

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 04/19/13; Decision Issued: 04/22/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10058; Outcome: No Relief – Agency Upheld; **Administrative Review: DHRM Ruling Request received 05/07/13; DHRM Ruling issued 05/15/13; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10058

Hearing Date: April 19, 2013

Decision Issued: April 22, 2013

PROCEDURAL HISTORY

On February 6, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization with an inmate.

On March 5, 2013, Grievant timely filed a grievance to challenge the Agency's action. The grievance proceeded to hearing. On March 23, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 19, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
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 Corrections Officer at one of its facilities. The purpose of his position was to provide security and supervision of adult offenders at the Facility. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant wanted to create a non-profit business. Grievant began discussing his plan with the Inmate. The Inmate gave Grievant suggestions about how to run a non-profit business. At the Inmate's suggestion, Grievant looked on the Internet for web pages discussing non-profit organizations and how to form them. Grievant printed off copies of what he found and gave some pages to the Inmate. Grievant gave the Inmate his personal email address and personal cell phone number so that he could receive information to help him with his non-profit business. Grievant also told the Inmate that he was thinking of purchasing a military surplus business. The Inmate recommended to Grievant that Grievant purchase the military surplus business and operate it through the charity. Grievant decided that he wanted to run the military surplus business separately from the non-profit. The Inmate suggested that Grievant open a bank account with a particular bank because that bank had a history of supporting a lot of non-profits. Grievant opened a bank account with the bank recommended by the Inmate. Grievant formed the non-profit business on December 30, 2011. Grievant realized he needed to draft by-laws for the non-profit. The Inmate recommended a book for Grievant to purchase and Grievant purchased the book. The Inmate helped draft the by-laws for Grievant.

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

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 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.

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

² Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

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 fraternized with the Inmate. He associated with the Inmate for the purpose of assisting in the creation of his non-profit business. He discussed his plans for the non-profit. He welcomed advice from the Inmate about the non-profit and acted on some of the Inmate's advice. Grievant shared his personal email address and cell phone number with the Inmate to further his objective of creating a successful non-profit business. 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 argued that he did not give or receive any money to or from the Inmate and that his business was not for making a profit. He claimed he did not intend to fraternize with the Inmate. The Agency established that Grievant entered into an association with the Inmate and, thus, there is a basis to take disciplinary action regardless of whether he intended to fraternize with the Inmate.

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 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.

Grievant argued that the Agency inconsistently disciplined its employees such that the disciplinary action against him should be reduced. Grievant presented evidence of Officer G who purchased food from a malfunctioning vending machine that dispensed food at a discounted price and then distributed the food to inmates and officers. The Agency disciplined Officer G but did not remove Officer G. The Warden explained that Officer G was treated differently from Grievant because Grievant was fraternizing with the Inmate over a several month period whereas Officer G acted in one instance. The Warden's explanation is sufficient to establish that the Agency did not single out Grievant for disciplinary action.

Grievant presented evidence of an officer who ordered recreational equipment with assistance from an inmate. The Warden was unaware of the officer's behavior and, thus, there is no basis to conclude that Grievant was being singled out for disciplinary action.

⁶ *Va. Code § 2.2-3005.*

Grievant argued that another officer was given warnings by Agency supervisors to stop his inappropriate behavior prior to being disciplined and removed for bringing contraband into the Facility. Even if the Hearing Officer were to adopt for the sake of argument the logic behind Grievant's defense, no evidence was presented to show that any manager knew Grievant was fraternizing with the Inmate. No warnings could have been given to Grievant if Agency managers were not aware of Grievant's behavior.

In light of the standard set forth in the Rules, 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.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.