

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 02/14/19; Decision Issued: 02/28/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11307; Outcome: Full Relief; **Administrative Review Ruling Request received 03/12/19; EDR Ruling No. 2019-4884 issued 05/03/19; 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: 11307

Hearing Date: February 14, 2019

Decision Issued: February 28, 2019

PROCEDURAL HISTORY

On November 26, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternizing with an offender.

On December 6, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 2, 2019, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 14, 2019, 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. 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 one of its facilities. He began working for the Agency in 2015. No evidence of prior active disciplinary action was introduced during the hearing.

Facility Managers authorized a search of employees and members of the public entering the Facility on November 8, 2018. The Agency used a trained drug detection dog to smell people entering the Facility. The dog would "alert" if someone entered the Facility with the odor of illegal drugs, a "narcotic odor".

On November 8, 2019 at approximately 5:35 p.m., the dog alerted as Grievant walked into the Facility. The K9 Officer informed the Lieutenant of the dog's reaction to Grievant. Facility managers assumed Grievant had contraband on him and initiated the Agency's strip search procedures.

The Lieutenant gave Grievant a form entitled "Consent for Strip or Body Cavity Search." This form read, in part:

In accordance with the Department of Corrections Operating Procedure 445.1, Employee, Visitor, and Offender Searches, there is reasonable belief that you or your minor children are attempting to transport

contraband into this facility. Before you will be allowed to enter this facility, you must submit to the search described below:

In order for the person indicated above to enter this facility they must submit to:

Strip Search a person and clothing by trained corrections staff of the same gender.

The search must be approved by the Facility Unit Head or Administrative Duty Officer and will be conducted in privacy.

You may question the adequacy of the reasonable belief claimed for the search by filing a petition with the Facility Unit Head. If you are dissatisfied with the response of the Facility Unit Head, you may appeal to the Regional Director.

If you refuse this request, you will not be allowed to enter the facility. You will be subject to the following sanctions in addition to possible law violations:

Employees will be subject to disciplinary action¹ in accordance with Operating Procedure 135.1, Standards of Conduct. ***

If you submit to this search and no contraband is found, you will be allowed to enter the facility. ***

I understand that I may leave the facility without submitting to the search indicated above. If I leave without submitting to the search, I will be subject to the sanctions listed above.

I hereby consent to the search of my person....

[Grievant's signature, name, and date]

I hereby grant approval for the search to be conducted on this person. If the search is negative, the individual is approved to enter the facility as otherwise eligible.

[Facility Unit Head signature, name, and date]

Grievant was strip-searched in private by two male corrections employees in accordance with Agency policy. No contraband was found on Grievant.

¹ The box indicating that employee would be subject to disciplinary action was not checked. Nevertheless, Grievant knew that if he refused a strip search he would be removed from employment. He knew of another employee who refused a strip search and the employee was removed from employment.

The Lieutenant decided to search Grievant's vehicle which was parked in the Facility's parking lot. The Lieutenant told Grievant to hand his keys to Officer P. The K9 Officer, drug detection dog, Officer P and the Lieutenant went to Grievant's vehicle. The drug detection dog did not alert on Grievant's vehicle. Nevertheless, the Agency employees decided to search the inside of Grievant's vehicle. Grievant was presented with a form entitled Consent to Search Vehicle. The form provided:

I, the undersigned, do hereby grant my complete and voluntary permission for Virginia Department of Corrections staff and/or law enforcement officers to conduct a complete and thorough search of the vehicle described as follows: [Information describing Grievant's vehicle].

I affirm that I have control and dominion over the property to be searched and therefore the legal authority to grant this consensual search.

I understand that my refusal to permit this search may be justification for being barred from the unit.

I understand that if I am an employee of the Commonwealth of Virginia, my refusal to permit this search may result in disciplinary action in accordance with the Commonwealth's Employee Standards of Conduct.

[Grievant's signature, name and date]

[Lieutenant's signature and date]

[Witness signature and date]

Agency employees unlocked Grievant's vehicle and searched inside. No illegal drugs were found inside the vehicle. Officer P located Grievant's personal cell phone in the arm rest of the driver's side door. The cell phone had an Android operating system and contained personal information such as his call history and text messages and history. Officer P opened the phone and asked Grievant if the phone worked. Officer P turned on the phone began scrolling through Grievant's text messages. Officer P did not ask Grievant's permission to view the contents of Grievant's phone.

Facility inmates were permitted to make telephone calls to people outside of the Facility. The Facility recorded the number called and the conversations between the inmate and the person called. The Inmate was incarcerated at the Facility. He sometimes called Ms. H who was his "Girlfriend". On October 26, 2018, the Inmate called Ms. H and told her something to the effect that she should call a telephone number and say, "I got the money and stuff from your uncle Robert." The Inmate told Ms. H to call a telephone number which ended in 321. That telephone number was Grievant's cell phone number.

Officer P was responsible for monitoring telephone calls between inmates and callers outside the Facility. He knew Ms. H's telephone number because the Inmate

had called her several times. Officer P noticed that one of the phone numbers appearing on Grievant's phone was Ms. H's telephone number.

The Lieutenant asked Grievant about the telephone number identified by Officer P. Grievant told the Lieutenant he did not know who the number belonged to but it may have belonged to a woman named "Pee Wee."

The Lieutenant used her cell phone to take pictures of Grievant's cell phone call and text history. She did not have Grievant's permission to take pictures of his phone. Grievant's cell phone showed one text message on October 26, 2018, one text message on October 27, 2018, three text messages on October 28, 2018, one text message on October 29, 2018, fifteen text messages on November 1, 2018, one telephone call lasting 28 seconds on November 1, 2018, and one text message on November 6, 2018. Grievant had deleted all of these text messages but the text history remained.

Grievant was asked to write a statement about the incident. He wrote:

I received phone calls and text messages from the number so I called and text it back to figure out who was calling me. Once I found out it was a different female each time I kept texting to figure out who was playing on my phone.²

The Agency conducted an investigation. The Investigator met with Grievant. She showed Grievant the photos of the text messages and the phone number identified as Ms. H's phone number. Grievant said he was trying to figure out who the person was who was contacting him. When the Investigator asked Grievant what all the text messages were back and forth, Grievant said "I have no idea." Grievant said it was probably one of his friends or cousin texting him. When asked why an offender would be giving someone Grievant's phone number to contact Grievant, Grievant said he had no idea. The Investigator asked Grievant if he deleted all of his text messages. Grievant said it "depends what it is" and said he keeps important texts. When asked if he knew Ms. H, Grievant said no. When asked who was sending him text messages from the phone number identified as Ms. H's phone, Grievant said, "I have no idea." Grievant told the Investigator he worked in all the buildings at the Facility but denied knowing the Inmate. Grievant said he gets "plenty of calls from random numbers." When asked why he did not block the number, Grievant said that the number might be of someone he knew who was "f—king with me."

CONCLUSIONS OF POLICY

State employees have a right of privacy with respect to their personal cell phones. Cell phones contain personal information including call and text history as well

² Agency Exhibit 5.

as other private information. State agencies may only access content of an employee's personal cell phone pursuant to State statute or Agency policy.

In this case, the Agency conducted a strip search of Grievant in accordance with its policy. The purpose of the strip search was to determine if Grievant possessed any narcotics. No contraband was found. The Agency searched Grievant's vehicle. The purpose of the search was to determine if illegal drugs were within Grievant's vehicle. When the drug detection dog failed to alert on Grievant's vehicle, the Agency was aware that the reason for its search no longer existed.³ The Agency searched the inside of Grievant's vehicle but did not find any contraband.

Grievant's cell phone was not contraband. He was free to keep his cell phone in his vehicle in the Agency's parking lot. The information contained on Grievant's phone obviously did not give an odor of narcotics. Examining the information contained in Grievant's phone was not a logical extension of a search arising from a dog alerting to the odor of narcotics. The Agency did not have a policy authorizing it to examine the contents of Grievant's cell phone.

The Agency violated Grievant's right of privacy when it reviewed the contents of his cell phone. By issuing disciplinary action in violation of Grievant's right of privacy, the Agency issue disciplinary action for an improper purpose thereby requiring the reversal of that disciplinary action.

The Agency alleged that Grievant consented to the search of his cell phone. The Hearing Officer finds as fact that Grievant did not consent to a search of his cell phone. Grievant did not provide written consent to the Agency. Grievant denied giving verbal consent to the Lieutenant and his testimony was credible. When Grievant questioned the Lieutenant about her authority to search the information on his cell phone, the Lieutenant told Grievant she was authorized to do so by the search form used to justify searching Grievant's vehicle. Nothing in the consent to search Grievant's vehicle authorized Agency employees to turn on Grievant's personal cell phone and scroll through the contents of that phone.

If the Hearing Officer were to disregard the Agency's improper action towards Grievant, the Agency has not presented sufficient evidence to support the issuance of a Group III Written Notice with removal for fraternization. The Agency contended that Grievant fraternized with the Inmate by communicating with Ms. H as an agent or proxy for the Inmate. To meet this burden of proof, the Agency had to show that Grievant knew he was communicating with someone who was a proxy or agent of the Inmate. The Agency has not done so.

³ DOC Operating Procedure 445.2 governs "Facility Searches" including "Searches of visitor/employee vehicles" and provides, "Narcotic detection canines may be used to detect the presence of narcotics in vehicles parked on facility grounds. No owner permission is needed for external searches of vehicles."

The only evidence before the Hearing Officer is that Grievant sent text messages to someone who he did not know. He communicated with two different women one of whom was named Pee Wee. He continued to communicate with the person because he thought the person was someone he knew who was “f—king with him.” The Agency has not established that Grievant knew his text messages were to Ms. H and that Ms. H was associated with the Inmate.

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 **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant’s same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility or nearby facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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 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 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.^[1]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.