

Issues: Group III Written Notice (fraternization and failure to follow policy), Group III Written Notice (falsifying statements), and Termination; Hearing Date: 09/13/18; Decision Issued: 09/24/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11241; Outcome: Partial Relief; **Administrative Review Requests received on 10/05/18 from Grievant, and on 10/10/18 from Agency: EDR Ruling No. 2019-4793, 2019-4797 issued 11/21/18; Outcome: Remanded to AHO; Reconsideration Decision issued 11/26/18; Outcome: Second Group III Written Notice with Termination for falsifying statements is Upheld.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11241

Hearing Date: September 13, 2018

Decision Issued: September 24, 2018

PROCEDURAL HISTORY

On May 30, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for engaging in a prohibited romantic relationship. On May 30, 2018, Grievant was issued a second Group III Written Notice of disciplinary action with removal for falsifying statements.

On June 27, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 17, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On September 13, 2018, 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 Captain at one of its facilities. He was hired by the Agency on February 25, 1999. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked at the Facility as the shift commander. He was the highest ranking employee when he was working.

Officer E began working for the Agency in October 2017 as an Officer in Training (OIT). Officer E graduated from the Academy on February 2, 2018 and began working at the Facility on February 5, 2018. Officer E worked within Grievant's chain of command at the Facility in 2018 on February 9, February 10, February 12, February 20, February 23, April 11, and April 12.

Grievant and Officer E engaged in sexual relations approximately three times sometime in March and/or April 2018.

The relationship ended in the last few days of April 2018.

Officer W had a child with Grievant and appears to have been following or stalking him. Officer W took a picture of Grievant's vehicle in front of Officer E's residence. Officer W confronted Officer E about her relationship with Grievant. On April 23, 2018, Facility managers learned from Officer W that Grievant might be having a relationship with Officer E. They received Officer W's picture of Grievant's vehicle parked in front of Officer E's home. The Agency began an investigation.

On May 1, 2018, the Assistant Warden and HRO interviewed Grievant regarding why so many employees were asking to leave the shift he supervised and to address rumors that Grievant was in a relationship with Officer E. The Assistant Warden told Grievant, "There is rumor and we have a picture. Are you in a relationship? Are you having sex? Anything going on with this officer?"

Grievant told the Assistant Warden he "is not in a relationship with any officer here." On May 1, 2018, Grievant wrote a statement that, "I am not in no relationship with a officer at [Facility]"¹ Grievant was not in a relationship with Officer E on May 1, 2018.

The Assistant Warden met with other corrections staff at the Facility. She concluded there were widespread rumors about Grievant and Officer E having a relationship. For example, Officer A told the Assistant Warden, he had heard rumors of a relationship between Grievant and Officer E and had observed Grievant's motorcycle in front of Officer E's residence. Officer W told the Assistant Warden she had heard rumors about a relationship between Grievant and Officer E and had sent text messages to Officer E about the rumors. Sergeant L told the Assistant Warden Officer W called her to tell her the rumor.

On May 10, 2018, the Investigator met with Officer E and asked her about her relationship with Grievant. Officer E said she had become close to Grievant and their relationship grew to an intimate sexual level. She said Grievant stopped coming over to her residence approximately a month earlier and they had not conversed nearly as much as they used to.

On May 10, 2018, Grievant met with the Investigator. The Investigator wrote in his report:

[Grievant] admitted that he had intimate (sexual) relations with [Officer E]. [Grievant] stated that they first started talking approximately two months ago and realized it was a mistake, had not been together for approximately a month.²

The Investigator believed Officer E and Grievant were truthful during the investigation.

¹ Agency Exhibit 7.

² Agency Exhibit 8.

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.”³ 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.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

Romantic Relationship with a Subordinate

DOC Operating Procedure 135.3 governs Standards of Ethics and Conflict of Interest. Section H addresses Personal Relationships/Sexual Harassment in the Workplace and provides:

Dating and intimate romantic relationships between supervisors and subordinates undermine the respect for supervisors with the other staff, undermine the supervisor’s ability to make objective decisions, may result in favoritism or perceived favoritism, may lower morale among co-workers, or open supervisors to future charges of harassment or retaliation claims. Additionally, supervisory/subordinate relationship may bring about complaints from co-workers and create a liability for the DOC.

- a. Supervisors are prohibited from dating or engaging in a personal romantic or sexual relationship with subordinates. Initiation of, or engagement in an intimate romantic or sexual relationship with a subordinates. Initiation of, or engagement in an intimate romantic or sexual relationship with a subordinate is a violation of the Standards of Conduct and will be treated as a Group I, Group II, or Group III offense depending on its effect on the work environment.⁶

Grievant engaged in a sexual relationship with Officer E thereby violating Operating Procedure 135.3. Numerous employees heard rumors of a relationship between Grievant and Officer E. Grievant held the highest position at the Facility and widespread knowledge that he was not following Agency policy must have undermined his ability to lead. The impact on the Agency was sufficient to justify issuing a Group III

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁵ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁶ Agency Exhibit 4.

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 argued that Officer E was not assigned to his shift during the relationship and, thus, she was not a subordinate to him. The evidence showed that Grievant held a higher rank than Officer E and, thus, she would be in his chain of command at any time they worked together. On at least two occasions in April 2018, Officer E worked on Grievant's shift while the relationship likely was ongoing.

The Agency made Grievant ineligible for rehire. The Hearing Officer recommends the Agency make Grievant eligible to be rehired. The Warden testified that Grievant's work performance showed he was a "superstar" with respect to managing a Facility. Grievant's lapse of judgment with respect to Officer E appears to be an isolated mistake when Grievant was experiencing a difficult time in his life.

Falsifying Records

On May 1, 2018, the Assistant Warden asked Grievant if he was in a relationship or having sex with Officer E. She was asking Grievant if he was currently (May 1, 2018) in relationship with Officer E. She did not ask Grievant if he had been in a relationship with Officer E prior to May 1, 2018. Grievant answered that he was not in a relationship. His answer was addressing his status on May 1, 2018. On May 1, 2018, Grievant was not in a relationship with Officer E and was no longer having sexual relations with her. Grievant's response was truthful.⁷ There is no basis to support the issuance of a Group III Written Notice for falsifying statements.

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"⁸ 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 further the disciplinary action.

⁷ It is clear that the questions asked by the Assistant Warden were different from the questions asked by the Investigator. The Investigator inquired about the beginning and end of the relationship whereas the Assistant Warden only asked about the current status of the relationship.

⁸ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for having a prohibited romantic relationship is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for falsifying statement is **rescinded**.

APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and 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]

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

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Office of Equal Employment and Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11241-R

Remand Decision Issued: November 26, 2018

REMAND DECISION

On November 21, 2018, the EEDR issued Ruling 2019-4793, 2019-4797 making alternate findings of fact, alternate weighing of evidence, and alternate conclusions of policy and then directing the outcome as follows:

The Assistant Warden testified that she understood the grievant's response to mean that he had never had an intimate or sexual relationship with Officer E.

Agency policy OP 135.1, Standards of Conduct, prohibits "[f]alsifying any records, willfully or by acts of gross negligence," and classifies falsification as a Group III offense. In addition, it is not unreasonable for the agency to expect its employees to provide truthful statements to management during the course of an investigation into potential misconduct.

Depending on the facts and circumstances, material omissions of information and/or misleading statements may appropriately be regarded as tantamount to falsification, and such conduct may justify the issuance of a Group III Written Notice. The record evidence in this case shows that the Assistant Warden was aware of rumors about the grievant's relationship with Officer E and was attempting to determine the nature and extent of that relationship at the May 1 meeting. For example, the hearing officer found that the Assistant Warden asked the grievant if "[a]nything [was] going on with" Officer E, and that the grievant denied the existence of a relationship with any officer at the facility. Although the evidence established that the grievant's relationship with Officer E had ended before May 1, the grievant's statement to the Assistant Warden was misleading and omitted material information: namely, the grievant did not disclose that

he had an unreported sexual relationship with Office E. As a result, EEDR finds that the agency properly considered the grievant's conduct to be an act of falsification, which warranted the issuance of disciplinary action at the level of a Group III offense under OP 135.1.

For these reasons, EEDR finds that the hearing officer's decision to rescind the Group III Written Notice is inconsistent with agency policy OP 135.1, Standards of Conduct. Accordingly, the matter must be remanded to the hearing officer, and the Group III Written Notice must be upheld as the proper application of policy in this case.

Based on EEDR's Ruling, the Group III Written Notice for "[f]alsifying any records, willfully or by acts of gross negligence" is upheld.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer