

Issues: Group III Written Notice (fraternization), Group III Written Notice (making false statement to investigator), and Termination; Hearing Date: 02/25/16; Decision Issued: 03/16/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10756; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 03/31/16; EDR Ruling No 2016-4332 issued 05/03/16; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Richmond City Circuit Court (06/02/16); Outcome: AHO's decision affirmed (09/14/16) [CL-15000399-00]; Judicial Review: Appealed to Virginia Court of Appeals (date unknown); Outcome: Filing Fee not timely. Case dismissed (11/15/16) [Record No. 1684-16-2].**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10756

Hearing Date: February 25, 2016

Decision Issued: March 16, 2016

PROCEDURAL HISTORY

On December 3, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization with an inmate. On December 3, 2015, Grievant was issued a second Group III Written Notice of disciplinary action with removal for making a false statement to an investigator.

On December 28, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 11, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 25, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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 employed Grievant as a Senior Probation Officer at one of its facilities. She had been employed by the Agency for approximately 22 years. Grievant received training regarding the Agency's fraternization policy. No evidence of prior active disciplinary action was introduced during the hearing.

The Virginia Correctional Enterprises (VCE) is a unit of the Department of Corrections. One of its facility's Buildings has a Print Shop and Warehouse. The Print Shop is located in the front of the Building. The Warehouse is located in the back of the Building.

Inmates were transported daily from a local DOC prison to the VCE facility to perform work duties. Inmates working in the Print Shop wore blue jeans with blue shirts and a logo on the front of the shirt. Inmates working in the Warehouse wore orange T-shirts. On the back of the orange T-shirt were the words, "DOC Inmate Workforce." The front of the T-shirt did not contain words. Warehouse inmates wore blue pants with orange strips on the left and right side of the pants. The orange strips were more than an inch wide. The clothing worn by Warehouse inmates was consistent with the uniforms worn by inmates throughout DOC prisons.

Ms. C worked in the front of the Print Shop. Ms. C was once a DOC inmate but upon her release she was hired as a temporary worker. Inmate T worked in the Print

Shop. Inmate L worked in the Warehouse. Inmate L was good at personal grooming including “doing eyebrows.”

On May 5, 2015, Grievant went to the Print Shop to pick up promotional items and discuss items for a church project. She spoke with Ms. C. Grievant received a call from a salon where she had an appointment for personal grooming. Grievant was informed that her appointment had to be changed. Ms. C overheard the conversation and asked Grievant if she knew that “they did eyebrows here.” Ms. C mentioned that there was a “girl in the back” who was “good at eyebrows”. Ms. C said they did “this here all the time.” Grievant agreed to receive personal grooming at that time. Ms. C spoke with Ms. T and asked her if they had anyone who could do eyebrows. Ms. T said yes. Ms. T walked to the back of the Building and into the Warehouse area. She asked Inmate L to come to the front with her. Ms. T and Inmate L walked to the front. Ms. T asked Inmate L if she would be willing to do a customer’s eyebrows. Inmate L said yes. Ms. C rolled a chair into the restroom in the Print Shop. The restroom had one toilet, sink, and mirror. Grievant and Inmate L went into the restroom. Inmate L then “threaded/arched” Grievant’s eyebrows. Grievant and Inmate L were in the restroom for approximately five minutes.

Another inmate walked past the restroom and observed Grievant and Inmate L. This inmate believed what she observed was inappropriate and she complained to a Facility employee. The Agency began an investigation.

Grievant met with the Investigator on June 16, 2015. The Investigator told Grievant to be truthful in answering questions. Grievant admitted to the Investigator that she had her eyebrows arched while at the Print Shop. She told the Investigator that she was unaware that Inmate L was an inmate.

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

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

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

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

Group III offenses include, “[f]raternization or non-professional relationships within 180 days of the date following their discharge from DOC custody or termination from supervision, whichever occurs last. Exceptions to this section must be reviewed and approved by the respective Regional Operations Chief on a case by case basis.”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 cause.* *** 5. To keep company, as a friend, companion, or ally: *He was 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.

DOC Operating Procedure 130.1 (IV)(D)(2) states that, “[n]o one shall cause or permit any offender to perform personal services for staff or any individual.”

On May 5, 2015, Grievant received a personal grooming service from an offender. Her actions were contrary to DOC Operating Procedure 130.1 and amounted to an unprofessional association with an offender. The Agency has presented sufficient evidence to show that Grievant fraternized with an inmate thereby justifying the issuance of a Group III Written Notice.

DOC Operating Procedure 030.4 governs the Special Investigations Unit. Section (f) provides, “[e]mployees are expected to cooperate fully during the course of administrative investigations and respond with truthful and complete answers to all proper questions of official interest *** (h) During administrative investigations, employee refusal to answer all official questions truthfully and provide complete information may constitute grounds for disciplinary action.”

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D)(2)(ee).

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

Grievant falsely informed the Investigator that she did not know the person performing grooming services was an inmate. Grievant knew or should have known that her statement was false thereby justifying the Agency's issuance of a Group III Written Notice for making false statement to an investigator. This is consistent with the offense of falsifying records which is a Group III offense under the Agency's Standards of Conduct.

Grievant argued that she did not know Inmate L was an offender. She argued that Inmate L stood behind the chair and, thus, the chair blocked Grievant's view of Inmate L's uniform. This argument is not believable for several reasons. First, Grievant entered a Building where she knew offenders sometimes worked. Second, Inmate L was a Warehouse worker who wore a bright orange T-shirt with the words "DOC Inmate Workforce" on the back. Inmate L's pants were blue with bright orange strips on each side. Inmate L's uniform was distinctive and should have been obvious to Grievant that Inmate L was an offender. This is especially true given that the uniform is worn by inmates in many DOC facilities Grievant had visited. Even if Grievant had not seen the back of the uniforms, she should have been able to recognize them as DOC inmate uniforms. Third, Grievant did not pay for the service she received. She did not inquire about the cost of the services or asked to pay for the service she received. If she believed she was receiving a service from a non-offender, she would likely have had to pay for that service just as she would have had to pay for the service if her salon appointment had not been delayed.

Grievant argued that she was disciplined as a form of retaliation for taking sick leave. Grievant notified the Agency that she was entering FMLA status for surgery. In November, Grievant notified the Supervisor of the pending surgery that would occur in November 2015. On November 30, 2015, the HR Analyst sent Grievant a letter informing Grievant of her rights under the Family and Medical Leave Act. The letter said the leave was effective January 4, 2016. Grievant was removed from employment on December 3, 2015. Although Grievant engaged in protected activity, there does not appear to be a sufficient connection between her protected activity and the Agency's decision to take disciplinary action. Indeed, it appears that the Agency took disciplinary action based on Grievant's inadequate behavior and not her protected activity.

Grievant argued that she was denied procedural due process by the Agency. To the extent the Agency may have denied Grievant procedural due process, that error has been cured by the hearing process. Grievant was provided with all of the Agency's evidence against her and given an opportunity to present her defenses during the hearing.

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"⁶ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

⁶ 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 for fraternization is **upheld**. The Group III Written Notice of disciplinary action for making a false statement is **upheld**. Grievant's 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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.