

Issue: Group II Written Notice (Fraternization); Hearing Date: 03/29/16; Decision Issued: 04/29/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10754; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10754

Hearing Date: March 29, 2016

Decision Issued: April 29, 2016

PROCEDURAL HISTORY

On September 18, 2015, Grievant was issued a Group II Written Notice of disciplinary action for fraternization.

On October 18, 2015, 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 he requested a hearing. On January 18, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 29, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's 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. 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 Corrections Officer at one of its facilities. No evidence of prior active disciplinary action as introduced during the hearing.

The control room contained the equipment necessary to open and close doors to inmate pods and to hallways attached to the control room booth. Behind the control booth was a hallway that was seldom used by employees. To enter the back hallway, an employee would have to have the control room officer open a door.

Officer C developed a romantic relationship with the Offender sometime in November 2014. Officer C often worked in the control room booth. If she needed to be relieved to go to the restroom, she would contact Grievant and ask him to assume her post.

The back hallway was not used often. Offenders and employees were seldom in the area. It would be an unusual event for a corrections officer and an inmate to meet in the back hallway.

Officer C asked Grievant to relieve her from her post in the control room. He did so and Officer C asked Grievant to open the door to allow her and the Offender to enter the back hallway. Officer C said she wanted to question the Offender about other inmates who might be smoking cigarettes.

Grievant let Officer C and the Offender enter the back hallway on several occasions. They remained there sometimes for ten or fifteen minutes. Grievant sometimes was able to see their heads through the window in a doorway but sometimes he could not see them at all. Grievant suspected they “were doing something that was not normal, but I was not sure on what exactly was happening.”¹

Grievant let Officer C and the Offender into the back hallway between two and eight times.

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

Fraternization is defined as:

Employee association with offenders, or their family members, 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 of offenders, discussing employee personal matters (marriage, children, work, etc.) with offenders, or engaging in romantic or sexual relationships with offenders.⁵

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*

¹ Agency Exhibit 3.

² Virginia Department of Corrections Operating Procedure 135.1(V)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

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

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.

Officer C had an inappropriate association with the Offender. She engaged in fraternization.

Grievant did not have any relationship with the Offender. He did not fraternize. He did not violate DOC policy. The Agency argued that Grievant aided and abetted fraternization thereby justifying the issuance of a Group II Written Notice. This argument fails. Grievant did not know the relationship between Officer C and the Offender. Although Grievant eventually believed something was improper between Officer C and the Offender, there were many improper things other than fraternization that could have been occurring.

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁶ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Grievant was in a position to prevent Officer C from entering the back hallway with the Offender by refusing to open the door to that area. He authorized entry by Officer C and the Offender into the back hallway between two to eight times. Grievant’s work performance was unsatisfactory because he did not refuse to open the doors to the back hallway.

Grievant argued that he was denied procedural due process because he requested a polygraph examination and his request was denied. Grievant complained that the Warden failed to provide him with requested information. On October 4, 2015, Grievant sent the Warden an email asking for all documentary evidence and video documentation regarding the allegations against him. The Warden read the email but chose not to respond.

The Agency should have provided Grievant with all of the evidence against him at the time he requested that information. The Agency had discretion as to whether to permit Grievant to have a polygraph examination. Although the Warden’s failure to respond was inappropriate and disrespectful, it does not affect the outcome of this case. Prior to the hearing, the Agency presented Grievant with the necessary information for him to properly prepare his defenses to the Agency’s allegations. Any defect in procedural due process created by the Agency was cured by the hearing process.

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

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

“in accordance with rules established by the Department of Human Resource Management”⁷ 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.

Grievant presented evidence that he told the Lieutenant of his concerns about Officer C. His actions were appropriate. He did not establish, however, when he spoke to the Lieutenant about Officer C. If Grievant had told the Lieutenant about Officer C after the first or second time Officer C entered the back hallway and the Lieutenant did nothing, there may have been a basis to mitigate the disciplinary action. If Grievant waited until after the 8th instance, there may not have been a basis to mitigate the disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for fraternization is **reduced** to a Group I Written Notice for unsatisfactory job performance.

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

⁷ Va. Code § 2.2-3005.

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.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 EDR before filing a notice of appeal.