



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11808

Hearing Date: July 11, 2022
Decision Issued: July 27, 2022

PROCEDURAL HISTORY

On February 3, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for engaging in an inappropriate consensual relationship with a subordinate.

On February 10, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 7, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 11, 2022, 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 Captain at one of its facilities. From July 2020 to February 2021, he worked as a Lieutenant. No evidence of prior active disciplinary action was introduced during the hearing.

Sergeant P began as an Officer but was promoted to Sergeant. She was in Grievant's chain of command and of subordinate rank. Sergeant P sometimes worked on Grievant's shift.

The Agency began investigating an allegation about fraternization between Sergeant P and an inmate. On October 20, 2021, the Inmate alleged Grievant and Sergeant P were involved in an intimate relationship. During that investigation, Sergeant P disclosed to the Investigator that she and Grievant had been involved in a personal and sexual relationship from July 2020 to February 2021. She claimed to have had sexual relations with Grievant at his house over 20 times and at a hotel once. The Agency investigated the relationship between Grievant and Sergeant P.

Grievant told the Investigator he was not involved in a romantic relationship with Sergeant P. Grievant admitting to sending sexually explicit text messages, photos, and

videos including some showing his genitals to Sergeant P. Grievant stated that Sergeant P sent him pictures of her breasts and genitals.

From July 13, 2020 through October 12, 2021, Grievant and Sergeant P exchanged more than 70 text messages and had over 800 telephone calls.

Grievant and Sergeant P exchanged gifts. Grievant gave Sergeant P a necklace for her birthday. He gave her \$150.

Grievant and Sergeant P went on dates to restaurants and casinos.

Sergeant P was removed from employment by the Agency. She refused to testify at the hearing.

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

Operating Procedure 135.3 governs Standards of Ethics and Conflict of Interest. Section VIII(E) provides:

Supervisors are strictly prohibited from dating or engaging in romantic or sexual relationships with subordinates. A subordinate includes anyone in a supervisor's direct chain-of-command.

Failure to promptly report the relationship could result in disciplinary action under Operating Procedure 135.1, Standards of Conduct.

Initiation of, or engagement in romantic or sexual relationship with a subordinate is a violation of Operating Procedure 135.1, Standards of Conduct, and will be treated as a Group I, Group II, or Group III offense depending on the impact on the work environment.

Group III offenses include:

Violation of Operating Procedure 135.3, Standards of Ethics and Conflict of Interest, relating to Consensual Personal Relationships/Sexual Harassment

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

in the Workplace, including but not limited to failing to report an intimate romantic or sexual relationship with a subordinate

Grievant dated and engaged in a romantic and sexual relationship with Sergeant P from July 2020 to February 2021. Grievant held superior rank to Sergeant P. They sometimes worked on the same shift. Grievant did not disclose the relationship to the Agency. The Agency has presented sufficient evidence to support its decision to issue Grievant a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant denied having a romantic or sexual relationship with Sergeant P. Grievant did not testify during the hearing. Grievant's admissions to the Investigator are sufficient to confirm Sergeant P's statements to the Investigator that they were having a sexual relationship. Grievant admitted to sending to Sergeant P sexually explicit text messages, photos, and video including pictures of his genitals.

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 ..."² 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 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.

² Va. Code § 2.2-3005.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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