

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 05/29/13; Decision Issued: 05/30/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10074; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10074

Hearing Date: May 29, 2013

Decision Issued: May 30, 2013

PROCEDURAL HISTORY

On February 5, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for introducing or attempting to introduce contraband into a facility or to an offender.”

On February 7, 2013, Grievant timely filed a grievance to challenge the Agency’s action. The matter proceeded to hearing. On April 15, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision due to the unavailability of a party. On May 29, 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 Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

An inmate approached Grievant and asked him to bring tobacco products into the Facility. The Inmate gave Grievant a code to use when he went to a local money order store to get the money. On September 5, 2012, Grievant went to the money order store and used the code. The code worked and the cashier gave Grievant \$200. He intended to use the money to purchase tobacco products as requested by the Inmate. On October 26, 2012, Grievant again went to the local money order store to get money promised by the Inmate. He provided the cashier with the code and received \$150. On each occasion he visited the money store, he used a name other than his own to obtain the money. He got "cold feet" and did not deliver the tobacco products to the Inmate. Grievant was "struggling" financially. He spent the money on gas, food, bills, but not on tobacco. The Inmate was transferred away from the Facility before Grievant could return the money to the Inmate.

Grievant received training regarding the Agency's fraternization policy. He was trained that if an inmate asked a corrections officer to bring contraband into the Facility, he was expected to report that request to Facility managers.

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

DOC Operating Procedure 130.1(IV)(C)(1)(a) provides:

Except for preexisting relationships (see below), fraternization or non-professional relationships between employees and offenders is prohibited This action may be treated as a Group III offense under Operating Procedure 135.1, Standards of Conduct.

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.⁴

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.

Grievant fraternized with the Inmate because he (1) was offered money by the Inmate to purchase tobacco and failed to report the request, (2) complied with the Inmate's instructions and actually obtained the money on two occasions, (3) had the

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

² Virginia Department of Corrections Operating Procedure 135.1(V)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁴ Virginia Department of Corrections Operating Procedure 130.1(III), Rules of Conduct Governing Employees' Relationships with Offenders.

intent to purchase tobacco to smuggle inside the Facility to benefit the Inmate, and (4) he converted the money for his own use rather than providing the money to the Agency. 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 Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.⁵

Grievant argued that he did not deliver tobacco to the Inmate or attempt to introduce it into the Facility. This argument is not sufficient to reverse the disciplinary action. The Agency presented sufficient evidence to show that Grievant fraternized with the Inmate. Fraternization is a Group III offense and the facts supporting that offense were discussed in the Written Notice as a basis for taking disciplinary action.

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. In light of this standard, 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

⁵ Grievant did not introduce or attempt to introduce contraband into the facility or to an offender as alleged by the Agency because he did not purchase the tobacco. His behavior constitutes fraternization as explained above.

⁶ *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 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.