

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 07/09/13; Decision Issued: 07/12/13; Agency: DOC; AHO: Cecil H. Creasey, Esq.; Case No. 10114; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 07/27/13; EDR Ruling No. 2014-3665 issued 08/05/14; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution
Department of Human Resource Management

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 10114

Hearing Date: July 10, 2013

Decision Issued: July 12, 2013

PROCEDURAL HISTORY

Grievant was a corrections officer for the Department of Corrections (“the Agency”), with three years of service with the Agency as of the offense date. On May 7, 2013, the Grievant was charged with a Group III Written Notice, with job termination, for violation of the Agency’s contraband and fraternization policies. The Grievant had no prior, active disciplinary notices.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and the grievance qualified for a hearing. On June 11, 2013, the Office of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. Through pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, July 9, 2013, but it was continued at the Agency’s request to July 10, 2013, on which date the grievance hearing was held at the Agency’s facility.

The Agency submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency’s Exhibits, accordingly.

APPEARANCES

Grievant
Advocate for Grievant
Agency Representative
Advocate for Agency
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?

The Grievant requests rescission or reduction of the Group III Written Notice and applicable relief.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW 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 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).

Code § 2.2-3000 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 the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on its *Standards of Conduct*, Operating Procedure 135.1, which defines Group III offenses to include acts of misconduct of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 7. An example of a Group III offense is any violation of Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*, and fraternization or non-professional relationships with offenders. Agency Exh. 6.

OP 130.1 provides a definition of fraternization:

Employee association with offenders, or their family members, outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior.

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a corrections officer, with approximately 3 years of service with the Agency. The Written Notice charged:

That on or about 4/15/2013 you did pass notes between two offenders at the offenders' request. You admitted to this fact. Further, that you also took a CD player from one offender in order to give it directly to another offender, in violation of procedure and instructions given by a supervisor.

The facility warden testified that the facility is medium security level, with a population of serious offenders, with known activity of five or six gangs. The warden testified that contraband and fights are a constant threat to the security of the facility, and that the facility personnel, including the Grievant, is given training on these policies. Agency Exhs. 8, 9. The warden testified that passing notes is a specific security concern because of unknown content and communication that can spread or cause disruption, damage or injury. The warden conducted a fact-finding meeting with the Grievant and others on April 19, 2013. At the fact-finding meeting, the Grievant admitted to the passing of a note from an offender confined to the segregated housing unit to another offender. The Grievant further admitted that he accepted a CD player from an offender for transfer directly to another offender. The warden testified that the offenders involved are known members of a gang.

The warden testified that all fraternization offenses he has handled resulted in a Group III Written Notice with termination, save one. The one exception was a situation when an officer failed to report an incident when an offender shoved the officer. No contraband was involved in this one exception.

The institutional investigator testified to his investigation of the offenses. The investigator testified that the Grievant admitted to the charged behavior, and confirmed that the offenders involved in Grievant's conduct were known gang members. The investigator testified that offenders constantly test officers to see how far they can go, and that passing notes is a big security risk to the staff and offenders. The investigator also testified that he had received information that the gang was recruiting the Grievant, but such allegation was never substantiated.

The Grievant did not challenge the Agency's assertion that he was appropriately trained on the policies prohibiting the conduct charged. The Grievant challenged the conduct of the April 19, 2013, fact-finding meeting, asserting that he was forced to remove his shirt so his tattoos could be viewed. The warden testified that the Grievant's tattoos were questioned, but the Grievant voluntarily removed his shirt to show his tattoos.

Based on the Grievant's admissions, I find the Agency has proved the offense and level: Group III Written Notice. The analysis moves to mitigation.

Mitigation

The Group III Written Notice with termination is necessarily a harsh consequence. Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, *even if he would levy lesser discipline*, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.* A hearing officer does not have the same discretion for applying mitigation as management does.

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" Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management." 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. The Grievant produced no such mitigating evidence. The Grievant asserted that his termination was motivated by the Agency's unfounded suspicion of gang activity, but the Agency convincingly showed that the discipline was based on the Grievant's admitted conduct.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding the security of the facility. The Grievant and all security personnel must interact with a challenging population of inmates, and it is incumbent, for

obvious security reasons, for staff conduct to adhere to strict expectations. The Grievant's conduct put the Agency at risk, and, while strict in its application, warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and offenders in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable standards of conduct provide stringent expectations of corrections officers. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action regarding the Group III Written Notice as outside the bounds of reasonableness.

DECISION

For the reasons stated herein, the Agency's issuance of the Group III Written Notice with termination 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.¹

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

A handwritten signature in blue ink, appearing to read "Cecil H. Creasey, Jr.", written over a horizontal line.

Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.