

Issue: Group III Written Notice with Termination (inappropriate behavior that could be considered criminal); Hearing Date: 10/29/13; Decision Issued: 11/13/13; Agency: DOC; AHO: Ternon Galloway Lee, Esq.; Case No.10167; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 12/03/13; EDR Ruling No. 2014-3777 issued 01/22/14; Outcome: AHO’s decision affirmed;** **Administrative Review: DHRM Ruling Request received 12/03/13; DHRM Ruling issued 02/12/14; Outcome: AHO’s decision affirmed.**

## **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 100167**

**Hearing Date: October 29, 2013**

**Decision Issued: November 18, 2013**

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### **SUMMARY OF DECISION**

The Agency had found Grievant engaged in behavior that was not appropriate and possibly criminal. The Agency then issued Grievant a Group III Written Notice with termination. The Hearing Officer found Grievant engaged in the alleged behavior, it constituted misconduct, and the Agency's discipline was consistent with law and policy. Moreover, the Hearing Officer considered Grievant's involvement in an abusive relationship with her boyfriend during the time of the misconduct, but she nevertheless found that the Agency's discipline was reasonable. Hence the Hearing Officer upheld the termination with removal.

### **HISTORY**

On July 3, 2013, the Agency issued Grievant a Group III Written Notice with termination for inappropriate behavior that may also be considered criminal. Grievant timely filed her grievance to challenge the Agency's action. On August 29, 2013, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A pre-hearing conference ("PHC") was scheduled for September 4, 2013, rescheduled due to Grievant's unavailability, and ultimately held on September 12, 2013. The grievance hearing was initially scheduled for October 1, 2013, under the Hearing Officer's scheduling order. At Grievant's request to provide her with more time to prepare, the hearing was reset for October 29, 2013, and held accordingly.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Officer. Grievant objected to the Agency's proposed Exhibit 3. She contended that the exhibit failed to reflect her full statement provided to the Agency regarding the investigation that led to the issuance of Grievant's group notice. After hearing arguments, the Hearing Officer overruled the objection.<sup>1</sup> Then the Hearing Officer admitted Agency Exhibits 1 through 6; Grievant Exhibits 1 through 8, and the Hearing Officer Exhibits 1 through 3. There were no objections to these exhibits.<sup>2</sup>

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witness presented by the opposing party.

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<sup>1</sup> However, during the hearing Grievant was permitted to note amendments to the statement provided in Agency Exh. 3.

<sup>2</sup> Grievant also requested that the Hearing Officer admit as an exhibit a fax from the Behavior Center. The Agency objected as the proposed exhibit had not been disclosed to the Agency. Thus, the Hearing Officer sustained the objection.

During the proceeding, the Agency was represented by its advocate and the Grievant represented herself.

### **APPEARANCES**

Advocate for Agency  
Witnesses for the Agency (2 witnesses)  
Grievant  
Witnesses for Grievant (5 witnesses, including Grievant)

### **ISSUE**

Was the written notice warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. The Agency is a prison. It employed Grievant as a correctional officer prior to her termination on July 3, 2013. (A Exh. 1, p. 1; Testimonies of Warden and Grievant).
2. Grievant’s boyfriend was also an employee of the Agency until October 2012, when he was fired because he was unable to satisfactorily complete his probationary period. (Testimony of Warden; Grievant’s Chronology of Events).
3. Grievant met with the Warden in his office in October/November 2012 and expressed that “things were not going well for her.” The Warden referred Grievant to the employee assistance counseling. But Grievant did not participate in this counseling. (Testimony of Warden; Grievant’s Chronology of Events).
4. On or about January 2013, it came to the Warden’s attention that one of the Agency’s gas credit cards was missing. It was also determined that from October 2012, to January 8, 2013, the card was used to obtain without authorization about \$30,000.00 worth of gas/diesel. The Warden then commenced an investigation which concluded June 2013. The ensuing investigative report was also issued in June 2013. (Testimonies of Warden and Investigator).
5. A few days after the Warden launched the investigation, Grievant met with the Warden again and expressed she was in a bad and abusive situation with her then boyfriend and needed immediate time off to reside with her parents outside the area. The Warden granted Grievant a

90 day unconditional leave period. About nine days later, Grievant left the area to live with her parents. During that time, she received therapy for about two months. (Testimony of Warden; Grievant's Chronology of Events; G Exh. 3c). Grievant returned to work from her leave on April 25, 2013. (Testimony of Grievant).

6. In the course of the investigation, the Agency was able to view several videos from December 2012/January 2013 provided by stores that had sold the gas that was purchased with the Agency's missing gas card. Surveillance videos from an earlier time were not available due to their being recorded over because of the lapse of time.

7. The videos and other information obtained during the investigation revealed that Grievant's boyfriend was the holder and user of the card. As referenced above, Grievant's boyfriend, a former employee of the Agency, had been previously fired from the Agency. (Testimony of Warden).

8. Several of the videos viewed during the investigation showed Grievant driving her vehicle up to the gas pump and her boyfriend filling her vehicle with gas. Grievant was aware her boyfriend fueled her vehicle. She was also aware that her boyfriend's activity was illegal. Grievant admitted this during an interview pursuant to the investigation and during her spring/summer grievance meeting with the Warden. (Testimonies of Investigator, Warden, and Grievant; A Exh. 1).

9. While Grievant knew her boyfriend was engaged in illegal activity, she did not know that he was using the Agency's credit card to fuel vehicles. (Testimony of Grievant).

10. Grievant did not report her boyfriend's illegal activity to the Agency or anyone at the time. Thereafter, however, when Grievant was interviewed during the course of the investigation, she admitted having knowledge of her boyfriend's illegal activity and permitting him to fuel her vehicle. (Testimonies of Warden and Grievant).

11. The Warden concluded that Grievant's behavior in effect was consorting with and having knowledge of criminal activity. Further, he believed that this conduct reflected poorly on the Agency, a facility tasked in part with facilitating the correction of the behavior of lawbreakers. The Warden also concluded that Grievant's behavior undermined the Agency's credibility. In addition the Warden opined that Grievant's credibility and trustworthiness had been compromised by her conduct and she could not be trusted to supervise felons, a responsibility she held as a correctional officer. (Testimony of Warden).

12. This was the Warden's first encounter with a case of this nature and the facts were unique. (Testimony of Warden).

13. The Warden conferred with his chain of command and other management. Agency management then determined Grievant's conduct was so serious that termination was warranted. Then on July 3, 2013, the Agency issued Grievant a Group III Written Notice with removal for inappropriate behavior that may also be criminal. (Testimony of Warden; A Exh. 1).

Specifically, the group notice described the offense as follows:

SIU Case File [#####] determined that [Grievant] was aware of a fraudulent scheme perpetrated by her boyfriend, [Boyfriend], a former employee of [the Agency]. Boyfriend was selling gas for half price to anyone he could convince to participate in the fraudulent activity. [Boyfriend] was using a [gas card] which was the property of the [Department/Agency]. By her own admission, [Grievant] had her vehicle fueled by [Boyfriend] on several occasions in the fall of 2012 ending early January 2013. By her own admission, [Grievant] was aware that the activity of [Boyfriend] was illegal beginning in December 2012. By failing to report this illegal activity, [Grievant] did not adhere to her sworn oath of office, to uphold the Laws and Constitution of the State of Virginia. Further, knowing the scheme was illegal, she could reasonably be considered an accessory to the crimes purportedly committed by [Boyfriend].

A Exh. 1, p. 2).

14. By fall 2012, Grievant was in an abusive relationship with her boyfriend. Grievant remained in the relationship until about February 3, 2013, when she departed for a 90 day leave period. Upon her return from leave, Grievant returned to the abusive relationship for the summer 2013. (Grievant's Chronology of Events; Testimony of Grievant).

During the relationship, Grievant became very depressed. Her boyfriend on several occasions reported he would commit suicide if Grievant left him. He threatened to harm Grievant and did physically abuse Grievant by, among other things, grabbing Grievant around the throat, hitting Grievant's face. (Testimonies of Grievant, Grievant Witnesses I, II, III, and IV; G Exh. 4).

15. Grievant received a copy of her Employee Work Profile ("EWP") on June 7, 2011, and October 16, 2012, and was aware of its contents. Among other requirements, the EWP obliges Grievant to:

- (i) Supervise offenders;
- (ii) Support the Agency's mission, to include promoting the VARI, EBP, and re-entry process through positive role modeling and by personal behavior;
- (iii) Demonstrate professionalism, respect, integrity, dignity and ethical practices through task completion and behaviors in support of the work unit and agency.

A Exh. 4 pp. 2 - 4; G Exh. 1c, pp. 2- 4).

17. Grievant was aware of and received the Department/Agency strategic plan, vision, mission, values, code of ethics. (A Exh. 5, p. 1; G Exh. 1b, p. 1).

18. Grievant was aware of Agency Policy #101.3. The Agency's mission, in part, is set forth in this policy in the section regarding activity outside the Agency. In pertinent part, it provides the following:

The [Department/Agency] is a unique work environment. Its mission, in part, is to house and/or supervise offenders who have violated the laws of the Commonwealth. As such, [Department/Agency] staff are expected to conduct themselves in a manner, either directly or indirectly, that will not bring reproach on the [Department/Agency]. This extends to activities while working as well as activities outside of the employee's [Department/Agency] work hours. As such, management has the right to deny a request for a second job if that activity may be viewed as inconsistent with the mission of the [Department/Agency].

(G Exh. 1e, p. 6).

19. The Agency's Operating Procedure # 135.1 defines due process regarding disciplining a Grievant as follows:

**Due Process** - prior to any pre-disciplinary or disciplinary actions, employees must be given oral or written notification of an offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond. [Department/agency] must provide a clear and descriptive explanation of the offense in a manner that ensures that the employee understands the facts presented and will be able to present mitigating factors or denial of the charge.

(A Exh. 6, p. 2,6; G Exh. 1f).

20. Policy # 135.1 also mandates that the Agency provide Grievant with a "Reasonable Opportunity to Respond" to the pre-disciplinary or disciplinary action. Normally, a 24 hour period is sufficient time to respond. But the response time provided to the employee should not be based solely on the nature of the offense which may or may not require more or less time to respond to refute it or provide mitigating circumstances. (A Exh. 6, p. 2,6; G Exh. 1f).

21. Further, policy # 135.1 provides in section III (E) the following:

The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or the agency may be considered a violation of the standards of conduct and may result in disciplinary action consistent with this operating procedure based on the severity of the offense.

(A Exh. 6, p. 3; G Exh. 1f).

22. Under Policy # 135.1, the conviction of a crime is not needed for the Agency to proceed with disciplinary action. The Agency must consider whether the evidence is sufficient to have an

impact on the Department/Agency, its employees, the public and its perception of the Department/Agency. (A Exh. 6, p. 7; G Exh. 1f).

23. Under Policy #135.1, management must issue a Group III Written Notice as soon as practical. (A Exh. 6, p. 11; G Exh. 1f).

### **DETERMINATIONS 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/her 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).

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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>3</sup>

The Commonwealth of Virginia Department of Corrections Operating Procedure sets forth the Commonwealth's Standards of Conduct and disciplinary process that the Department of Corrections ("DOC") must employ to address unacceptable behavior, conduct, and related employment problems in the workplace and outside the workplace when the conduct impacts an employee's ability to do his or her job, or influences the agency's overall effectiveness.<sup>4</sup>

These standards establish three groups of offenses. They provide that Group III offenses are the most serious acts and behavior which normally warrant removal on a first occurrence.<sup>5</sup> Moreover, these standards provide that when circumstances warrant it, management may mitigate discipline if in its judgment it is proper to do so.<sup>6</sup>

As stated previously, Agency management issued Grievant a Group III Written Notice

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<sup>3</sup> Grievance Procedural Manual §5.8

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1 I.

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1V (D)(1).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1V (D)(3)(b)

with termination for inappropriate behavior that also maybe criminal. The Hearing Officer examines the evidence to determine if the Agency's discipline was warranted and appropriate under the circumstances.

**I. Analysis of Issue before the Hearing Officer**

**Issue: Whether the discipline was warranted and appropriate under the circumstances?**

**A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?**

The Agency contends that Grievant engaged in inappropriate behavior. It also noted that the behavior may be considered criminal. That behavior has been set forth here in "finding of fact 13."

The facts are undisputed that Grievant was aware of her boyfriend's involvement in a scheme whereby he was selling gas illegally and profiting from it. And further, with this knowledge Grievant permitted her boyfriend to fuel her car on at least two occasions. The evidence also shows that Grievant was unaware at the time her car was fueled that her boyfriend was using a credit card belonging to the Agency. This activity occurred outside the Agency. It was not reported to the Agency by Grievant until February 2013 when the Agency, upon learning that one of its credit cards was missing, commenced an investigation. This inquiry revealed surveillance videos implicating Grievant in her boyfriend's activities. The Agency then interviewed Grievant and she acknowledged knowing about her boyfriend's illegal activity and permitting him to fuel her vehicle.

Considering the facts noted above, the Hearing Officer finds Grievant's had knowledge of her boyfriend's fraudulent scheme and then allowed him to fuel her tank. Regarding whether Grievant's behavior may be criminal, the Hearing Officer notes that she has no authority to determine if Grievant committed a crime. That said, she does find that it is reasonable to conclude (as the Agency did) that Grievant's behavior "may be" criminal. This is so because Grievant by her own admission was aware her boyfriend was engaged in illegal activity. Yet she drove her car to the gas stations and allowed her boyfriend to fill her tank with gas. This activity could reasonably be construed as assisting her boyfriend in committing an illegal activity. Thus, the Hearing Officer finds Grievant engaged in the conduct alleged by the Agency.

Now a consideration of whether the behavior was misconduct is undertaken.

As the evidence reveals, Grievant was not charged with a crime. But Agency Policy #135.1 indicates that the conviction of a crime is not needed for the Agency to proceed with disciplinary action. The Agency must consider whether the evidence is sufficient to have an impact on the Department/Agency, its employees, the public and its perception of the Department/Agency. The Hearing Officer finds that a reasonable view held by others of the Agency is the Agency is instrumental in correcting the behavior of offenders it houses and facilitates their re-entry to the non-prison community. Further, the evidence reveals that the



Agency's mission comports with this perception. Moreover, the evidence shows that Grievant's EWP expects her as a correctional officer who supervises offenders to be a role model and exhibit positive behavior. Her conduct was contrary to these expectations and therefore inappropriate. Moreover, the Warden testified that Grievant's conduct undermines the Agency's credibility. Having observed the Warden's demeanor during the hearing and considering other evidence of record, the Hearing Officer finds the Warden's testimony credible. Thus, the Hearing Officer finds the behavior was misconduct.<sup>7</sup>

**B. Was the discipline consistent with policy and law?**

The Agency Policy # 135.1 notes that Group III offenses are the most serious acts and behavior which normally warrant removal on a first occurrence. The evidence shows that Grievant's offense undermines the credibility of the Agency. Further, it has an impact on the mission of the Agency and its employees. Of note, Grievant's superior, the Warden, testified that he was unable to trust or depend on Grievant after learning of the offense. His testimony was convincing. Thus, the Hearing Officer finds that the offense is serious enough to warrant a Group III Written Notice with removal.

Grievant argues that the Agency failed to follow policy for several reasons.

First, she contends the Agency took too long to issue her the disciplinary notice. Under Agency Policy #135.1, management must issue a Group III Written Notice as soon as practical. The Warden testified that the investigation commenced in January/February 2013, but was not completed until June 2013. Hence he issued the notice of intended disciplinary action on or about June 24, 2013, and provided Grievant an opportunity to respond by July 3, 2013. After Grievant's response on July 3, 2013, the group notice was issued that same date. The Hearing Officer accepts the Warden's explanation regarding the timing of issuing the notice and finds it was provided to Grievant as soon as practical.

Second, Grievant contends that she was not provided adequate time to respond. The evidence illustrates that Grievant requested more time to respond to the Agency's notice that it intended to discipline Grievant. Regarding this claim, the Hearing Officer notes that Agency Policy # 135.1 also mandates that the Agency provide Grievant with a "Reasonable Opportunity to Respond" to the pre-disciplinary or disciplinary action. Normally, a 24 hour period is sufficient time to respond. But the response time provided to the employee should not be based solely on the nature of the offense which may or may not require more or less time to response to refute it or provide mitigating circumstances. Here Grievant was made aware of the proposed disciplinary action on June 24, 2013, and provided with nine days to respond. Considering the evidence, as well as mitigating factors (particularly the abusive relationship) offered by Grievant, the Hearing Officer finds the Grievant was not unfairly burdened in preparing her response to the disciplinary notice as the Agency provided Grievant with a reasonable opportunity to respond.

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<sup>7</sup> The Hearing Officer does note the Agency's assertion that Grievant had a duty to report her boyfriend's fraudulent activity to the Agency since he had recently been fired from the Agency. Considering all the evidence, the Hearing Officer does not find the evidence sufficient to show Grievant's failure to report the crime to the Agency was misconduct.

Third, Grievant contends the allegations against her were not clearly stated in the group notice. The Hearing Officer has reviewed the group notice and assertions against Grievant. Having done so, she finds Grievant's argument unpersuasive.

Thus, the Hearing Officer finds that Grievant did engage in the conduct. It was misconduct. And the Agency's discipline is consistent with policy and law.

## **II. Mitigation**

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”<sup>8</sup> EDR's *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”<sup>9</sup> More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>10</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice, the behavior was misconduct, and the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable and therefore should be mitigated. To advance her claim of mitigation, Grievant claims disparate treatment. She contends another employee was charged with a crime, but he was not terminated. The Hearing Officer finds the evidence shows the employee referenced by Grievant and Grievant were not similarly situated. Thus, the evidence is not sufficient to show Grievant was treated differently under similar circumstances. Next Grievant contends discipline should be mitigated

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<sup>8</sup> Va. Code § 2.2-3005 and (c)(6)

<sup>9</sup> *Rules for Conducting Grievance Hearings* VI(A)

<sup>10</sup> *Rules for Conducting Grievance Hearings* VI(B)

due to the abuse she has suffered from her boyfriend. The Hearing Officer has carefully considered this evidence as well. In addition all other evidence has been reviewed, to include, but not limited to Grievant not being charged with a crime and being subpoenaed to testify against her former boyfriend. Having undergone this thoughtfulness, the Hearing Officer cannot find the Agency acted without reason.

### **DECISION**

Hence for the reasons stated here, the Hearing Officer upholds the Agency's discipline.

### **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  
Departmental of Human Resource Management  
101 N. 14th 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 N. 14th 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>11</sup>

Entered this 18<sup>th</sup> day of November , 2013.

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Ternon Galloway Lee, Hearing Officer  
cc: Agency Advocate  
Grievant  
EDR Program's Hearing Director

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<sup>11</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.