

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 09/03/14; Decision Issued: 09/22/14; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 10329; Outcome: No Relief - Agency Upheld; Administrative Review: EDR Ruling Request received 10/07/14; EDR Ruling No. 2015-4015 issued 10/28/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 10/07/14; DHRM Ruling issued 10/30/14; Outcome: AHO's decision affirmed.

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,  
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**IN RE: CASE NUMBER 10329**

**DECISION OF HEARING OFFICER**

**HEARING DATE: SEPTEMBER 3, 2014**

**DECISION ISSUED: SEPTEMBER 22, 2014**

**I. PROCEDURAL MATTERS**

The agency issued the grievant a Group III Written Notice and terminated him from employment on February 24, 2014. He filed this grievance on March 21. I was appointed as hearing officer on April 16. I conducted a prehearing conference by telephone on April 21, setting the hearing for June 6.

On April 15, the grievant submitted a request to the agency for certain documents to be produced. The agency filed its objection to that request on April 18. I entered a prehearing order on April 30, which order included provisions for the agency to be required to produce certain documents requested by the grievant. On that same date, the grievant requested to continue the scheduled hearing due to a scheduling conflict. The parties agreed to continue the hearing while the agency sought a compliance ruling from the Office of Employment Dispute Resolution (“OEDR”) to my rulings as to the documents. On May 17 the grievant submitted a Motion to

Compel the agency to produce certain emails relevant to a retaliation defense he intended to present. The agency requested a compliance ruling on May 23. The grievant filed his response on June 1. The Director of OEDR issued his Ruling (No. 2014-3895) on June 2. Pursuant to the directive in that ruling I issued an amended prehearing order on June 21. In the interim, on June 10, the parties submitted arguments to me with regard to the ruling and the grievant's entitlement to certain records. On July 2 the agency sought a compliance ruling from OEDR, challenging my Amended Prehearing Order of June 21. The grievant filed his response on July 8. On July 11 I scheduled the matter for hearing on August 11 with the expectation that the parties would have sufficient time to prepare for the hearing after OEDR issued its compliance ruling.

That Ruling was issued on July 25 (No. 2015-3931). The parties agreed that the August 11 date would not provide sufficient time for them to prepare. I scheduled the hearing for September 3. The hearing was conducted on that date.

## **II. APPEARANCES**

The agency was represented by a lay advocate. It presented two witnesses and five exhibits. The grievant was represented by counsel. He presented seven witnesses and twenty-three exhibits.

## **III. ISSUE**

Whether the agency acted appropriately in issuing to the grievant a Group III Written Notice and terminating him from employment on February 24, 2014 for violating the Anti-Fraternization Policy?

#### **IV. FINDINGS OF FACT**

At all relevant times the grievant served as a corrections officer with the agency, holding the rank of Sergeant. He had an outstanding work record. He earned “exceeds contributor” or “extraordinary contributor” ratings in several evaluation periods prior to the subject incident. For the period covering the date of the subject incident he received an extraordinary contributor rating. The Warden testified that he was a great employee.

While working on August 10, 2013 the grievant took a telephone call from an individual seeking to speak with another corrections officer. The other officer is a female. She was not working at the time of the call. The grievant took the name and phone number given by the caller and advised he would contact the other officer with the information. The caller had stated that he needed to speak to her regarding an insurance matter.

The grievant called the officer on her cell phone and relayed the message as he had indicated he would do. The female officer called the number provided and left a voice message. Shortly thereafter, the female officer received a return call. The caller identified himself as a former inmate at the facility. He indicated an interest in establishing a personal relationship with the female officer. She recognized who the caller was and advised him that she had no interest in speaking with him and not to call her again.

On that date the former inmate was still on post-release supervision and probation period. The female officer was extremely upset by the contact from the former inmate. She called the grievant back to advise him who had called. The grievant had ended his shift and returned home by that time. Upon learning who the caller was, the grievant thought about how to proceed. He

considered the female officer to be a friend, one with whom he wanted to establish a closer relationship upon her divorce.

At 7:49 p.m. on August 10 the grievant sent a text message to the former inmate which stated "Hello [name redacted] ha ha. . . looking forward to seeing u again. All of us is. Real soon." The grievant received a text from the former inmate in response. The message was not introduced into evidence. The grievant then responded (at 7:56 p.m.) "I got a hell of alot of resorses. i will be seeing u soon. lol to u. Ha ha."

Again, after receiving a message from the offender the grievant responded (at 8:14 p.m.) "Never have. cya latr. Looking forward to it. lying false name felon yea u r real smart."

Another exchange from the offender occurred, in which he threatened to report the grievant to another agency employee. At 8:24 p.m. the grievant answered "I'm real glad i can help u. Thought you wanted to quit. So do it. Later"

The following day the grievant reported the call from the offender seeking to speak with the female officer. On August 29, 2013 the agency referred the matter to its Special Investigations Unit. An agent in that unit interviewed the grievant on October 24. In that interview he admitted sending the text messages. The Warden received the investigation report on January 24, 2014. The report was the first indication he had of the text messages between the grievant and the offender. The Warden then began a review of the situation with his superiors. His final determination was to issue a Group III Written Notice to the grievant and terminate him from employment, citing "the serious and unprofessional nature of this incident."

## **V. DISCUSSION AND ANALYSIS**

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedural Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Office of Employment Dispute Resolutions, *Rules for Conducting Grievance Hearings*. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The position agency argues that the grievant violated Agency Operating Procedure 130.1,

“Rules of Conduct Governing Employees Relationships with Offenders.” That document defines fraternization as “the act of . . . association with offenders. . . that extends to unacceptable, unprofessional and prohibited behavior.” An offender is defined as “an inmate, probationer, parolee, or post-release supervisee.” The grievant does not contest that the offender in this case meets this definition.

The grievant strenuously argues that his conduct in sending the text messages was not a violation of the Operating Procedure. I agree that the contacts on August 10, 2013 do not meet with the traditional view of fraternization. If the Operating Procedure was less specific, the grievant’s argument would carry more weight. Section 5 of the Operating Procedure, however, is explicit.

It sets forth that “while performing their job duties, employees are encouraged to interact with persons under DOC supervision on an individual and professional level to the extent necessary to further the Departments goals. Interactions shall be limited to the employees assigned job duties.” The grievant engaged in this exchange of text messages with a known offender while not working. The exchange was not inadvertent or incidental contact with an offender that would be excusable under the Operating Procedure. Instead, the grievant knowingly sent multiple messages to the offender, specifically referencing the offender’s status and the employment status of the grievant. The taunting nature of at least one of the messages constitutes unprofessional behavior by the grievant. Section 4 of the Operating Procedure requires that employees “exercise a high level of professional conduct when dealing with offenders to insure the security and integrity of the correctional process.”

The agency has argued that the discipline is warranted because the grievant “opened up

his flanks” by contacting the officer. The most serious exposure in the entire incident was the female officer’s phone number becoming known to the offender when she called him back. No evidence shows that the grievant did this intentionally. His assumption that the caller was who he said he claimed to be was a reasonable assumption. I cannot find the cell phone number of the grievant unintentionally becoming known to the offender through the exchange constitutes a possible serious security breach for which a Group III Written Notice should be issued.

Despite the fact that this event was not the most egregious example of fraternization imaginable, I do find that it fall under the Operating Procedure. A violation of that procedure is classified under the Standards of Conduct (DHRM Policy 135.1) only as a Group III offense. The Warden considered merely demoting the grievant as part of the discipline, rather than terminating him. He considered his exemplary work history in mitigation. I am required to give deference to the decisions made by agency’s management. My job is not to act as a “super-personnel officer.” See Section VI (B), *Rules For Conducting Grievance Hearings*. I cannot find the determination by the Warden to have been unreasonable under the facts and policies as written.

The grievant has argued that the length of time that has elapsed from the event is a denial of due process. Counsel provided Rulings from hearing officers in other cases dealing with this issue. I find those cases to be distinguishable from this one.

In Case No. 9916, a lapse of approximately 13 months occurred between the subject incident and the first interview of the grievant by the agency. In this case, the lapse was less than two months. From the time that the grievant was interviewed on October 4, he either knew, or reasonably should have known, that his conduct could subject him to disciplinary action.



The grievant also referred me to Case No. 9123. In that case, 9.5 months lapsed between the agency's ending the criminal investigation and the issuing a disciplinary action. Here, the internal

Agency investigation became known to the Warden on or around January 24. He issued his disciplinary action one month later.

The time between the texts on August 10, 2013 and the issuance of the Group III Written Notice on February 24 was not unreasonable. The length of time between the filing of the grievance on March 21 and the hearing on September 3 is unusual. As set forth above, however, the delays were caused, in part, by the grievant's requesting a postponement from the original hearing date and the agency's seeking two pre-hearing compliance rulings from OEDR. These rulings were not entirely favorable to the grievant. I find that no due process violation occurred from the delays in this matter being brought to hearing.

## **VI. DECISION**

For the reasons stated herein, I uphold the issuance of the Group III Written Notice to the grievant on February 24, 2014 and his termination from employment.

## **VII. 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 to EDR.

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.

RENDERED this 22nd day of September, 2014.

//s/Thomas P. Walk  
Thomas P. Walk, Hearing Officer