



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11471**

Hearing Date: March 4, 2020

Decision Issued: April 10, 2020

#### **PROCEDURAL HISTORY**

On November 18, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On December 5, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 23, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 4, 2019, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Lieutenant at one of its facilities. She had been employed by the Agency for approximately 20 years. The Warden described Grievant as a really good employee except for the facts giving rise to this grievance.

Grievant worked in an office inside a Facility. When Grievant was in the office, the unit manager, security staff, and the counselor would enter and exit the office throughout the day.

The Inmate worked as a house manager in the office where Grievant worked. Grievant did not select him for the position. He was responsible for cleaning, taking care of building supplies, counting food carts, and several other duties relating to inmates. When he was working, either Grievant or Lieutenant T was to supervise the Inmate. Grievant was not always present when the Inmate was in the office. In those instances, Lieutenant T would be responsible for supervising the Inmate. Even when Grievant was in the office, she might not be responsible for supervising the Inmate.

The Inmate told the Investigator he was in the office sometimes five to six hours a day. The Inmate could not remain the office all day. He had to leave the office to participate in count and performed duties in the housing unit. Grievant was notified on September 30, 2019 that she was supposed to search the Inmate (and any other

inmates) coming into the office. The Inmate had to be in his cell during count. Count occurred several times each day. Grievant worked at least one day prior to October 10, 2019 when she failed to search the Inmate upon his entry into the office.

The Inmate was infatuated with Grievant claiming he loved her and wanted to marry her. The Inmate was over ten years younger than Grievant.

The Agency received an anonymous tip about Grievant and the Inmate. The Agency searched the Inmate's cell and discovered numerous items he was not supposed to have. For example, the Inmate had the Warden's telephone number even though the Warden did not give the Inmate that information. The Inmate had numerous documents relating to Grievant because he was obsessed with Grievant.

Grievant previously worked in a different housing unit. She placed items she had at the first housing unit into a "banker's box" and took them with her to the second housing unit. Grievant placed the box in a closet in the office. The Inmate had access to the closet to obtain cleaning supplies. He could obtain items from the box when either Grievant or Lieutenant T was not supervising him closely. The Inmate told the Investigator he had been advised not to go through any boxes, but said, "Well I moved those things." Grievant did not authorize the Inmate to take any items from the box. The Investigator did not ask Lieutenant T if he gave any of the items in the box to the Inmate.

The Agency Investigator interviewed the Inmate on October 9, 2019 and October 10, 2019. He told the Investigator that he cared for Grievant and that many of the items located in his cell came from Officer J.<sup>1</sup> The Inmate told the Investigator he had asked Officer J to look up information on Grievant and let him see it. He said that Officer J allowed him to go to the interview room. Officer J would access mylife.com to look up information on Grievant and other people including Officer T for the Inmate. The Inmate wrote down Grievant's birthdate as November 1 because November 1 was listed as her birthdate on the website. Grievant's birthday was not November 1<sup>st</sup>. The Inmate had a calendar where he wrote Grievant's birthday as November 11. The Inmate had a note where he had written Grievant's home address and telephone number.

The Inmate told the Investigator he obtained Grievant's CPR certificates from inside of a composition book. He later said the certificates were in a box in the office.

The Inmate told the Investigator he never asked Grievant for anything. The Inmate claimed he had information on Grievant's vehicle from the website Officer J showed the Inmate. When asked if Grievant knew that the Inmate had personal information on Grievant to include her children's names, her father's names, etc., the Inmate said Grievant did not know that and that he did not get that information from her.

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<sup>1</sup> Officer J was removed from employment on December 9, 2019 for reasons other than providing information to an inmate.

Grievant intended to consolidate her bills so she wrote out the payee names of all her credit card and other accounts. She kept the document in her day-planner which she placed on her desk when she was working. She did not know that the Inmate had taken her list. When asked about how he obtained the list containing the retailer names of Grievant's accounts and bills, the Inmate initially stated he did not recall where he obtained the information. The Inmate said the bills belonged to Grievant and he had gotten the list in a box. He later said he had gotten the list from Grievant and put it in a box and then got it later.

When asked how the Inmate knew where Grievant worked part-time, the Inmate said, "Well, I've known that for a while" from people talking. When asked why he had Officer T's information and Ms. D's personal email address, the Inmate said, "Some of that I just grabbed." He said sometimes he takes responsibility for staff's belongings and that sometimes he grabs things he did not mean to grab.

The Inmate said he spent a lot of time talking to Grievant in the office. He said he obtained information about Grievant's vehicles from Grievant. Grievant denied providing the Inmate with her personal information.

When asked about a memorandum sent by the Major, the Inmate said that Lieutenant W gave the memorandum to him. He said he knew he was not supposed to have the memorandum. The memorandum stated that effective September 9, 2019, most offenders would not be allowed to frequent the second and fourth floors of the housing unit.

The Inmate had a drawing showing his first name and Grievant's first name. The Inmate told the Investigator he had obtained the paper from the fourth level and had another offender make the drawing.

The Inmate had a photo of Grievant and other officers. The photo was taken when Grievant worked at another facility. Grievant kept the photo in a box in a storage area. The Inmate told the Investigator the photo came from an old box that "I shouldn't have never had." He said Grievant did not give him the photo.

The Inmate had a composition book and pen to write. The Inmate told the Investigator he obtained the pen out of a cabinet and not from Grievant. The Inmate had written a letter to Grievant in the composition book professing his love for Grievant. He did not give the letter to Grievant. Grievant did not receive the letter and was not aware of it. The Inmate wrote a note to Grievant and on the side of the page appeared "I love you!!!" written in green ink. The writing appears to be the Inmate's writing.<sup>2</sup>

The Inmate had a bag containing snacks. The Inmate told the Investigator it was Grievant's bag and it was left out and he took it.

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<sup>2</sup> For example, the word "you" written in green ink shows the "ou" as a "w." The Inmate repeatedly wrote "you" and often the "ou" appeared as a "w."

The Inmate had a calendar showing when staff worked. The Inmate told the Investigator he obtained the calendar from the office.

The Inmate had a usb charging cord. He told the Investigator he obtained it from a trashcan and used it to charge his JP5 player.

The Inmate had Internal Incident Reports written by Grievant. The Inmate told the Investigator the reports were in a "pink clip and when I grabbed I just that's what I had. I didn't intend to do anything with it." The Incident Report was on a bulletin board where everyone coming into the office could see it. Grievant did not give the document to the Inmate.

The Inmate had a post-it note with shoe sizes written on the note. It showed a woman's shoe size of 8.5. The Inmate told the Investigator the sizes were Grievant's shoe sizes and that Grievant provided him with the information. The Agency was unable to determine whose handwriting appeared on the note. Grievant told the Investigator her shoe size was 9.

When asked if he had any physical contact such as holding hands, touching back, etc. with Grievant, the Inmate told the Investigator "Not that I can recall. I haven't had sex with her. I haven't kissed her." The Inmate said he had not made sexually explicit comments to Grievant.

The Inmate believed he was on the edge of "walking" (being released from prison) because someone else had confessed to his crimes for which he was incarcerated. No evidence was presented to confirm the Inmate's belief.

The Inmate said he and Grievant had a conversation about her bills and then Grievant wrote down her bills to provide it to the Inmate. The Inmate said he put it in a box and got it from that box later.

The Inmate said he obtained a piece of paper that contained Grievant's name and other information from a trashcan.

The Inmate had written down information about a corrections officer working at the Facility. He had written email addresses including Grievant's email address. He had written Grievant's Aunt's name. The Inmate said he knew about Grievant's aunt because people talk and he knew Grievant's aunt worked in the kitchen. The Inmate said that conversation about Grievant's husband "was probably overheard."

The Inmate had Grievant's CPR certificate. The Inmate told the Investigator it was inside a book outside of a supervisor's office.

On October 7, 2019, Inmate H went to the office where Grievant was working. Inmate H was an "older" inmate. The Inmate was also in the office. Inmate H wanted ice

and Grievant said she would provide it to him. In response, Inmate H told Grievant “I love you and I appreciate all you do for us in the housing unit.” Grievant replied to Inmate H, “I love you too. Come on, let’s go get the ice.” Grievant did not take Inmate H “seriously.” When the Inmate heard Grievant’s comment, he told Grievant, “I love you too.” Grievant did not reply to the Inmate. The Investigator did not infer a romantic relationship between Grievant and Inmate H.

Grievant was trained to report if an inmate said “I love you” to her. She could have reported the Inmate’s comments to the Watch Commander when she ended her shift on October 7, 2019.

The Investigator asked the Inmate how he obtained Grievant’s computer log in user identification. The Inmate said he did not know.

The Inmate told the Investigator he got things off of the copier for Grievant and both shifts allowed him to do that even though he knew he was not supposed to do so.

Grievant completed her shift on Monday, October 7, 2019 and left the Facility. Grievant reported to work on October 10, 2019 and went to the morning briefing. She was told to report to the administration building. The Investigator interviewed Grievant on October 10, 2019. Grievant “volunteered” to the Investigator information about her interaction with Inmate H and Grievant.

The Counselor worked on the second floor in an area adjacent to where Grievant worked. She did not supervise the Inmate. She was concerned because it seemed like the Inmate was “always” in the office. She observed Grievant and the Inmate sometimes sitting close and talking. She did not know what they were talking about. When she came into the room the Inmate would move away from Grievant although he did not always do so. The Counselor preferred to keep inmates an “arm’s distance” from her. The Counselor told Lieutenant T of her concerns about Grievant and the Inmate.

The Counselor did not observe any physical contact between Grievant and the Inmate. She did not hear any inappropriate conversations between Grievant and the Inmate. She did not know if Grievant called for the Inmate to come to the office or if the Inmate simply chose to go to the office.

## **CONCLUSIONS OF POLICY**

The Agency alleged Grievant fraternized with the Inmate. 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, connections on social media, and employees, non-work related

relationships with family members of offenders, discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.<sup>3</sup>

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.

Female corrections officers working in prisons with male offenders sometimes receive additional attention from inmates that male corrections officer might not receive. An employee cannot be disciplined for additional inmate attention arising from the employee's gender. An employee can only be disciplined based on the employee's behavior.

The Inmate was infatuated with Grievant. He told the Investigator he loved Grievant. The Inmate did not testify during the hearing. To the extent his statement to the Investigator were exculpatory, the Agency is bounded by his statements regardless of his credibility because the Agency cannot rise above its own evidence. To the extent his statements to the Investigator were accusatory, his statements should not be believed when Grievant presented credible testimony and other evidence to reject them.

Whether Grievant engaged in fraternization depends on what items and information she gave to the Inmate or allowed the Inmate to have and not on what items and information he obtained without Grievant's knowledge or permission. The Inmate showed a pattern of theft of items relating to Grievant. The Inmate took numerous items he should not have had. The Inmate took Grievant's bag of snacks. He took a picture of her with her former co-workers. He took an incident report she had written. The Inmate's willingness to steal from Grievant does not indicate that Grievant fraternized with the Inmate. Indeed, no credible evidence was presented to show that Grievant gave any items to the Inmate.

No credible evidence was presented showing that Grievant knowingly allowed the Inmate to obtain items relating to her. For example, the Inmate removed items from a box belonging to Grievant. The box was located in a closet and it is not clear who was responsible for supervising the Inmate when he removed items from the box without permission.

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<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.2, Rules of Conduct Governing Employees' Relationships with Offenders.

The items in the Inmate's possession were not sufficient to show that Grievant fraternized with the Inmate.

The Inmate obtained personal information about Grievant such as her home address, vehicle type, and telephone number. No credible evidence was presented showing Grievant provided the Inmate with her personal information. The Inmate obtained most of Grievant's personal information by viewing a website.<sup>4</sup> The Inmate was permitted to view the website by Officer J – not by Grievant.

The evidence showed that the Inmate wrote a letter to Grievant professing his love for her and his expectation that they would marry. The Inmate did not deliver the letter and there is no evidence showing Grievant was aware of the letter prior to its discovery by the Agency. The Inmate's expressions of affection for Grievant did not show Grievant fraternized with the Inmate. Only Grievant's expression of affection for the Inmate would be evidence of fraternization. No credible evidence was presented showing that Grievant felt love for the Inmate.

The Agency presented testimony from the Counselor who noticed that Grievant and the Inmate were too friendly. She observed them sitting closely and speaking. When she entered the room, they reacted as if they knew they were doing something wrong. The Counselor could not hear what Grievant and the Inmate were discussing. Grievant's "body language" in this case is not sufficient to support a Group III Written Notice for fraternization.<sup>5</sup> It is sufficient to support the issuance of a Group I Written Notice for unsatisfactory performance.<sup>6</sup> Grievant should not have placed herself in a position where another employee would reasonably question her interaction with an offender.

The Agency presented evidence showing that on at least one day, Grievant did not search the Inmate prior to his entry into the office. The Written Notice cannot be read to charge Grievant with failure to follow instruction, a Group II offense. There is no reason to believe that Grievant granted a special privilege (a Group III offense) to the Inmate because no evidence was presented showing Grievant treated the Inmate differently from any other inmate entering the office. In other words, it appears that Grievant failed to search all inmates entering the office and not just the Inmate.

The Agency presented evidence showing that on October 7, 2019, Grievant told Inmate H "I love you too" and that the Inmate told her he loved her. The Agency did not discipline Grievant for her interaction with Inmate H. Grievant "volunteered" information

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<sup>4</sup> The Agency presented a printout of Grievant's information available on mylife.com. The Agency heavily redacted that information making it difficult to determine what information was available on the website.

<sup>5</sup> Without knowing the topic of their conversation, it is not possible to measure the depths of inappropriate conversations.

<sup>6</sup> Grievant's interaction with the Inmate would be a "lesser included offense" within a Group III Written Notice for fraternization.



about her interaction with Inmate H and the Inmate on October 10, 2019. The Agency established that Grievant failed to immediately report to the Watch Commander the Inmate's comment to Grievant. Grievant's failure to timely report the Inmate's comment to the Watch Commander is sufficient to support the issuance of a Group I Written Notice for unsatisfactory work performance.<sup>7</sup> Accordingly, the disciplinary action must be reduced from a Group III Written Notice to a Group I Written Notice.

*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 ...."<sup>8</sup> 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 further.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because she is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

## 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 **reduced** to a Group I Written Notice. The Agency is ordered to **reinstate** Grievant to Grievant's former position, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the

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<sup>7</sup> The Agency indicated employees were trained on timely reporting of such comments. It did not identify a policy requiring this behavior. Thus, there is no basis to support the issuance of a Group II Written Notice.

<sup>8</sup> *Va. Code § 2.2-3005.*

period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**

**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 11471-A**

Addendum Issued: June 1, 2020

**DISCUSSION**

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.<sup>1</sup> For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.<sup>2</sup>

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's attorney submitted a petition showing that he devoted 20.60 hours towards representing Grievant. EDR sets the rate of reimbursement at \$131 per hours. Accordingly, Grievant should receive attorney's fees in the amount of \$2,698.60.

**AWARD**

Grievant is awarded attorney's fees in the amount of \$2,698.60.

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<sup>1</sup> Va. Code § 2.2-3005.1(A).

<sup>2</sup> § 7.2(e) Department of Human Resource Management, *Grievance Procedure Manual*, effective August July 1, 2017. § VI(E) EEDR *Rules for Conducting Grievance Hearings*, effective July 1, 2017.

## APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer