

Issue: Group III Written Notice with Termination (Fraternization); Hearing Date: 08/18/16; Decision Issued: 08/23/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10843; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 09/06/16; EDR Ruling No. 2017-4414 issued 09/15/16; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 09/06/16; DHRM Policy Review Ruling issued 09/22/16; Outcome: AHO's decision affirmed.



# ***COMMONWEALTH of VIRGINIA***

***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10843**

Hearing Date: August 18, 2016  
Decision Issued: August 23, 2016

### **PROCEDURAL HISTORY**

On June 16, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On June 25, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 12, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 18, 2016, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's 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. 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 Lieutenant at one of its facilities. He had been employed by the Agency for approximately 20 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant met the Inmate's Mother at a store where she worked. At the time he met her, he did not know she had a son who was an inmate at the Facility where he worked.

On Sunday March 6, 2016, the Mother visited her son at the Facility in the visitation room. Grievant approached the table where they were sitting and spoke to them. Grievant left the visitation room. Later he asked the Inmate to tell him the Mother's telephone number. During a telephone conversation between the Inmate and his Mother later in the day on March 6, 2016, the Inmate told his Mother that Grievant wanted her telephone number.

Sometime after March 6, 2016, Grievant called the Mother and said "Do you know who this is?" The Mother said, "I don't have a clue. And I don't like playing guess who this is." Grievant said he met her Sunday when she was visiting one of her sons. The Mother said, "Ok." Grievant said the Inmate "gave me your number." The Mother said, "He did?" Grievant said "yes" the Inmate gave him the Mother's telephone number. Grievant asked "Is this a good time to speak?" The Mother said no this is not a good time because she was visiting her mother. Grievant said he was a very private person. The Mother said, "I am too!" Grievant said "You have my number and can call

me back.” The Mother said, “That won’t happen.” Grievant said, “Call me when you get a chance.” The Mother ended the telephone call.

The Agency investigated the relationship between Grievant and the Mother. On April 27, 2016, Grievant told the Investigator he continued to text the Mother from time to time. Grievant had a “new” cell phone. He showed his cell phone to the Investigator who observed there were two missed calls from the Mother’s telephone and that Grievant just received a text from the Mother on April 26, 2016. On May 2, 2016, Grievant told the Investigator he met the Mother in February or March, told her he was attracted to her, and asked for her telephone number.

### **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.”<sup>1</sup> 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.”<sup>2</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>3</sup>

Group III offenses include, “[f]raternization or non-professional relationships 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 respective Regional Operations Chief on a case by case basis.”<sup>4</sup>

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, children, work, etc.) with offenders, or engaging in romantic or sexual relationships with offenders.<sup>5</sup>

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D)(2)(ee).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 130.1(III), Rules of Conduct Governing Employees’ Relationships with Offenders.

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 presented sufficient evidence to show that Grievant fraternized with an offender's family member. Grievant was attracted to the Mother. He knew she was a relative of an inmate when he called her. He called her after seeing her on March 6, 2016 with the objective of establishing a relationship with her. The Mother called Grievant after March 6, 2016 and sent Grievant several text messages. 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 the Agency had not presented sufficient evidence to show that he contacted the Mother after he knew she was related to the Inmate on March 6, 2016. The evidence presented by the Agency was not rebutted by Grievant who did not testify. The Agency presented voice recordings of the Mother describing Grievant's telephone contact with her. No evidence was presented to show that the statements she made during her telephone conversations with the Inmate were untrue.

Grievant argued that when he first met the Mother, he did not know she was related to an offender. When he met her on March 6, 2016, he realized she was related to an offender. Grievant claimed he told the Mother he could not talk to her any more. The evidence does not support Grievant's argument. On March 6, 2016, the Inmate revealed to the Mother during a telephone call that Grievant wanted to call and speak with her. During subsequent telephone calls, the Mother confirmed that Grievant called her.

Grievant argued that he did not receive adequate procedural due process. The evidence showed that the Agency provided him with notice of a pre-disciplinary hearing and afforded him the opportunity to present any witnesses and defenses. The Agency issued Grievant a Group III Written Notice identifying its basis for discipline and removal. The Agency provided Grievant with adequate procedural due process. Even if the Hearing Officer were to assume that Grievant was denied procedural due process by the Agency, the hearing process has cured any such defects. Grievant was provided with the Agency's list of witnesses and documents at least four days prior to the hearing. Grievant was allowed to present any evidence and make any arguments he wished during the hearing. Grievant has been given adequate notice of the allegations against him and sufficient opportunity to rebut those allegations before an independent and impartial Hearing Officer.

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>6</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.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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

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<sup>6</sup> Va. Code § 2.2-3005.

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 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 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.<sup>7</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>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.