

Issue: Group III Written Notice with Termination (falsification); Hearing Date: 11/13/13; Decision Issued: 11/18/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10191; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 12/03/13; EDR Ruling No. 2014-3778 issued 12/13/13; 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: 10191**

Hearing Date: November 13, 2013  
Decision Issued: November 18, 2013

**PROCEDURAL HISTORY**

On August 23, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On September 20, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 7, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 13, 2013, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
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 Community Re-entry Specialist at one of its facilities. She began working for the Agency on May 25, 2011. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant met with Mr. W in the 1990s. They lived in the same town. They had a friendship that sometimes became a romantic relationship. For example, their relationship became romantic in 1996 and then became a friendship until 1999. The relationship became romantic from 1999 to 2001. They resumed dating in December 2012 and their relationship became "serious" in February 2013. Grievant continued a romantic relationship with Mr. W and eventually concluded she wished to marry Mr. W. On July 30, 2013, Grievant met with her Supervision regarding the relationship. On August 8, 2013, she sent the Supervisor a memorandum disclosing a "pre-existing relationship with an individual currently on DOC supervision."<sup>1</sup> Grievant and Mr. W were married on August 18, 2013.

Mr. W was under the Department's supervision when Grievant's relationship with him became romantic in February 2013. Although Grievant and Mr. W were in the same district, none of Grievant's duties placed her in direct supervision of Mr. W.

### **CONCLUSIONS OF POLICY**

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<sup>1</sup> Grievant Exhibit 2.

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>2</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>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</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>5</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, children, work, etc.) with offenders, or engaging in romantic or sexual relationships with offenders.<sup>6</sup>

An offender is defined as:

An inmate, probationer, parolee, post release supervisee, or other person placed under the supervision or investigation of the Department of Corrections.

Beginning in February 2013, Grievant had a romantic relationship with Mr. W. Mr. W was an offender at that time because he remained under the supervision of the Agency. Grievant fraternized with Mr. W when she had a romantic relationship with an offender. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for fraternization. Upon the issuance of a Group III Written

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

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

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

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D)(2)(ee).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 130.1(III), Rules of Conduct Governing Employees’ Relationships with Offenders.

Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that her relationship with Mr. W was an exception to the Agency's policy because her relationship was "pre-existing." Operating Procedure 130.1 provides:

Exception – Any family or pre-existing non-professional relationship (established friendship, prior working relationship, neighbor, etc.) between employee and offenders, including when the offenders is within 180 days of the date following his or her discharge from DOC custody or termination from supervision, whichever occurs last, must be reported to the Unit Head.

- i. In consultation with the Regional Operations Chief, a decision will be made regarding future contact between the employee and the offender.
- ii. The Regional Operations Chief has final authority in these matters.
- iii. The relationship and guidance on future contacts shall be documented in VACORIS case notes.

The Agency's "exception" is not one that automatically permits fraternization between an employee and an offender if the relationship is pre-existing. The policy is intended to require the employee to notify Agency managers so that the Agency can determine what future contact it will permit the employee to have with the offender. In this case, Grievant did not inform the Agency of her existing friendship with Mr. W and did not report to the Agency when that friendship escalated into a romantic relationship. She continued her romantic relationship for approximately five months before notifying the Agency of her relationship. Agency managers had no opportunity to determine the nature of future contact between Grievant and Mr. W. Grievant's prior friendship with Mr. W does not serve as an exception to enable Grievant to fraternize with an offender.

Grievant argued that the policy required a decision to be made by the Regional Operations Chief and that the Agency did not permit the Regional Operations Chief to issue a decision. The Agency's failure to have a decision made by the Regional Operations Chief is harmless error. The Regional Operations Chief reported to the Chief of Corrections Operations. The issue was brought to the attention of the Chief of Corrections Operations and he concluded Grievant's relationship was contrary to policy and that disciplinary action including removal should be taken.

Grievant emphasized that she did not have direct supervision of Mr. W. The Agency's policy does not require direct supervision by an employee over an offender in order for there to be fraternization.

*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>7</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. In light of this standard, 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  
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

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<sup>7</sup> Va. Code § 2.2-3005.

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>8</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>8</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.