

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 09/20/13; Decision Issued: 09/25/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10159; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 10/08/13; EDR Ruling No. 2014-3732 issued 10/30/13; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 10/08/13; DHRM Ruling issued 10/17/13; Outcome: Declined to review.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10159**

Hearing Date: September 20, 2013

Decision Issued: September 25, 2013

#### **PROCEDURAL HISTORY**

On July 10, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternizing with an offender.

On July 25, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 22, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 20, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
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 employed Grievant as a Corrections Officer at one of its facilities. He had been employed by the Agency for approximately 19 and a half years prior to his removal effective July 10, 2013. Grievant had prior active disciplinary action consisting of a Group II Written Notice issued on February 26, 2013.

Employees may not bring food into the Facility. They receive one free meal per day. Inmates may eat in the inmate dining area but may not take food from the dining area to their living units. When inmates leave the dining area to return to their housing units, they go through a "shake down" to ensure that they are not taking food from the dining area to their housing units.

On June 23, 2013, Officer M was in the staff dining area with the Inmate. Officer M asked the Inmate to make him a sandwich "to go." The Inmate asked Officer M if the Inmate could make a sandwich for himself. Officer M said the Inmate could do so. The Inmate made a sandwich for Officer M and for himself. The Inmate placed his sandwich in a brown paper bag. The Major entered the dining area. Both the Inmate and Officer M knew they were not supposed to take food out of the dining area. Officer M ate his sandwich while he was in the dining area instead of taking it to his work area. The Inmate waited until the Major left and gave the brown paper bag to Officer M and asked Officer M to take the bag to Housing Unit 6. The Inmate did not reside in Housing Unit 6, but Officer M was not aware where the Inmate resided so he did not question the Inmate's request to take the bag to Housing Unit 6. Officer M took the bag to Housing Unit 6. Once Officer M took the bag out of the dining area, the bag became contraband.

Officer M gave the bag to Grievant who was working inside the control booth with Officer H. Officer M told Grievant that the bag contained a sandwich for the Inmate and asked Grievant to give the bag to the Inmate when the Inmate came to the Control Booth in Housing Unit 6. After the Inmate finished working in the dining area, he passed through “shake down” and walked to Housing Unit 6. He approached Grievant and asked Grievant if he was “holding something” for the Inmate. Grievant said “yea, yea” and then passed the brown paper bag containing the sandwich through the tray slot to the Inmate. The Inmate took the bag and walked out of the Housing Unit.

Officer H was in the control booth with Grievant and recognized that it was inappropriate to give the bag to the Inmate. Officer H reported the incident to a Facility manager.

### **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.

Improprieties include non-professional associations such as granting special privileges to inmates. Under DOC Operating Procedure 130.1, "[e]mployees shall not extend or promise to an offender special privileges or favors not available to all persons similarly supervised, except as provided for through official channels."

Grievant received a bag containing a sandwich. He knew (1) a sandwich was inside the bag, (2) inmates were not permitted to take food out of the dining area, (3) and that he should not give special privileges to inmates. When Grievant handed the bag to the Inmate, Grievant permitted the Inmate to have a special privilege not available to other inmates. The effect of Grievant's action was to participate in a non-professional relationship constituting fraternization with the Inmate. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that he had worked with Officer M for a long time and placed trust in Officer M's decision. Grievant argued that Officer M was the one who made the improper agreement with the Inmate and that Grievant was merely an unknowing accomplice. Grievant received training regarding the Agency's policies and knew or should have known that Officer's M's actions were contrary to policy. To the extent he relied on Officer M, he did so at his own risk. Officer H was also in the control booth and realized passing a bag to an inmate was inappropriate.

Grievant argued that passing sandwiches is an event that happened on a daily basis at the Facility. Because employees could only take one meal break during long shifts, they sometimes took food from the dining area to their work stations. If the Hearing Officer assumes for the sake of argument that employees engage in this behavior and managers were aware of the behavior, it would not excuse Grievant's actions. Grievant did not establish that it was common practice for officers to give sandwiches to inmates in a manner designed to avoid detection.

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

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 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 he was only six months away from having the option to retire prior to his removal. He argued that this consideration should serve to mitigate the disciplinary action to something less than removal. Although an agency may have discretion to consider an employee’s pending retirement status, possible retirement is not a circumstance that would make disciplinary action exceed the limits of reasonableness and enable a Hearing Officer to mitigate the disciplinary action. 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 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 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

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<sup>6</sup> Va. Code § 2.2-3005.

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.