

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 05/04/16; Decision Issued: 05/05/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10782; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10782

Hearing Date: May 4, 2016

Decision Issued: May 5, 2016

PROCEDURAL HISTORY

On February 10, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternizing with an offender.

On February 10, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 14, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 4, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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. 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 Virginia 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.

The Offender was a probationer under the supervision of the Agency during the relevant time frames. Employees were prohibited from fraternizing with him for at least six months after his probationary period ended. Grievant received training about the Agency's fraternization policy in 2012, 2013, 2014 and 2015.

Sometime in late October or early November 2014, the Offender delivered pizza to the Grievant's home. At that time, Grievant did not know the Offender was on probation. They had a short conversation in which she shared that she might lose her job because her employer was closing. The Offender asked where she was employed and she disclosed where she worked. He said his mother recently retired from a local prison. He provided her with his telephone number so she could call him.

Sometime later, Grievant sent the Offender text messages and he replied. They continued communicating and developed a friendship and personal relationship over several weeks.

Grievant and the Offender began a sexual relationship in January 2015. In late January or early February 2015, the Offender became ill. She took care of him in her home for a few days during his illness. A few weeks, the Offender told Grievant he had

fallen behind in paying his car title loan. The Offender yelled at her about the debt. Grievant paid one of his loan payments because she was scared of him. Grievant learned that the Offender was a gang member and had been incarcerated before having sexual relations with him a second time.

In February 2015, Grievant knew that the Offender was a probationer.¹ Grievant continued the relationship until late March or the first week of April 2015 when she concluded, "I just wanted him out of my life."

On April 7, 2015, Grievant was at a hotel with a family member celebrating a birthday. The Offender came to the lobby unannounced and intoxicated. He threatened to kill Grievant and her family member with a gun he had in his car.

In May 2015, Grievant began dating another man.

At the end of July or beginning of August 2015, the Offender sent Grievant a text demanding that she meet with him at a local restaurant or he would harm her and the man she was dating. Grievant was fearful for her life and her children's lives so she obtained a court order restraining contact by the Offender. Grievant had no further contact with the Offender.

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

Group III offenses include, "[f]raternalization 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."⁵

¹ One of Grievant's witnesses testified that Grievant knew the Offender was a probationer in February 2015.

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 135.1(V)(D)(2)(ee).

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.⁶

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 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.

Grievant fraternized with the Offender. Grievant had a romantic and sexual relationship with the Offender. She shared personal information with the Offender. He was under the Agency's supervision because he was a probationer. Grievant learned that the Offender was on probation in February 2015 and continued the relationship until sometime in March or April 2015 when she decided to end the relationship. 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, Grievant's removal must be upheld.

Grievant should have ended the relationship with the Offender in February 2015 once she learned he was a probationer. Grievant argued that she continued the relationship after learning he had been an inmate because she feared the Offender. That factor alone would not be a sufficient basis to justify continuing to fraternize with the Offender. Indeed, Grievant was able to end the relationship in March or April 2015 and she was able to obtain a restraining order against the Offender in August 2015.

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"⁷ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

⁶ Virginia Department of Corrections Operating Procedure 130.1(III), Rules of Conduct Governing Employees' Relationships with Offenders.

⁷ 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.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.