

Issues: Group III Written Notice (fraternization and making false statement to Warden), Group III Written Notice (failure to report two incidents), and Termination; Hearing Date: 05/14/13; Decision Issued: 05/22/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No.10071; Outcome: Partial Relief; **Administrative Review:** **EDR Ruling Request received 06/06/13; EDR Ruling No. 2013-3635 issued 06/18/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 06/06/13; DHRM Ruling issued 06/18/13; 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: 10071**

Hearing Date: May 14, 2013

Decision Issued: May 22, 2013

#### **PROCEDURAL HISTORY**

On February 19, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization and making a false statement to the Warden during the investigation. On February 19, 2013, Grievant received a second Group III Written Notice for failure to report to her supervisor or Facility management two serious incidents.

On March 19, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 9, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 14, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
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 Unit Manager at one of its Facilities. The purpose of her position was, "[s]erves as OIC over one or more housing Units, with the decision-making authority for all within-Unit aspects of prison operations."<sup>1</sup> No evidence of prior active disciplinary action was introduced during the hearing.

On January 19, 2013 at approximately 11 p.m., Grievant was in her office. The Inmate came into her office and they talked with the door closed. Officer S became concerned regarding the length of time the Inmate was in Grievant's office with the door closed. He depressed the button to the intercom located in Grievant's office so he could hear their conversation. Officer S heard the Inmate say to Grievant, "Show me your ties." Grievant and the Inmate began whispering. Grievant's office had a narrow vertical window. Several officers were in or near the Control Room and could see the Inmate's side but not his full body or any part of Grievant. The Inmate had his pants partially down and he was thrusting his hips back and forth. On several occasions, the Inmate "peeked" out of Grievant's door to see if anyone else was nearby. After approximately 20 minutes, Grievant and the Inmate walked out of Grievant's office. They were "joking and laughing."

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<sup>1</sup> Agency Exhibit 3.

When the Inmate returned to his cell, Officer M activated the intercom to listen to the Inmate's conversation with his cell mate. The Inmate told his cell mate that he "hit that", "got her naked", and "it was good." Officer M interpreted the Inmate's comments to mean that the Inmate claimed he had sexual relations with Grievant.

From January 19, 2013 through January 23, 2013, Grievant met with the Inmate eleven times. This number was much greater than the number of time she met with other inmates.

On January 25, 2013, the Warden met with Grievant to inform her that she was being placed on paid pre-disciplinary leave. The Investigator and two other employees were also in the meeting with the Warden and Grievant. The Warden questioned Grievant regarding why she was in her office for a lengthy period of time with the door shut.

On February 15, 2013, Grievant sent the Assistant Warden a text message stating that the Inmate forced himself on her and that she did not say anything because she was too embarrassed and humiliated. The Assistant Warden sent Grievant a text asking if the Inmate physically assaulted her. Grievant replied "yes."

## **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 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 for Fraternalization

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."<sup>5</sup>

Fraternalization is defined as:

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

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

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

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

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.<sup>6</sup>

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 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.

On January 19, 2013, Grievant met with the Inmate with her office door closed.<sup>7</sup> Grievant did not call for help or take appropriate action when the Inmate asked to see her breasts. Grievant whispered to the Inmate so that her conversation could not be overheard and her behavior could not be detected. She remained in the room while the Inmate pulled down the front of his pants and thrust his hips back and forth. Based on the evidence presented, it is likely that Grievant engaged in a sexual act with the Inmate. These facts show that Grievant had an inappropriate relationship with the Inmate sufficient to establish fraternization. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for fraternization. Upon the issuance of a Group III offense, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that her interaction with the Inmate was not consensual and that she could not yell or push the panic button. Grievant did not testify. No credible evidence was presented to support this allegation. The evidence showed that Grievant consented to a sexual interaction with the Inmate.

#### Group III Written Notice For Failure to Report

The Agency argued that Grievant should receive a Group III Written Notice for failing to report to the Warden two incidents. The first incident was that Grievant had received a letter on January 5, 2013 from the Inmate asking her to bring contraband into

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

<sup>7</sup> When meeting with other inmates, Grievant typically complied with the Facility's practice of leaving her office door open.

the Facility, requesting a relationship, and providing a post office box number where the Inmate could send letters. The second incident was the Inmate had forced himself on her on January 19, 2013. Insufficient evidence was presented to support this allegation. The facts surrounding the letter Grievant may have received from the Inmate were not presented in sufficient detail for the Hearing Officer to determine what occurred. The second incident did not occur. Grievant did not report to the Warden that the Inmate forced himself on her because the Inmate did not force himself on Grievant. She was a willing participant. Grievant was not obligated to report an untrue statement. The second Group III Written Notice must be reversed.

### Mitigating Circumstances.

*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 light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the first Group III Written Notice for fraternization.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for fraternization is **upheld**. The Group III Written Notice for failure to report is **rescinded**.

## 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

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<sup>8</sup> *Va. Code § 2.2-3005.*

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 14<sup>th</sup> St., 12<sup>th</sup> 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 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 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.<sup>9</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>9</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.