



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11846

Hearing Date: October 21, 2022

Decision Issued: October 24, 2022

PROCEDURAL HISTORY

On May 24, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for being charged with a crime against a person.

On May 31, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 27, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 21, 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 Probation Officer I at one of its locations. He began working for the Agency on November 25, 2018. No evidence of prior disciplinary action was introduced during the hearing. Grievant was born in 1980.

On May 16, 2022, Grievant was arrested by "WARRANT OF ARREST – FELONY." He was charged with feloniously violating Va. Code § 18.2-61, Rape. The Warrant of Arrest alleged Grievant committed rape by having sexual intercourse with a 15 year old juvenile. The Warrant of Arrest stated, "[INVESTIGATOR] SPOKE WITH THE ACCUSED WHO ADMITTED HAVING SEXUAL INTERCOURSE WITH THE ABOVE JUVENILE AND THAT IT WAS AGAINST THE LAW AND A MISTAKE."¹

The Agency initiated disciplinary action and presented Grievant with an opportunity to respond. Grievant responded to the possible disciplinary action by describing his history of depression and stating:

I allowed myself to get in to a position that I never should have been in and made a horrible decision but I did not rape that young lady. I am not sure why she is claiming that I did, my only guess at this point is she regretted

¹ Agency Exhibit p. 8.

the decision she made, which explains why she decided to remain at my home for 13 hours after it happened before making a claim of rape. I will not deny that I did not make the best decisions that night and I am aware that at some point I will need to answer for those decisions.²

The Agency considered Grievant's statement to be an admission he had sexual intercourse with the 15 year old female.

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."³

Operating Procedure 135.1 Section VI:

C. Charges or situations that involve crimes against persons are subject to a disciplinary charge that could include termination.

D. A conviction is not necessary to proceed with a disciplinary action. The Unit Head must determine whether the evidence is sufficient to have an impact on the DOC, its employees, and the public and its perception of the DOC.

Section XIV(B)(30) defines Group III offenses to include, "Charges or situations that involved crimes against a person." Rape is a crime against a person. Grievant denied raping the 15 year old female but admitted to having sexual intercourse with her and that his doing so was a crime and a mistake. The Agency's Warden determined that Grievant held a position of power over probationers and that employing someone who had sexual intercourse with a 15 year old would place those probationers at risk of harm and adversely affect the Agency's reputation. The Agency has presented sufficient evidence to show that Grievant was charged with a crime against a person such that Grievant should receive a Group III Written Notice. Upon the issuance of a Group III Written Notice, an employee may be removed from employment. Accordingly, the Agency's decision to remove Grievant must be upheld.

² Agency Exhibit p. 10.

³ See, Virginia Department of Corrections Operating Procedure 135.1.

Grievant argued that he has not been indicted or convicted of a crime. There is no reason to dispute Grievant's assertion. The Agency, however, is not obligated to show that Grievant was indicted or convicted of a crime in order to support its disciplinary action.

Grievant argued that he suffered from depression and that the Agency failed to fully consider his mental health concerns. The evidence showed that Grievant did not seek any accommodation from the Agency for depression. Although Grievant's depression may have contributed to his behavior, it does not excuse his behavior or render the Agency's disciplinary action invalid.

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. 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.

Please address your request to:

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

⁴ Va. Code § 2.2-3005.

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.