

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 05/30/13;
Decision Issued: 06/07/13; Agency: DOC; AHO: Ternon Galloway Lee, Esq.; Case No.
10072; Outcome: No Relief - Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10072

Hearing Date: May 30, 2013

Decision Issued: June 7, 2013

SUMMARY OF DECISION

The Agency had found Grievant engaged in fraternization with an offender which is against Agency policy. The Agency then issued Grievant a Group III Written Notice with termination. The Hearing Officer found Grievant engaged in the conduct alleged, that it was misconduct, and that the Agency's discipline was consistent with law and policy. Thus, the Hearing Officer upheld the discipline.

HISTORY

On February 26, 2013, the Agency issued Grievant a Group III Written Notice with termination for fraternization with an offender (inmate). On or about March 26, 2013, Grievant timely filed her grievance to challenge the Agency's action. On April 10, 2013, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A scheduling order was issued on May 18, 2013. A prehearing conference ("PHC") was held on May 22, 2013, and an order addressing topics discussed during that PHC was issued on May 22, 2013.¹ One matter of concern raised by Grievant at the PHC was the location of the hearing. Grievant had objected to the hearing being held at the Agency. Grievant claimed that the Agency was a hostile environment and she did not desire to have the hearing in that location. Grievant offered nothing in support of her position. The Agency objected to the hearing being moved to another location. After discussions, the Hearing Officer took the matter under advisement and later determined that holding the hearing at the Agency was appropriate. Thus, the Hearing Officer denied Grievant's request to move the hearing to a location other than the Agency.

Grievant failed to show for the hearing which was scheduled for 8:30 a.m. on May 30, 2013. In an attempt to determine if Grievant planned to attend the hearing, at 8:40 a.m. and 8:50 a.m. she was telephoned. After receiving her voice mail, Grievant was left messages which provided the telephone number of the hearing location. The messages also requested Grievant return the calls. Grievant did not. Finding no reason to

¹ The PHC was initially scheduled for April 24, 2013, but it did not take place at the Agency Advocate's request due to death in her immediate family. Thereafter, on numerous attempts the Hearing Officer sought the availability of the parties to reschedule the PHC. While the Hearing Officer received the Agency Advocate's availability, the Hearing Officer was unable to obtain responses from the Grievant as to her availability for the PHC. Thus, the Hearing Officer exercised her authority to manage the hearing process and rescheduled the PHC for May 22, 2013, at 8:30 a.m. This was a date and time the Agency's Advocate had indicated she was available. As noted previously, Grievant had not responded to attempts to obtain her availability for the rescheduling.

delay the hearing further, under GPM § 5.5, the Hearing Officer held the hearing in Grievant's absence.

Prior to beginning the hearing, the Agency's Advocate was given an opportunity to present any matters of concern. She was also permitted to make an opening statement, call witnesses on the Agency's behalf, and make a closing statement. The Hearing Officer admitted Agency's Exhibits 1 – 7 and the Hearing Officer's exhibit. Under the scheduling order Grievant had been given an opportunity to submit exhibits as well but declined to do so.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (2 witnesses)
Grievant (did not attend) nor did she present any witnesses to testify on her behalf.

ISSUE

Was the written notice warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified in person at the hearing, the Hearing Officer makes the following findings of fact:

1. The Agency is a prison. Before her termination from the Agency, Grievant had been employed as a correctional officer since on or about July, 2011. (A Exh. 1, p. 1).
2. Agency Policy 130.1 precludes fraternization. It provides in pertinent part the following:
 - C. Improprieties: Non-Professional Association
 1. Fraternization

a . Except for pre-existing relationships ...,² fraternization or nonprofessional relationships between employees and offenders is prohibited, including when the offender is within 180 days of the date following discharge from DOC custody or termination from supervision, whichever occurs last. This action may be treated as a Group III offense under Operating Procedure 135.1 *Standards of Conduct*.

(A Exh. 5, pp. 2-3).

3. Agency Policy 130.1 defines fraternization as follows:

Employee association with offenders [inmates], 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.

(A Exh. 5, p. 1).

4. Grievant was involved in a non-physical relationship with an offender ("inmate") housed at the Agency prison that involved Grievant writing and mailing letters to the inmate. For her return address, Grievant would use the address of the inmate's mother. Further, Grievant would pick up letters mailed to her from the inmate at his mother's residence. This relationship started about Fall 2012 when Grievant was working as floor officer in the building where the inmate was housed. Through talking to the inmate, Grievant determined she and the inmate had some common interests. Then letter writing ensued. (A Exh. 1, p. 3; A Exh. 3A, p. 3; A Exh. 3E; Testimony of Agent).

5. The association between Grievant and the inmate came to the attention of management when Grievant's ex-husband reported to the Agency that his children (also Grievant's children) reported Grievant was receiving letters from someone who was supposed to be on a long vacation. Grievant's ex-husband reported that he believed their was an inappropriate relationship between Grievant and an inmate at the prison. (Testimony of Warden).

6. Sufficient reasons were provided for the Agency to investigate the matter and upon doing so Grievant and others were interviewed. During her interview on February 21, 2013, Grievant acknowledged that she had been communicating with the inmate in the manner noted above and that she had violated the rules regarding fraternization. She acknowledged making a mistake. (A Exh. 3A, pp. 1-2; A Exh. 3E).

7. The inmate involved was also interviewed by Agent and stated he and Grievant wrote to each other using his mother's address. (A Exh. 3).

² The evidence does not show that there was any preexisting relationship between Grievant and the inmate involved in this grievance.

8. The investigation included questioning at least two other correctional officers about contact they had observed between Grievant and inmate. Those officers had observed Grievant having one on one conversations with the inmate. One of those officers described Grievant and inmate as "laughing and being extremely friendly." (A Exh. 3A, p.4).

9. At the conclusion of the investigation, Grievant was issued a Group III Written Notice with termination. (A Exh. 1, p.1).

10. Grievant was aware of the policy against fraternization and had received training and/or education pertaining to it on several occasions. (Testimony of Warden; A Exh. 6).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act, VA. Code §2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.³

The Commonwealth of Virginia Department of Corrections Operating Procedure sets forth the Commonwealth's Standards of Conduct and disciplinary process that the Department of Corrections ("DOC") must employ to address unacceptable behavior, conduct, and related employment problems in the workplace.⁴

³ Grievance Procedural Manual §5.8

⁴ Virginia Department of Corrections Operating Procedure 135.1 I.

These standards provide that Group III offenses are the most serious acts and behavior which normally warrant removal on a first occurrence.⁵ When circumstances warrant it, management may mitigate discipline if in its judgment it is proper to do so.⁶

As stated previously, Agency management issued the Grievant a Group III Written Notice with termination on February 26, 2013, for fraternization with an offender. The Hearing Officer examines the evidence to determine if the Agency's discipline was warranted and appropriate under the circumstances.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?

The Agency contends that Grievant engaged in fraternization against agency policy.

Agency policy 130.1 IV (C) provides in pertinent part the following:

C. Improprieties: Non-Professional Association

1. Fraternization

a. Except for pre-existing relationships⁷ fraternization or nonprofessional relationships between employees and offenders is prohibited, including when the offender is within 180 days of the date following discharge from DOC custody or termination from supervision, whichever occurs last. This section may be treated as a Group III offense under Operating Procedure 135.1 *Standards of Conduct*.

The evidence shows that during her employment with the Agency, Grievant had received training and education regarding fraternization on several occasions. And further, she knew it was against Agency policy to maintain an inappropriate/non-professional relationship with an inmate. Yet, Grievant did so as she and the inmate agreed to correspond with one another. The inmate would write Grievant letters and mail them to Grievant at his mother's residence. Grievant would retrieve them there. And she also wrote him letters using his mother's address as the return address. What is more, once management became aware of the relationship and interviewed Grievant, she acknowledged in writing that her behavior was misconduct.

⁵ Virginia Department of Corrections Operating Procedure 135.V (D)(1).

⁶ Virginia Department of Corrections Operating Procedure 135.V (D)(3)(b)

⁷ The evidence does not show that there was any preexisting relationship.

The Hearing Officer finds the testimony of Agent was credible and the Agency has met its burden and shown Grievant engaged in fraternization and provided a written statement, without duress, acknowledging the same.

That said, the Hearing Officer is cognizant of Grievant's written response to her discipline where she claims that she was under duress when she was interviewed and that the statement she signed is not her own. Grievant's assertion of duress is not credible.

Accordingly, considering the evidence the Hearing Officer finds Grievant engaged in fraternization which was misconduct.

B. Was the discipline consistent with policy and law?

The Agency's policy provides that fraternization is a Group III offense and that an employee engaging in such is subject to removal. As noted above, Grievant did engage in the conduct. Her discipline is consistent with policy and law.

II. Mitigation

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution ["EDR"]."⁸ EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a super-personnel officer" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."⁹ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.¹⁰

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

⁸ Va. Code § 2.2-3005 and (c)(6)

⁹ *Rules for Conducting Grievance Hearings* VI(A)

¹⁰ *Rules for Conducting Grievance Hearings* VI(B)

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice, the behavior was misconduct, and the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable. The Hearing Officer has carefully deliberated and considered all evidence. This includes her recognition of Grievant's written response to the discipline and Grievant's tenure with the Agency. Further, the Hearing Officer notes that Grievant acknowledged that her behavior was a mistake. Having undergone this thoughtfulness, the Hearing Officer cannot find the Agency acted without reason.

DECISION

Hence for the reasons stated here, the Hearing Officer upholds the Agency's discipline.

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
Departmental of Human Resource Management
101 N. 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 N. 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.¹¹

Entered this 7th day of June, 2013.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate
Agency Representative
Grievant
Director of EDR

¹¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.