Grievant's original abnormal body image scan resulted from contraband.

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"³ 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.

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 request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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.

³ Va. Code § 2.2-3005.

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.