

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 02/16/17; Decision Issued: 02/23/17; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 10933; Outcome: No Relief – Agency Upheld.

IN THE VIRGINIA DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
IN RE: CASE NO.: 10933

DECISION OF HEARING OFFICER

HEARING DATE: FEBRUARY 16, 2017

DECISION DATE: FEBRUARY 23, 2017

I. PROCEDURAL BACKGROUND

The agency issued the grievant a Group III Written Notice on November 14, 2016 and terminated him from employment. As a disciplinary matter, it automatically entitled the grievant to a hearing. He filed his Form A on November 21, 2016. The Office of Employment Dispute Resolution appointed me as Hearing Officer effective December 20, 2016. I conducted a prehearing conference by telephone on January 18, 2017, scheduling the matter for hearing on February 16. The hearing was held on that date and lasted approximately forty minutes.

II. APPEARANCES

The agency was represented by legal counsel. It presented three witnesses. Six exhibits were offered and accepted into evidence without objection.

The grievant represented himself. He presented no other witnesses and testified. He offered no exhibits.

III. ISSUE

Whether the agency acted appropriately in issuing the grievant a Group III Written Notice for fraternization and in terminating him from employment on November 14, 2016?

IV. FINDINGS OF FACT

The agency employed the grievant as a Corrections Officer. He worked for the agency for approximately 18 months prior to the subject events.

Agency Operating Procedure 135.2 establishes certain standards for relationships between employees and offenders. An offender is defined as “an inmate, probationer, parolee, post-release supervisee, or other person placed under the supervision or investigation of the Department of Corrections.” The policy includes under the definition of fraternization non-work related visits between offenders and employees and engaging in romantic relationships with offenders. Under agency Operating Procedure 135.1 (the “Standards of Conduct”) fraternization is listed as a Group III offense. Operating Procedure 135.2 prohibits fraternization between employees and offenders, including an offender within 180 days of the date following discharge from the custody of the agency or termination from supervision, whichever occurs last.

On September 26, 2016 a female probationer (hereafter “Offender C”) was arrested for driving under the influence of narcotics. She was driving the grievant’s truck at the time. Upon her arrest she gave her address as being that of the grievant. Offender C, at that time, was on indefinite active probation for a combination of felony and misdemeanor convictions involving theft.

On October 20, 2016 the agency’s institutional investigator received information from an officer with a nearby town’s police department. The town officer reported that a separate female (hereafter “Offender S”) had recently been arrested and stated that she enjoyed being around the grievant because he liked having a good time and had money for drugs.

The Warden at the facility where the grievant worked followed up on this phone call to the investigator by calling in the grievant for a meeting. The grievant admitted that he was dating Offender C and had been in a relationship with her for approximately one year. The grievant told the Warden that he knew that Offender C was an offender, being on probation. The Warden conducted a second meeting with the grievant. In that meeting, he told the Warden that

he did not know that Offender C was on probation. He further stated that third parties told him that fact but he chose to ignore the statement as he believed individuals were prone to lie about Offender C. The Warden issued a pre-disciplinary suspension on November 2. He issued the grievant the Group III Written Notice and terminated him from employment on November 14.

V. ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual (GPM)*. This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These *Rules* state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

This disciplinary action is based on the allegation that the grievant was involved with an offender as defined by the applicable policies. The grievant has admitted to the dating relationship with Offender C. A probation officer testified that Offender C was under the supervision of the agency at all relevant times. No evidence has been presented to the contrary as to these facts. Therefore, I conclude that he did engage in the alleged conduct. Other than the statement from the town police officer, no evidence was presented as to the nature of any relationship between the grievant and Offender S. Also, no evidence was presented as to whether she qualified as an "Offender" under the policies at the time of her arrest in September, 2016. I do not base my findings or analysis to any extent on the information provided by the town officer as to Offender S.

As described above, the agency's Operating Procedures prohibit certain relationships between an employee and offenders. The grievant does not dispute his relationship with Offender C, but argues that it does not qualify as misconduct. His argument is that it cannot be grounds for the disciplinary action because he was not aware of her status as an individual with whom he could not have a dating relationship while working for the agency.

The Warden testified that the agency has a "zero tolerance policy" for fraternization. Section IV(C)(1) of Operating Procedure 135.2 sets forth certain exceptions for what could otherwise be viewed as prohibited contacts. None of those exceptions directly address the argument made by the grievant.

Multiple scenarios can be imagined in which an employee of the agency would "fraternize" with an offender yet not reasonably be subject to discipline. For example, an employee, while on a trip to another part of the Commonwealth, meets a stranger at a club and then has a one night affair with that offender. Expecting an employee to inquire of a romantic

interest “are you on parole or probation, or have you been released from either of those within the immediately preceding 180 days?” is beyond the bounds of reason.

I have found no controlling legal authority dealing with what standard should be applied to determine whether the actions of an employee who does not know whether a person is an offender constitutes prohibited fraternization. At a minimum, the analysis should include consideration of the nature of the relationship, length of the relationship, and whether the employee had reason to know of the status of the offender. In contrast to my hypothetical employee, the grievant had been involved with Offender C for approximately one year. The nature of the relationship appeared to be a stable, if not monogamous one. The grievant denied that Offender C was cohabiting with him, but the absence of cohabitation is not determinative. Her use of his vehicle and listing of his address is evidence of the depth of the romantic relationship.

The grievant, after first admitting knowledge of the status of Offender C, now denies that he knew of it. Even if I were to accept that denial by him as the truth, my analysis does not require me to do so. He has adopted the position that he did not know of it, despite having been provided with information from multiple third parties that she was an offender. His choosing not to ask Offender C directly about her status was not reasonable. He had reason to know of the status but chose not to make further inquiry. This sort of approach, under these circumstances, does not shield the grievant from discipline. I find that his continuing this relationship with Offender C after having been put on notice that she was on probation, constitutes misconduct under the applicable operating procedures.

The grievant has not otherwise argued that his discipline is inconsistent with the applicable laws and policy. Similarly, he has presented no evidence or argument that the

discipline should be mitigated by me as permissible under the Grievance Procedure Manual. I find no other evidence in the record that would support mitigation under that section.

VI. DECISION

For the reasons stated above, I hereby affirm the issuance of the Group III Written Notice and termination of employment on November 14, 2016.

VII. 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 this final.

RENDERED this February 23, 2017.

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer