



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11722

Hearing Date: November 10, 2021
Decision Issued: November 30, 2021

PROCEDURAL HISTORY

On June 24, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization with an Inmate.

On July 16, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 2, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 10, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
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. 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 Officer at one of its locations. She had been employed by the Agency for approximately five years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant and the Inmate were friends in high school. They dated for over a year. A mutual friend of Grievant and the Inmate gave Grievant's personal cell phone number to the Inmate. The Inmate wanted to check up on Grievant and see if there was a chance of re-establishing their relationship.

Grievant worked at Facility 1. The Inmate was incarcerated at Facility 2. The Inmate called Grievant's cell phone number. He called Grievant 75 times from March 23, 2021 to April 20, 2021. Grievant knew she was receiving telephone calls from an Inmate in a corrections facility. Several of the calls lasted between 10 and 20 minutes.

Grievant used the Agency's database, VACORIS, to look up what crime the Inmate had committed. She learned that the Inmate was incarcerated for first degree murder and that he was a gang member. She was not authorized to use VACORIS for that purpose. Once Grievant learned the Inmate had been convicted of murder, she stopped accepting his calls.

Grievant knew she needed permission to write and visit the Inmate. She did not realize she needed permission to speak with the Inmate by telephone.

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.” 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.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”¹

Group III offenses include:

Fraternization or non-professional relationships with inmates/probationers/parolees who are 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 Chief of Corrections Operations (CCO) or as designated to the Deputy Director for Administration or respective Regional Operations Chief (ROC) on a case by case basis, see Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Offenders.²

Fraternization is defined as:

Employee association with offenders, their family members, or close friends of offenders, 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 or close friends of offenders, connections on social media, discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.³

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:

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

² Virginia Department of Corrections Operating Procedure 135.1(XIV)(B)(31).

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

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 the Inmate. She had a friendship with the Inmate prior to his incarceration. Grievant received 75 calls from the Inmate from March 23, 2021 to April 20, 2021. Many of the calls lasted from 10 to 20 minutes. The number and length of the calls showed that Grievant and the Inmate maintained a friendship including discussion of non-work related matters. Grievant did not obtain permission from the Agency to contact the Inmate. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for fraternization. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued she was not in a relationship with the Inmate. Although Grievant may not have been in a romantic relationship with the Inmate, she was having non-work related conversations with the Inmate consistent with a friendship. Having a friendship with an Inmate meets the definition of fraternization.

Grievant argued she knew she needed permission to write or visit the Inmate but did not know she needed permission to speak with him by telephone. The evidence showed that Grievant received notice of the Agency's policy. Nothing in the policy distinguishes between methods of contacting an 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"⁴ 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.

Grievant argued the Agency inconsistently applied disciplinary action. She referred to examples of behavior but did not present sufficient detail for the Hearing Officer to conclude that other employees who engaged in fraternization were treated differently by

⁴ Va. Code § 2.2-3005.

the Agency. 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 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 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 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.^[1]

[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].

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer