

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 12/16/16; Decision Issued: 12/21/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10905; 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: 10905

Hearing Date: December 16, 2016

Decision Issued: December 21, 2016

PROCEDURAL HISTORY

On September 16, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternizing with an inmate.

On October 11, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 7, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 16, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Psychology Associate I at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received training and was aware of her obligation to refrain from fraternizing with inmates.

Grievant had been treating the Inmate for PTSD. She met with him on a weekly basis for several months.

On June 17, 2016, Grievant was in her office with the Inmate. Grievant approached the door and was facing the door. The Inmate was directly behind Grievant and he placed his hands on her waist.

Officer T was making his rounds and delivering a tray of food to the Inmate. He approached Grievant's office. Grievant's office door was closed. The door had a window of approximately one square foot located towards the top. Officer T looked into the window and downward. He observed Grievant and the Inmate. Officer T could see the front of Grievant from approximately her shoulders up. Her hands were pressed against the door. The Inmate's body was pressed against Grievant's body. Officer T observed that Grievant had her eyes closed. Her mouth was parted slightly. The Inmate had his chin downward and placed his lips on Grievant's neck. The Inmate kissed the middle of Grievant's neck and then a little bit lower and again a little bit

lower.¹ The length of time between each kiss was approximately a half to a full second. Officer T watched Grievant's expressions and believed she was "enjoying it."

The Inmate looked upward and noticed Officer T look through the window. The Inmate stopped. Grievant looked up and saw Officer T through the window. Grievant exclaimed "sh-t!" or "f—k!" Officer T interpreted Grievant's action to be an admission of being caught doing something wrong. Grievant opened the door and Officer T delivered the tray of food. Grievant did not show any signs of distress or ask for help. Grievant and the Inmate remained silent. Officer T left the unit to report the incident to the Captain.

Grievant walked out of her office and down the hall to the copy machine. She copied some documents she wanted to give to the Inmate. She returned to her office and gave the items to the Inmate. She instructed the Inmate to leave and he left her office.

Grievant called the Captain. Grievant told the Captain "I messed up." The Captain instructed Grievant to report to his office. When she met with the Captain, the Captain asked her several questions about the incident and asked her to write a statement. She then left the Facility.

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."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

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,

¹ Officer T testified that he observed Grievant being kissed two or three times.

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

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

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

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

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.

The Agency has established that Grievant fraternized with the Inmate. On June 17, 2016, she was kissed two or three times on the neck by the Inmate without stopping the Inmate or displaying any objection to his actions. She appeared to be "enjoying it." When she realized Officer T was observing her, she cursed as if recognizing she had been caught doing something wrong. She spoke with the Captain and admitted, "I messed up." Grievant's behavior is consistent with having a personal relationship with the Inmate and being caught having that relationship. 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 when the Inmate touched her she "froze" and that what Officer T saw was not her enjoying the moment but rather her freezing in response to the Inmate's action. Grievant claimed she was the victim of the Inmate's assault. She claimed her statement that she "messed up" was about permitting the Inmate to get behind her as she was opening the door to let him out.

Although it is possible Grievant's version of events is accurate, the Agency has established by a preponderance of the evidence that she fraternized with the Inmate for several reasons. First, Grievant's demeanor was consistent with someone enjoying the interaction, not someone objecting to it. Second, she cursed only after realizing that she was being observed by Officer T. She did not curse in response to the Inmate kissing her. Third, she did not ask Officer T for assistance or ask him to remove the Inmate. Fourth, when she spoke to the Captain she said, "I messed up" which appeared to be an admission that she made a mistake by failing to stop the Inmate from kissing her.

Grievant argued she was denied due process. Grievant argued she did not receive the Agency's due process letter and notice of the disciplinary hearing date before the Warden. The evidence showed that Grievant was called and asked to come

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

to the Facility. The Warden held a disciplinary hearing. After hearing Grievant's comments, the Warden presented Grievant with a Group III Written Notice with removal. Although the due process afforded to the Grievant by the Agency may have been imperfect, Grievant was given an adequate opportunity to present her explanation of what happened. The Agency did not violate Grievant's right of due process.

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.

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.

⁶ Va. Code § 2.2-3005.

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.