

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 07/31/15; Decision Issued: 08/03/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10634; 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: 10634

Hearing Date: July 31, 2015
Decision Issued: August 3, 2015

PROCEDURAL HISTORY

On June 2, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On June 2, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 24, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 31, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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. He had been employed by the Agency for approximately 19 years. Grievant had received accommodations regarding how well he handled inmate work crews. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility sends groups of up to eight inmates out into the community to work. They are referred to as road crews. Each road crew must be supervised by a corrections officer. If the road crew is "under gun", the corrections officer must carry a shotgun and a handgun. Inmates were expected to remain 25 feet away from an officer armed with a weapon while working on a road crew. If an inmate attempts to escape from a road crew, the corrections officer is authorized to shoot and kill the inmate.

Grievant was responsible for supervising inmates working outside of the Facility on road crews. On April 22, 2015, Grievant was providing security over eight inmates working outside of the Facility on a road crew. A VDOT Foreman was also assisting Grievant. Grievant was carrying a shotgun with 9 rounds and a 40MM Glock handgun with 36 rounds of ammunition. Grievant was not authorized to give his shotgun to the VDOT Foreman unless he had to use the restroom or some other unique circumstance.

Grievant and the Inmate were "talking trash" back and forth while the offenders were cleaning out a ditch. Grievant was standing next to the VDOT Foreman. Grievant gave his shotgun and handgun ammunition magazine to the VDOT Foreman. Grievant

approached the Inmate from behind to surprise him but the Inmate realized Grievant was approaching him. The Inmate turned quickly, grabbed Grievant, and “took him to the ground” in a “playful manner.” They wrestled for a short period of time and Grievant said “let me up”. The Inmate let Grievant up. Grievant and the Inmate were laughing and joking.

When the road crew returned to the Facility, a substantial amount of contraband was found as part of a K-9 search. The VDOT bus had seven one pound bags of tobacco, two large bags of dip, a soda bottle containing what appeared to be cough syrup and numerous sandwich bags.

During the Agency’s investigation of the contraband, the Agency questioned each of the eight inmates on the road crew. One of the Inmates said Grievant would have known how the contraband got on to the bus had he not been playing with the Inmate. The Major questioned Grievant if anything unusual had happened on April 22, 2015. Grievant admitted his improper interaction with the Inmate. Grievant was not the source of the contraband and the Agency was unable to determine how and when the contraband was placed on the bus.

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 violation of DOC Operating Procedure 130.1, Rules of Conduct Governing Employee’s Relationships with Offenders.⁴ Operating Procedure 130.1 states, “fraternization or non-professional relationships between employees and offenders are prohibited.”⁵

Fraternization is defined as:

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)(y).

⁵ Virginia Department of Corrections Operating Procedure 130.1(IV)(C)(1)(a).

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 developed an inappropriate relationship with the Inmate. He developed a friendship with the Inmate such they would "trash talk". He approached the Inmate in order to surprise him in a joking or playful manner. Grievant received training regarding the importance of maintaining a professional relationship with offenders. When Grievant approached the Inmate, he was no longer supervising the Inmate he was "playing" with Inmate. The Agency has presented sufficient evidence to show that Grievant engaged in a Group III offense of fraternization.

Grievant argued that when the Inmate grabbed him, it was an assault by the Inmate. Grievant's assertion does not affect the outcome of this case. Grievant "trash talked" with the Inmate, gave his shotgun and ammunition to the VDOT Officer and placed himself in position that the Inmate would think it was appropriate to grab him. Grievant treated the Inmate in a manner different from the way he treated other inmates and in a manner not consistent with this supervisory duties. Grievant fraternized with the Inmate.

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

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

⁷ Va. Code § 2.2-3005.

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.

Grievant argued that this was an isolated incident and that the disciplinary action is too harsh. This case is unfortunate. It is clear that Grievant was a good employee for 19 years and displayed a lapse in judgment on April 22, 2015. Grievant's argument does not support reversal of the disciplinary action. Even an isolated incident may be sufficient to support disciplinary action including removal. The Agency's decision to remove Grievant from employment is consistent with the Standards of Conduct. In light of the standard set forth in the Rules, 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 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.