

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 07/23/14; Decision Issued: 08/07/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No.10398; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10398

Hearing Date: July 23, 2014
Decision Issued: August 7, 2014

PROCEDURAL HISTORY

On April 30, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On April 27, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 23, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 23, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency 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. Grievant had prior active disciplinary action. On October 1, 2013, she received a Group II Written Notice with a two workday suspension. She was removed from employment effective April 30, 2014.

Grievant worked at the Institution where she was responsible for supervising inmates. The Institution had a main Facility and a satellite Facility. Grievant had been moved from the main Facility to the satellite Facility because of the Agency's concerns about her work performance. Grievant had concerns about the appropriateness of the move.

Agency managers believed that the Inmate likely was a gang member. Other members of his gang were incarcerated at the Facility. He had been moved to the main Facility before speaking with Grievant on the telephone.

Grievant and the Inmate were related. On January 18, 2014, Grievant went to the home of the Inmate's Mother for a surprise birthday party. The Inmate called his mother from the main Facility. In addition to speaking with his mother, the Inmate spoke with Grievant. Their conversation included several phrases and words whose usage was not Standard English and but was understood by them. The Inmate's Mother knew that Grievant worked for the Agency. Several portions of their conversation revealed the nature of the relationship between Grievant and the Inmate:

The Inmate's Mother said to the Inmate "[Grievant's first name] says what's up."

The Inmate's mother asked the Inmate, "Are you at [Facility]?" The Inmate replied "yea." The Inmate's Mother spoke to Grievant in the background and asked "Is that where you work at?" Grievant responded, "yea." The Inmate asked to speak with Grievant and the Inmate's Mother gave Grievant the telephone.

Grievant and the Inmate discussed Grievant's work location. The Inmate asked, "Are you outback?" referring to whether Grievant was at the main Facility. Grievant responded, "No, I ain't outback ...". The Inmate said, "man, it would have been a better situation if you was in place man." Grievant responded, "yea" and then added, "I'm coming dog, I ain't making no noise" ... "everybody in my head, so that's why I just be chilling."

Grievant and the Inmate discussed writing each other. The Inmate said, "man you was supposed to, you wasn't even supposed to man, I'm going to write you and talk to you about it, you see what I'm saying." Grievant replied, "yea, I'm going to write you, I'll let you know what happened."

Grievant and the Inmate discussed Grievant obtaining information about the Inmate's girlfriend and providing the information to him. The Inmate said, "but look, you run into my [explicative], that girl that got my [explicative] son, you know who I'm talking about right?" The Inmate wanted to make sure that "you don't make it look like it coming from me." Grievant responded that, "I'll use the EBP¹ [explicative] I learned at work" and then laughed.

Grievant and the Inmate discussed a gang member at the Facility. Grievant said, "yea, you know [gang member's first name] cool"

Grievant and the Inmate discussed meeting in person. Grievant asked, "where you at?" Grievant added, "oh [explicative], yea I'm going to holler at you, I'm going to get with you." The Inmate said, "all right". Grievant said, "all right, I love you" and their conversation ended.

The Agency requires employees to report to the Agency any existing relationships with inmates. Grievant did not report to the Agency that she was related to the Inmate.

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

¹ EBP refers to evidence based practice.

work force.”² 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.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

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.”⁵

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.⁶

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 cause.* *** 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.

Grievant fraternized with the Inmate. She conducted a non-work related conversation with the Inmate. She discussed where she was assigned at the Facility. She discussed granting the Inmate a favor by obtaining and providing him with information about the mother of his child. She discussed writing the Inmate to let him know what happened. She discussed a gang member at the Facility. Grievant expressed a desire to meet with the Inmate and expressed affection for him. The Agency has presented sufficient evidence to support its decision to issue Grievant a

² Virginia Department of Corrections Operating Procedure 135.1(V)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(D)(2)(ee).

⁶ Virginia Department of Corrections Operating Procedure 130.1(III), Rules of Conduct Governing Employees' Relationships with Offenders.

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 she did not intend to fraternize with the Inmate. She asserted that she did not plan to have a telephone conversation with the Inmate, she was merely having a telephone conversation with a relative. Grievant's argument is unpersuasive. It is clear from the context of the call that Grievant knew the Inmate was incarcerated at the Facility where she worked. Even if the Hearing Officer assumes for the sake of argument that she did not know the Inmate was at her Facility, it is clear Grievant knew the Inmate was incarcerated by the Agency. Based on Grievant's training, she should have recognized that her conversation with the Inmate should not have involved personal details. Grievant should have disclosed to the Agency her relationship with the Inmate and her conversation. Grievant failed to do so.

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"⁷ 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:

⁷ Va. Code § 2.2-3005.

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.⁸

[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

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