

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 12/09/14; Decision Issued: 12/29/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No.10484; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 01/12/15; EDR Ruling No. 2015-4084 issued 01/23/14; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 01/12/15; DHRM Ruling issued 01/22/15; 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: 10484

Hearing Date: December 9, 2014
Decision Issued: December 29, 2014

PROCEDURAL HISTORY

On September 12, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 21, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 9, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Casework Counselor at one of its facilities. She worked in an office that was located inside a housing unit.

Agency staff conduct searches of housing units to look for contraband. This is referred to as a "shakedown." Contraband is not permitted inside the institution.

On August 25, 2014, Grievant's office was searched. An envelope was found inside of the drawer of Grievant's desk, but the envelope was not opened. Grievant observed the search and knew that the envelope had been found in her desk drawer.

On August 26, 2014, the Lieutenant decided to shakedown the counselor's office. He asked Grievant whose office it was and Grievant responded that it was her office. The Lieutenant conducted the shakedown of the counselor's office while Grievant watched. The Lieutenant found a manila envelope inside the drawer of Grievant's desk. The envelope was wrapped in tape. The Lieutenant asked Grievant who owned the envelope. Grievant said it was not hers and she had never seen it before. Inside the envelope were 39 cigarettes wrapped in plastic and several pages of photocopies of pornography. These items were contraband and not permitted in the Facility. A note from an offender to Grievant was also found in the envelope. The offender asked Grievant to call members of his mother and sister because they had some tracking numbers for him. Offenders typically used tracking numbers to transfer money from one inmate to another to avoid detection by Agency employee.

On September 2, 2014, a confidential source informed Agency employees that Grievant was hiding the contraband in her desk for Inmate M.

The Intelligence Officer at the Facility watched the Rapid Eye video of Grievant's office from the time the envelope was found in Grievant's desk on August 25, 2014 until the envelope was found again on August 26, 2014. During that time, no one other than Grievant entered her office.

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

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).

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

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.

Grievant fraternized with an offender at the Facility. She was in possession of cigarettes and photocopies of pages of pornography. The Agency did not allow these items to be brought into the Facility. Grievant knew or should have known that the items were contraband. On August 26, 2014, Grievant was found in possession of the contraband. She was holding it on behalf of an inmate. Her actions showed an association with an offender to enable prohibited behavior at the Facility. 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.

Grievant argued that she did not place the envelope in her desk and that others could have entered the office when she was not present. Grievant did not testify during the hearing and, thus, the credibility of her assertion could not be measured. The evidence showed that Grievant was present on August 25, 2014 and observed the envelope when it was located by the Agency employee conducting a search. If Grievant had doubts about the contents of the envelope she likely would have attempted to determine the contents of the envelope and report finding the envelope to Agency managers. Grievant's failure to do so suggests she knew the contents of the envelope and that it was located in her office as she expected.

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 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.

⁶ Va. Code § 2.2-3005.

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 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.