

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 09/20/13; Decision Issued: 10/03/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10160; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 10/17/13; EDR Ruling No. 2014-3747 issued 11/05/13; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 10/17/13; DHRM Ruling issued 12/16/13; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10160

Hearing Date: September 20, 2013
Decision Issued: October 3, 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.

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 Representative
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. He had been employed by the Agency for approximately 15 years prior to his removal effective July 10, 2013. Grievant had prior active disciplinary action consisting of a Group I Written Notice issued on July 28, 2011.

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, Grievant was in the staff dining area with the Inmate. Grievant asked the Inmate to make him a sandwich "to go." The Inmate asked Grievant if the Inmate could make a sandwich for himself. Grievant said the Inmate could do so. The Inmate made a sandwich for Grievant and for himself. The Inmate placed his sandwich in a brown paper bag. The Major entered the dining area. Both the Inmate and Grievant knew they were not supposed to take food out of the dining area. Grievant 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 Grievant and asked Grievant to take the bag to Housing Unit 6. The Inmate did not reside in Housing Unit 6, but Grievant was not aware where the Inmate resided so he did not question the Inmate's request to take the bag to Housing Unit 6. Grievant took the bag to Housing Unit 6. Once Grievant took the bag out of the dining area, the bag became

contraband. Grievant gave the bag to Officer B who was working inside the control booth with Officer H. Grievant told Officer B that the bag contained a sandwich for the Inmate and asked Officer B 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 Officer B and asked Officer B if he was “holding something” for the Inmate. Officer B 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 Officer B 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.”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

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.”⁴

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,

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 135.1(V)(D)(2)(ee).

children, work, etc.) with offenders, or engaging in romantic or sexual relationships with offenders.⁵

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 permitted the Inmate to make a sandwich for himself as a reward. Grievant knew that the Inmate could not take the sandwich out of the dining area and that he would be caught during the "shake down" if he tried to do so. Grievant took the bag containing the sandwich and delivered it to Housing Unit 6 so that the Inmate could obtain the bag at a later time. Grievant gave the bag to Officer B and asked Officer B to deliver the bag to the Inmate. Grievant knew that inmates should not be given special privileges. Permitting the Inmate to make a sandwich for himself and then taking actions to ensure deliver of the sandwich to the Inmate at a later time was a special privilege to the Inmate. That privilege was 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.

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

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

⁶ Va. Code § 2.2-3005.

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 some security staff were permitted to remove food from the dining area and eat at their desks. To the extent, this is true, it would not constitute a mitigating circumstance. Grievant was not disciplined for removing food for himself from the dining area. He was disciplined for assisting the Inmate by taking contraband out of the dining area and returning it to the Inmate at a location of the Inmate’s choice.

Grievant argued it was not uncommon to permit inmates to make food for themselves. To the extent this may be true, it does not serve as a basis to mitigate the disciplinary action. Grievant did not establish that it was common practice for officers to transport food to a housing unit for an inmate’s benefit.

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 for fraternization 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.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.