

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 02/20/19; Decision Issued: 02/22/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11298; Outcome: Partial Relief; **Administrative Review Ruling Request received 03/08/19; EDR Ruling No. 2019-4883 issued on 05/02/19; Outcome: AHO's decision affirmed.**



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11298**

Hearing Date: February 20, 2019

Decision Issued: February 22, 2019

#### **PROCEDURAL HISTORY**

On October 21, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for Fraternalization with offenders.

On November 16, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 10, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 20, 2019, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's Counsel  
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 the Facility. He had been employed by the Agency for approximately 10 years. No evidence of prior active disciplinary action was introduced during the hearing.

On October 21, 2018, Grievant's favorite Football Team was set to play a televised game. Grievant wore a T-shirt with the logo of the Football Team under his uniform. He went to the Facility and assumed his post in the Control Booth. Officer L was also working in the Control Booth. Grievant was responsible for monitoring two Pods.

The Facility had televisions on the walls of each Pod. Some inmates had their own televisions. Grievant watch the Football Game on a television as he performed his duties in the Control Booth.

When the Football Team won the game, Grievant took off the shirt to his uniform to reveal his T-shirt with the logo of the Football Team. He left his uniform shirt in the Control Booth and walked out of the Control Booth into the First Pod. He had both of his hands above his head and walk through the First Pod as he celebrated the Football

Team's victory. As he passed one inmate, the inmate raised his hand and touched Grievant's hand as a "high-five". Grievant continued to walk through the First Pod celebrating the victory. He left the First Pod and went to the Second Pod to display his T-Shirt to the Inmates and continue his celebration. He then returned to the Control Booth.

On October 23, 2018, a family member of an inmate at the Facility sent the Assistant Warden and the Warden an email stating:

As a side note, apparently there was a CO who was a [Football Team] fan watching a game in which they won on an inmate's TV the other night. Surprising to me was that in addition to watching the TV instead of whatever his duties were, he then donned a [Football Team] jersey over his DOC uniform and went around blowing a whistle in triumph for his team throughout the building. Is this something that your office would support?<sup>1</sup>

The Agency investigated the allegation made in the email. The Agency reviewed videotape of the incident. A Facility Manager spoke with Grievant and he admitted to planning to display his Football Team T-shirt to the inmates if his team won that day. The Agency issued Grievant a Group III Written Notice with removal.

The Counselor worked at the Facility where Grievant worked. Her chain of command included reporting to the Facility Warden. The Facility planned to have a Cognitive Community Day for inmates at the Facility. The Counselor attended the event. On October 26, 2018, the Counselor sent employees, including the Warden and Assistant Warden, at the Facility an email with a picture of her playing cards with three inmates. The picture showed the Counselor seated at a table holding a hand of cards. Five inmates were seated at the table. The table has a sign reading "Spades." Three of the inmates were holding cards and appeared to be playing cards with the Counselor. Upon receiving the picture, Facility Managers may have had "discussions" about the appropriateness of the Counselor's behavior, but the Counselor did not receive any disciplinary action and was not removed from employment.

## **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."<sup>2</sup> 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

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<sup>1</sup> Agency Exhibit 7.

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

warrant removal.”<sup>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</sup>

Group III offenses include “Violation of Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Offenders”<sup>5</sup> this policy defines Fraternization 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, connections on social media, and employees, non-work related relationships with family members of offenders, discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.<sup>6</sup>

Black’s Law Dictionary (6<sup>th</sup> 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 105.1 governs Employee Uniforms. This policy provides:

All employees must be appropriately attired and well-groomed whenever on duty or otherwise in uniform. \*\*\* The wearing of a partial uniform is not permitted.<sup>7</sup>

On October 21, 2018, Grievant was assigned to a post at the Control Booth. He removed the shirt of his uniform while on duty thereby acting contrary to the Agency’s policy prohibiting the wearing of a partial uniform. He then entered the First Pod with his hands held high to display his T-shirt with the objective of celebrating the victory with

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<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D)(2)(y).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.2, Rules of Conduct Governing Employees’ Relationships with Offenders.

<sup>7</sup> Agency Exhibit 3.

the offenders in the First and Second Pods. Celebrating a football team's victory with offenders was not a part of Grievant's job and was contrary to the Agency's expectations for its employees. Grievant attempted to associate with the offenders by walking through the pods to celebrate the victory with the offenders. One offender recognized Grievant's attempt to celebrate by giving Grievant a "high-five" as Grievant held his hands above his head. The Agency has presented sufficient evidence to show that Grievant fraternize with offenders on October 21, 2018. Grievant's behavior would normally support the issuance of a Group III Written Notice of disciplinary action with removal but for the mitigating factors discussed below.

Grievant argued that the Agency use an outdated Written Notice that did not contain notification of the Correctional Officer Procedural Guarantee Act. Although the Agency used an outdated Written Notice, the Agency provided Grievant with notice of the Correctional Officer Procedural Guarantee Act in its October 26, 2018 Due Process Notification. The Agency's failure to issue Grievant an updated Written Notice is harmless error.

*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 ...."<sup>8</sup> 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 order to show that the Agency has not consistently applied disciplinary action among similarly situated employees, Grievant must show that another employee engaged in similar behavior, that Agency managers were aware of that behavior, and Agency managers treated the two employees differently without reason or justification.

The Counselor engaged in fraternization with several inmates at the Facility. Her duties did not include playing cards with inmates. Although the Cognitive Development Day was a planned and sanctioned event for the Facility, there is no reason to believe the Counselor was expected to play cards with inmates during the event. A sign on the table indicated they were playing "Spades". This card game usually involves completing with other players to obtain a high score. The Counselor associated with the offenders by playing a competitive card game with them. She did not maintain a professional boundary with the offenders because she placed herself in a position where she was no

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<sup>8</sup> *Va. Code § 2.2-3005.*

different than an offender. The Counselor should have received disciplinary action for fraternizing with inmates.

The Agency inconsistently applied disciplinary action among similarly situated employees thereby justifying mitigation of Grievant's disciplinary action. Both Grievant and the Counselor reported to the Assistant Warden and the Warden. The Counselor sent Facility employees including the Warden and Assistant Warden an email showing her fraternizing with three inmates. The Assistant Warden issued Grievant a Group III Written Notice of disciplinary action with removal for fraternizing with offenders. No action was taken against the Counselor despite evidence she fraternize with offenders. Facility managers learned of the Counselor's behavior on October 26, 2018. Grievant was issued a Written Notice on November 5, 2018 showing that the Agency was aware of the Counselor's behavior at the time it issued disciplinary action to Grievant.

The Hearing Officer will reduce the disciplinary action to a Group II Written Notice with a 10 workday suspension. This level of discipline is consistent with Grievant's failure to wear the shirt of his uniform while on duty. Grievant must be reinstated.

## 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 **reduced** to a Group II Written Notice with a 10 workday suspension. The Agency is ordered to **reinstate** Grievant to his former position at the Facility where he worked, or if occupied, to an objectively similar position. After the Agency accounts for a ten work day suspension, Grievant is awarded full **back pay**, from which interim earnings (including unemployment compensation) must be deducted. Grievant's full **benefits** and **seniority** are restored.

## APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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.<sup>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.