

Issue: Group III Written Notice with Suspension (fraternization); Hearing Date: 03/02/15; Decision Issued: 03/23/15; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 10522; 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: 10522**

Hearing Date: March 2, 2015  
Decision Issued: March 23, 2015

#### **PROCEDURAL HISTORY**

On October 15, 2014, Grievant was issued a Group III Written Notice of disciplinary action with a 15 workday suspension for fraternization with an inmate.

On October 20, 2014, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 5, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 2, 2015, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
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. 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 employs Grievant as a Corrections Officer at one of its Facilities. She has been employed by the Agency for approximately 3 years. No evidence of prior active disciplinary action was introduced during the hearing.

On October 5, 2014, Grievant was assigned to transport an offender to the Hospital. While on that assignment, she received a telephone call on her personal cell phone from Officer Y who was working in the Master Control Room. Officer Y told Grievant that someone called and left a message for her to call home. Officer Y did not identify the caller but provided Grievant with the telephone number to call. Grievant called the telephone number and heard a voicemail recording that identified the telephone number is belonging to the Former Offender. Grievant knew the Former Offender when he was incarcerated at the Facility. Grievant ended the telephone call without leaving a message or speaking to the Former Offender.

Grievant called Officer Y and asked Officer Y if she recognized the voice of the person who called and left a message. Officer Y indicated that she did not recognize the voice. Grievant told Officer Y the caller was the Former Offender. Officer Y told Grievant to report the incident.

Grievant called the Lieutenant to report the incident but the Lieutenant was involved in an offender count at the time so Grievant left him a message.

Grievant used her personal cell phone to send a text to the Former Offender. Grievant provided Agency investigators with part of her text conversation with the Former Offender. She omitted the beginning of the conversation. At the beginning of the text conversation provided to the Agency, Grievant wrote “You know damn well you ain’t supposed to be contacting me fool!” Grievant told the Former Offender that she had heard he had been stabbed. The Former Offender said he had not been stabbed. Grievant responded “Yes that’s what an inmate told me lol huh? With made you want to connect me?” The Former Offender responded, “Are you serious you my ace. Cut it out I tried to find you on fb.” Grievant then asked him when he got out of the institution and what he was up to. She told the Former Offender that was bored where she was working.

During the Agency’s fact-finding meeting, Grievant admitted to the Warden that her texting the Former Offender was inappropriate.

### **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>1</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>2</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>3</sup>

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.”<sup>4</sup>

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,

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

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

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

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D)(2)(ee).

children, work, etc.) with offenders, or engaging in romantic or sexual relationships with offenders.<sup>5</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 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.

On October 5, 2014, Grievant was contacted by the Former Offender. The Former Offender's release date from the Institution was within 180 days of October 5, 2014. Grievant knew that her conversation with the Former Offender was prohibited by policy. Officer Y told Grievant to report to Agency managers that she had been contacted by the Former Offender. Grievant acknowledged in her text conversation with the Former Offender that contacting him was inappropriate. She admitted to the Warden that contacting the Former Offender was inappropriate. She had a "friendly" conversation with the Former Offender telling him what other inmates had told her about him. She asked him what he was up to and told him that she was bored where she worked. By sending the Former Offender a text using her personal cell phone number, she provided the Former Offender with her personal cell phone number. The Agency has presented sufficient evidence to show the Grievant fraternized with the Former Offender thereby justifying the issuance of a Group III Written Notice. She had a non-work-related conversation with the Former Offender. She informed the Former Offender of information she received about him through her work. She asked him about his status and told him she was bored at work. Upon the issuance of a Group III Written Notice, an agency may suspend an employee for up to 30 workdays in lieu of termination. Accordingly, Grievant's 15 workday suspension must be upheld.

Grievant argued that she sent a text to the Former Offender because she was concerned that he might be outside of the Hospital waiting for her. The tone of the text conversation, however, is friendly and it displayed more of a friendship than fear or tension.

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>6</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

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<sup>5</sup> Virginia Department of Corrections Operating Procedure 130.1(III), Rules of Conduct Governing Employees' Relationships with Offenders.

<sup>6</sup> Va. Code § 2.2-3005.

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 disciplinary action was too extreme as her first offense. The Agency's disciplinary action in this case is consistent with the Standards of Conduct. Although the discipline may appear to Grievant to be harsh, it does not exceed the limits of reasonableness such that the Hearing Officer can reduce the discipline. 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 a 15 day work suspension 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 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>7</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>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.