

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 07/23/15; Decision Issued: 08/10/15; Agency: DOC; AHO: Ternon Galloway Lee, Esq.; Case No. 10636; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10636

Hearing Date: July 23, 2015

Decision Issued: August 10, 2015

SUMMARY OF DECISION

The Agency had found that Grievant's engaged in fraternization. The Agency then issued Grievant a Group III Written Notice with removal. The Hearing Officer found Grievant engaged in the misconduct as alleged and the discipline is consistent with policy and law. Thus, the Hearing Officer upheld the Agency's discipline.

HISTORY

On May 4, 2015, the Agency issued Grievant a Group III Written Notice with termination for engaging in an intimate, sexual relationship with an offender who is on community supervision with the Agency. On June 1, 2015, Grievant timely filed her grievance to challenge the Agency's action. Thereafter, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal, effective June 24, 2015. A prehearing conference ("PHC") was held on July 1, 2015, and order addressing topics discussed during that PHC was issued on July 6, 2015. It set the hearing for July 23, 2015, at 2:00 p.m.¹

On the date and scheduled time for the hearing, the Agency appeared, but Grievant did not. Before beginning the hearing, the Hearing Officer telephoned Grievant and left her a voice mail message informing Grievant that the Agency's Advocate and Hearing Officer were located at the hearing site and ready to commence the grievance hearing. The hearing was postponed for about 20 minutes to allow Grievant time to arrive or make telephone contact. Grievant neither called in nor showed for the proceeding. Thus, the Hearing Officer held the hearing in her absence.

During the course of the hearing proceedings, the Agency was given an opportunity to present matters of concern to the Hearing Officer, make opening and closing statements, and call witnesses. Moreover, the Hearing Officer admitted Agency Exhibits 1 through 9 and its chronology of events.

During the hearing, an advocate represented the Agency.

APPEARANCES

Advocate for Agency

Witnesses for the Agency (3 witnesses)

¹This was the first date the parties were available for the hearing.

Grievant failed to appear.²

ISSUE

Was the discipline warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) §5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified in person at the hearing, the Hearing Officer makes the following findings of fact:

1. The Agency is a prison within the Department. Grievant had been employed for about four (4) years with the Agency as a correctional officer. By 2014, Grievant’s job duties included providing therapeutic counseling to offenders³ who were close to being released from the prison. (A Exh. 7; A’s Chronology).

2. In August, 2014, the Agency released Offender I to local community supervision with the Department’s probation division. (A Exh. 5).

3. On the date that Offender I was released by the Agency, Grievant provided Offender I with her telephone number. Thereafter, the two of them engaged in intimate/sexual relations from September, 2014, to October 14, 2014. (A Exh. 4, p. 1; A Exh. 5, Testimonies of Special Agent and Investigator).

4. On October 23, 2014, Grievant filed an incident report purportedly informing management of her acquaintances with three offenders. The third offender reported is the subject of this Grievance. Regarding that offender, in pertinent part, Grievant stated in her incident report the following:

(i) Offender [I], #[8999999], was previously housed at [Agency] and released from the Cognitive Community in the early Fall of 2014. Upon my employment here at Agency, I discovered Offender [I] was the same young man with whom I had formed a “friendship” in the early 1990s. His family home, at the time, was two houses from my grandparents [John and Mary Doe at 2222 Address, Town, VA]. There have been no incidents of fraternization or any improprieties during

² As noted previously here, Grievant had notice of the hearing and had agreed to the date, time, and location. However, she failed to appear for the hearing.

³ An “offender” is an inmate housed in the prison or an individual who has been released from the prison but who remains under the supervision of the Department.

or subsequent to this discovery. Our families do maintain ties and I do occasionally see Offender [I] in the community and at family gatherings (cookouts, church, etc.) Offender [I] is currently under the supervision of [Tom Jones] P&P.

I have reported this information to my previous administration and wanted the current administration to be aware of these acquaintances to avoid the appearance of fraternization or undue familiarity. At the instruction of the Warden and Assistant Warden, I submit this statement of these facts.

(A Exh. 2, p. 2; Testimonies of Assistant Warden, Special Agent, and Investigator).

5. On her October 23, 2014 incident report, Grievant mentioned nothing about having a sexual relationship with Offender I. (A Exh. 5, p. 2; A Exh. 2, p. 2; Testimonies of Assistant Warden, Special Agent, and Investigator).

6. The Agency became aware of the extent of the relationship between Grievant and Offender I when the father of Grievant's children reported it to another correctional officer employed by the Agency. This correctional officer then informed management. (A Exh. 4, pp. 2-3; A Exh. 5, p. 3).

7. Thereafter, on March 18, 2015, management placed Grievant on administrative leave with pay and notified Grievant that an internal investigation would take place regarding the allegation. (A Exh. 2, pp. 4 – 5; A Exh. 6). Among other procedures, the investigator interviewed Grievant and Offender I separately. Both acknowledged the sexual relationship took place from September 2014, to October 2014. Thus, the investigator determined that the allegation of fraternization against Grievant was established. (A Exh. 5; Testimonies of Special Agent and Investigator).

8. On April 14, 2015, Grievant received written notice of a hearing regarding the matter that was set for April 16, 2015. Grievant had previously received oral notice of this hearing as well. Moreover, on April 23, 2015, Grievant's pre-discipline leave was extended so that management could consult with the regional office of the Department. (A Exh. 2, pp. 6-7).

9. On May 4, 2015, Assistant Warden issued Grievant a Group III Written Notice with termination. The notice cited Grievant for fraternization with an offender. It described the nature of the offense as follows:

Upon completion of investigation and based on your admission [sic], you engaged in an intimate, sexual relationship with an offender who is on community supervision with the [Department]. The offender was housed at [Agency] prior [to] his release.

(A Exh. 1, p. 1).

10. In a written statement and at the Agency's hearing Grievant contended that she did not

believe her interaction with Offender I violated Agency policy because she initially became acquainted with Offender I over 20 years ago. (A Exh. 2, p. 5; A Exh. 7).

Standards of Conduct Operating Procedures

11. Fraternalization with offenders is precluded by Agency policies 130.1 and 135.1. (A Exh. 8, p. 1 and A Exh. 9, pp. 9-10).

12. The Agency had discussed Policies 130.1 and 135.1 with Grievant and she had received the policies when she was initially employed by the Agency. Subsequently, the Agency had provided Grievant, as well as other employees, with routine reminders of the policies. Thus, prior to Grievant engaging in the sexual relationship with Offender I, she had knowledge of Agency policies 130.1 and 135.1 (A Exh. 3; Testimony of Assistant Warden).

13. Policy 130.1 defines “fraternization” as follows:

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.

(A Exh. 8, p. 1).

14. Under Policy 135.1, fraternization with an inmate is a Group III offense which normally warrants termination. (A Exh. 9, p. 9-10).

15. The Agency maintains a zero (0) tolerance policy for employees engaging in fraternization. Historically, employees found to have engaged in this conduct are terminated at the first occurrence. (Testimony of Assistant Warden).

16. Grievant’s annual performance evaluation in 2013 rated her as “exceeds expectation,” and her 2014 annual evaluation rated her as a “contributor.” (A Exh. 7).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee’s ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth’s grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁴

The Commonwealth of Virginia Department of Corrections Operating Procedure sets forth the Commonwealth’s Standards of Conduct and disciplinary process that the Department of Corrections (“DOC”) must employ to address unacceptable behavior, conduct, and related employment problems in the workplace.⁵

These standards group offenses in three categories – Group I, Group II, and Group III offenses. The least severe are noted as Group I violations of workplace conduct; Group II offenses are more severe; and Group III offenses are the most severe normally warranting termination for a first offense.⁶ When circumstances warrant it, management may mitigate discipline if in its judgment it is proper to do so.⁷

As stated previously, Agency management issued Grievant a Group III Written Notice with termination. The Hearing Officer examines the evidence to determine if the Agency’s discipline was warranted and appropriate under the circumstances.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?

The evidence establishes that by Grievant’s own admission and Offender I’s confirmation, the two of them engaged in sexual relations from September 2014, to October 2014. Moreover, the evidence shows that Offender I remained under the supervision of the Department as he had been released in August 2014, from the Agency and was on probation with a local probation office serving the Department. Hence, this evidence demonstrates that the recently released inmate was considered an offender. As such, Grievant’s conduct with this

⁴ Grievance Procedural Manual §5.8

⁵ Virginia Department of Corrections Operating Procedure 135.1

⁶ Virginia Department of Corrections Operating Procedure 135.IV.

⁷ *Id.*

offender constituted fraternization. Hence, Grievant's behavior violated Agency policies 130.1 and 135.1. Accordingly, the Hearing Officer finds that Grievant engaged in the conduct alleged and it was misconduct.

Having made this finding, the Hearing Officer is cognizant of evidence and Grievant's assertion that she told her superiors that she thought the relationship was acceptable because she had known Offender I for over 20 years. The Hearing Officer notes that Grievant was well aware of the applicable policies prohibiting fraternization before she engaged in the misconduct. Those policies did not provide for the exception Grievant has offered to support her conduct. Accordingly, Grievant's argument fails to persuade this Hearing Officer that her behavior was acceptable.

B. Was the discipline consistent with policy and law?

The evidence shows that the applicable policies demonstrate that fraternization is a group III offense. Further the Agency has established a zero tolerance for such misconduct. Also, systematically an employee who engages in this misconduct is terminated. The evidence shows that Grievant was given the exact discipline any other employee would have received. Hence, the Hearing Officer finds the Agency's discipline is consistent with policy and law.

II. Mitigation

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”⁸ EDR's *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”⁹ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.¹⁰

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three

⁸ Va. Code § 2.2-3005 and (C)(6)

⁹ *Rules for Conducting Grievance Hearings* VI(A)

¹⁰ *Rules for Conducting Grievance Hearings* VI(B). The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the “exceeds the limits of reasonableness” standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionable disproportionate, abusive, or totally unwarranted.¹¹

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice, the behavior was misconduct, and the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable and therefore should be mitigated. Although Grievant failed to appear for the hearing and offered no exhibits on her behalf, the evidence does show that she had been employed with the Agency for 4 years. Further, her annual performance ratings for 2013 and 2014 were “exceeds expectations” and “contributor,” respectively. In contrast, the evidence establishes that Grievant was not forthright with the Agency about her relationship with Offender I. Moreover, the Agency has legitimate and compelling business reasons to prohibit fraternization between employees and offenders. For example, such relationships could greatly compromise the institution's security and could foster showing favored treatment to offenders who are the subject of the fraternization or their friends who are also offenders within the Department.

Thus, having carefully considered all evidence of record, whether specifically mentioned or not, the Hearing Officer cannot find the Agency acted without reason.

DECISION

Accordingly, for the reasons provided here, the Agency's Group III Written Notice with termination 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, Departmental of Human Resource Management

¹¹ *E.g., id.*

101 N. 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 N. 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.¹²

Entered this 10th day of August, 2015.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate
Grievant
EDR

¹² Agencies must request and receive prior approval from EDR before filing a notice of appeal.