

Issue: Group III Written Notice with Termination (workplace harassment and creating a hostile environment); Hearing Date: 05/07/19; Decision Issued: 05/28/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11311; Outcome: No Relief – Agency Upheld; **Administrative Review Request received 06/12/19; EDR Ruling No. 2019-4945 issued 07/09/19; 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: 11311

Hearing Date: May 7, 2019
Decision Issued: May 28, 2019

PROCEDURAL HISTORY

On December 11, 2018, Grievant was issued a Group III Written Notice of disciplinary action for violation of Operating Procedure 145.3, DHRM Policy 2.10 and DHRM Policy 1.60 for sexual harassment, workplace harassment, and creating an offensive work environment.

Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 14, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 7, 2019, 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 an Offender Workforce Development Specialist. She began working for the Agency on April 10, 2018. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked at the Facility. She met the Principal on April 12, 2018 who also worked at the Facility. Grievant did not report to the Principal and she was not in his chain of command.

The Principal reported to the Administrator. Grievant reported to the Developmental Specialist.

The Principal was attracted to Grievant and devoted additional time and attention to her. The Principal repeatedly gave Grievant unsolicited attention and compliments. The Principal entered Grievant's classroom several times per day to speak with Grievant and ask if she needed anything.

Grievant initially was resistant to the Principal's attention towards her. The Principal made it clear through his behavior that he wanted to impress Grievant and date Grievant in a romantic relationship. The Principal would summon Grievant to his

office to read articles on successful inmate reentry. He showed her his “personal value cards” reflecting his aspirational goals and character.

In July 2018, the Principal advocated for Grievant to receive office space with a telephone and internet access. The Principal had a welding teacher construct a secured printer stand and a lock for the telephone to be used by Grievant. Grievant and the Principal had a conversation about their backgrounds, education, and teaching philosophies. Grievant began to consider the possibility of dating the Principal.

On July 19, 2018, the Principal sent Grievant an email using his Agency computer to ask Grievant for her personal cell phone number. The Principal began sending Grievant text messages from July 19 to July 22, 2018 with Grievant replying frequently. They sent text messages outside of normal work hours. The Principal sent texts discussing his personal interests, family, and pets. He complimented Grievant on her beauty and attractiveness. He sent Grievant photos himself and his son and dog. The Principal told Grievant he missed her and asked her to dream about him.

On July 21, 2018, the Principal asked Grievant to meet him for a drink at Restaurant 1. She refused. The Principal asked to come to her home. Grievant refused the request.

The Principal asked Grievant to meet at Restaurant 2. Grievant agreed and they met at Restaurant 2 on Sunday July 22, 2018. The Principal greeted Grievant with a hug. The Principal complimented Grievant’s beauty and referred to her as the “complete package.”

During the date, the Principal told Grievant that he has a girlfriend who lived with him, but that it was not a good relationship. He told Grievant he was in the process of ending his relationship with the girlfriend but that it would take time because she had no education, job, or family in the area. The Principal asked Grievant to continue to date him. Grievant told the Principal, “No, absolutely not.” Grievant was insulted and deeply offended by the Principal’s suggestion that they date while he continued his relationship with his girlfriend.

The Principal changed the topic of conversation from having an affair to Grievant’s career goals. He asked her where she saw herself at DOC. He said he saw her holding a leadership position in the future.

On Monday July 23, 2018, Grievant was sick and took the day off. She believed the Principal was “grooming her for sex.” This made her ill.

At 7:55 a.m. on July 23, 2018, the Principal sent Grievant a text:

[Grievant’s first name] ... it was further than I recognized. It wasn’t intentional ... all I can do is say I’m sorry.

Grievant replied:

You think I go around telling randoms I'm gonna dream about them and other nonsense? You took it further. You basically told me you flirted with me because I'm the first attractive coworker you had. And the worst part is you are totally unaware of how douchie and misogynistic that is of you.

On July 26, 2018, Grievant left a voicemail for the Principal apologizing for calling him names. She was worried that because she had rejected his advances, he might use his position of power to retaliate against her at work.

Grievant made an effort to avoid the Principal at work. On August 9, 2018, the Principal lurked and stared at Grievant while she worked at the Facility. This made Grievant feel uncomfortable.

At some point, the Principal blocked Grievant's cell phone number so she could not send text messages to his personal cell phone.¹

On August 22, 2018 at 4:27 p.m., Grievant sent the Principal several text messages from a phone number ending in 358 including:

I have never spoken negatively about u to anyone at work. I don't trust someone who only speaks to call me a c--t. Pretty shabby.

On August 22, 2018, Grievant sent the Principal text messages from a phone number ending in 059 beginning at 7:12 p.m. and end at 7:17 p.m.:

You obviously did not have a mother who was present in your life.
And did not grow up having any close relationship to females.
Cuz u got no clue what it is like to be a woman who is only valued for the way she looks.
And how degrading it is to be appreciated by a man only cuz you are attractive.
And if u treated people with respect. There would be no drama.

On August 28, 2018 at 8:05 p.m., Grievant sent the Principal a text from a phone with the number ending 830:

I miss you.
I'm sorry for the s---t I said.

On Saturday September 1, 2018 at 9:17 a.m., Grievant sent the Principal a "selfie" picture from a phone with the number ending 525 and with the message:

¹ See, Agency Exhibit 162.

Dumbest man alive In too deep with your own s—t to allow the possibility of something authentic.

At 2:48 p.m., Grievant send text messages from a phone with the number ending 781:

Idk why you're letting some slut bag use you. If it were a satisfying arrangement, you wouldn't have been up my ass at work.

At 7:37 p.m., Grievant sent the Principle a picture of Grievant with the title "Damaged goods for sure". She added a message, "I hope you took antibiotics before you rescued yr hoe." Grievant used a phone with the number ending 708.

On Sunday September 2, 2018, Grievant sent the Principal text messages from a phone with a number ending in 601:

You're not even the type of person I thought you were. I thought u were independent like me. You're a douche whose somebody's sugar daddy. Gross. U prob got stds from yr hood rat too. F—k that s-t.

At 9:21 p.m., Grievant sent the Principal text messages from the phone number ending 249:

I guess I need to accept that you're not the guy for me. And you're not the person I thought you were nor do you have the capacity to make me happy.

On September 5, 2018 at 5:30 p.m., Grievant sent the Principal text messages from a phone number ending 345:

We could be kicking it having drinks, good conversation, and a good time right now. Idk why you are wasting your life with an unhealthy situation that's only going to lead to stress and problems. Plus if we were hanging out your son would probably think you're a lot cooler and want to spend more time with you.

On September 6, 2018 at 8:40 p.m., Grievant sent the Principal text messages from a phone number ending 272:

I mentioned to [name] I have allergies and he's getting me a brand new air purifier on the sly. Lemme know if u want one.

On September 7, 2018 at 7:53 p.m., Grievant sent the Principal a text message, "That's okay. I am not upset with you anymore. I won't be a bitch to u anymore."

On September 9, 2018 at 10:03 p.m., Grievant sent the Principal text messages from a phone number ending 981:

Well I guess you were just feeling me out to see if I was down to hang out with you while you're in your weird ass situation. Which I'm not. If you wanted to be with me. You'd be with me.

On September 11, 2018 at 6:03 p.m., Grievant sent the Principal text messages from a phone number ending 940:

I miss you. Have a nice night. It would be so nice to hear from you and not every other guy. I'll remove the nonsense from my life if you remove the nonsense from yours. On the real tho, if my house gets f—king treed this weekend and I lose my slate roof. Will U come help me.

On September 12, 2018 beginning at 3:52 p.m. and ending at 4:55 p.m., Grievant sent him the Principal a text message from a phone with the number ending 455:

I need to speak with you as soon as possible. I am very upset. I'm not bullsh-tting around. It's important. Please call me to clarify. I'm a good person and you know that. I would never do anything to damage your reputation. I am so upset. I think you're a decent person and I would like to give you the opportunity to explain before I assume what was told to me today is true. Please give me the respect I deserve and call me. Please call me. I am literally sick to my stomach.

On September 12, 2018 at 6:14 p.m., Grievant sent the Principal a text message from the phone number ending with 702:

I never imagined you were this big of an asshole.

At 6:19 p.m. Grievant sent the Principal a text message from a phone number ending 402:

I guess I should go around trashing your reputation because apparently that is what you have done to me. And u don't even have the decency to speak to me about it.

At 7:33 p.m., Grievant sent the Principal text messages from a phone number ending 574:

I am upset because I was informed by somebody that a CO at [location] is going around saying he has hooked up with me. I don't know anyone at [location]. And I don't even know any COs . And would never hook up with a f—king CO. You are the only person I have ever talked to at work. So I immediately thought you were behind it. Maybe I overreacted. But I

am so upset and don't know how this rumor got started. I don't know any COs. I guess I shouldn't pay it any attention. But I am so upset because I am so serious about my professional image. I thought you had something to do with it. I really need to talk to you as a friend. I'm really upset about this. I have never talked to anyone outside of work except you. I'm so upset. Why would someone make up that s—t and why would anyone pay any attention to it. People are always f—king jealous of me everywhere I work. I can't stand gossip.

In mid-September 2018, the Principal contacted the Administrator to express his concern about Grievant. The Principal told the Administrator that he and Grievant began to develop a relationship and then they met and broke off the relationship. The Principal said it was best not to have a relationship with Grievant since they work together and the Principal had a girlfriend. The Principal told the Administrator that he started getting “nasty” text messages from Grievant.² The Administrator told him not to respond to Grievant and that hopefully “it would resolve itself.”

On September 20, 2018 from 7:11 p.m. until 7:17 p.m., Grievant sent the Principal several text messages from a phone with the telephone number ending 924:

Today was the most awkward day. I was putting my allergy eyedrops and when you knock on the door. There is a rodent living in my classroom. Either it's a sign we should be together or I really need to find another job. I don't have a problem with you. I just want to do my job, help the [inmates], and leave.

On Friday, September 21, 2018 from 6:53 a.m. to 8:10 a.m., Grievant sent the Principal text messages from a phone with a number ending 548:

I am quitting my job because of you. I don't enjoy work when you are there. You have bad energy. You're inconsiderate as f—k and all-around total douche who never had any regard for me. You're f—king toxic and you have no consideration for my feelings. Couldn't even call me back when I was upset. I am quitting. I'm done. F—k you. You're a selfish douche. And you probably wouldn't know how to f—k me right anyways. You're a dick. Totally into yourself. I am quitting that suck ass job because I can't stand your bad energy.

From 9:20 a.m. to 9:46 a.m., Grievant sent the Principal text messages:

I knew that you were going to shoot down me getting computers. F—k you. More concerned with your pettiness than helping the [inmates]. You prob put a f—king mouse in my classroom too. F—king quit. I can't stand

² At some point, the Principal told the Administrator that he had blocked Grievant's cell phone number from sending him text messages.

you. Seriously f—k you. Why are you being such an ass. I never done anything to you at work. Is that what you want? For me to f—king quit.

From 12:50 p.m. until 12:53 p.m., Grievant sent the Principal text messages:

Maybe Im f—ked up but at least I don't have some word boyfriend living with me. Meanwhile I'm texting my coworkers I want to be in their bed. And meeting them places. So f—k you. I don't treat people like that. You just wanted to f—k me cuz if you cared about my feelings you'd be talking to me.

From 6:11 p.m. to 6:56 p.m., Grievant sent the Principal text messages from a phone with a number ending 345:

Maybe if you talk to me like a normal person and resolved your drama I wouldn't trip out on all types of conspiracy theories when my computers aren't being replaced and when [name] tells me crazy rumors because she is jealous of me. I'm really starting to hate that place. My ex-husband is flying into [location] tomorrow. We are going to dinner. You made it clear how you feel. So I guess I'm gonna move on.

On September 24, 2018 at 7 p.m., Grievant sent the Principal text messages from a phone with the number ending 695:

Everything about our encounter was painful to me. I am letting it go. I will be chill. I am asking that you please be courteous and continue to support me at work. Don't forward my emails. Just let me know who to contact next time. I was just trying to get it straight so [name] wouldn't give me s—t about the master pass. I am very sick with my allergies and on steroids. I won't bother you anymore.

On September 26, 2018 at 5:22 p.m., Grievant sent the Principal several text messages from a phone with a number ending 651:

I guess your invite for me to speak it graduation was about as sincere is all of your other interactions with me. What a f—king joke. And I never would have flipped had you shown any consideration for my feelings.

September 27, 2018, the Facility Correctional Education Graduation Ceremony was held. The Principal spoke at the graduation and recognized staff members including teachers and administrative staff but not Grievant. During the ceremony, the Principal stared at Grievant. The Administrator was on the stage with Grievant during the graduation. The Principal pointed out Grievant to the Administrator. The Principal said he was concerned about Grievant being there today and indicated that Grievant's presence at the graduation upset the Principal.

On September 27, 2018 beginning at 7:46 p.m. until 8:03 p.m., Grievant sent the Principal text messages from a phone with a number ending 267:

I really enjoyed graduation today. It was a reminder of all that I have accomplished in my life and how transformative education has been in my sense of self, self-confidence, and independence. And also of the misogyny that I experience every day, in particular in the workplace for men in positions of power who only value me for my appearance. So thank you for reinforcing my passion of continuing to empower the demographic [inmates] that we work with. I don't need your resources or collaborations if you want to be a dick. I've always been an underdog and I thrive in that role.

Sometime towards the end of September 2018, the Principal complained to the Administrator that Grievant continued to send him offensive text messages and that a matter was escalating. The Administrator concluded that he and the Principal should meet with Grievant and the Developmental Specialist in October 2018 to resolve the conflict. The Administrator contacted the Developmental Specialist and told the Developmental Specialists of Grievant's concerns and asked to have the group meet. A meeting date was set but later canceled due to a conflict with the Developmental Specialist's schedule. The second date was selected but at that point in time the Principal had been placed on suspension for matters unrelated to Grievant's contact with him. The meeting did not occur.

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

Operating Procedure 145.3 governs Equal Employment Opportunity. This policy defines Sexual Harassment as:

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).

Unsolicited, unwelcome behavior of a sexual nature including, but not limited to, sexual advances, requests for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor co-workers or nonemployee (third party). Sexual harassment is unlawful. Examples of sexual harassment are:

Hostile Environment. A form of sexual harassment when a target is subjected to unwelcome and severe and/or pervasive sexual comments, innuendos, touching, or other conduct of a sexual nature that creates an intimidating or offensive work environment.

Workplace Harassment is defined as:

Any unwelcome verbal, written or physical conduct that denigrates or shows hostility or aversion towards a person that:

- Has the purpose or effect of creating an intimidating, hostile, or offensive work environment.
- Has the purpose or effect of unreasonably interfering with the employee's work performance.
- Affects an employee's employment or opportunities or compensation. Workplace harassment on the basis of race, sex (including sexual harassment, pregnancy, and marital status), color, national origin, religion, sexual orientation, gender identity, age, political affiliation, veteran status, or against other qualified persons with disabilities is illegal. Workplace harassment not involving protected areas is a violation of DOC operating procedures.

Grievant realized she did not wish to have a relationship with the Principal on July 23, 2018. Nevertheless she sent him hundreds of text messages over the following two months complaining and denigrating him. Grievant's text messages were unwelcome by the Principal. He blocked her cell phone number to prevent her from sending him text messages. She circumvented the block by using an application allowing her to send messages that appeared to be coming from a cell phone other than her own.

Grievant created a hostile and offensive work environment for the Principal. After the Principal stopped communicating with Grievant, Grievant sent denigrating text messages:

- Saying the Principal did not have a mother present in his life.
- Calling the Principal the "dumbest man alive" and an "asshole."
- Referred to the Principal's girlfriend as a "slut bag".
- Hoping he took antibiotics.
- Calling him a douche who was somebody's sugar daddy.
- Suggesting he got a sexually transmitted disease from his girlfriend.
- Suggesting she should go around trashing his reputation.

- Suggesting she was quitting her job because of him.
- Calling the Principal “bad energy” and “toxic” and “a selfish douche” and “a dick”.
- Saying “f—k you” several times.
- Saying he “wouldn’t know how to f—k me right anyways.”
- Saying he “just wanted to f—k me cuz if you cared about my feelings, you’d be talking to me.”

The Principal perceived his work environment as hostile and offensive. Grievant’s behavior affected the Principal to the extent that he contacted the Administrator on two occasions to seek guidance and resolution of the problems Grievant was creating for him.

The Agency has presented sufficient evidence to show that Grievant engaged in workplace harassment of the Principal. Operating Procedure 145.3(D)(3) provides:

Any employee who engages in conduct determined to be harassment, or who encourages such conduct by others, will be subject to corrective action under Operating Procedure 135.1, Standards of Conduct, which may include discharge from employment.

The Group III Written Notice for disciplinary action issued to Grievant must be upheld. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly Grievant’s removal must be upheld.

The Principal also engaged in inappropriate behavior. The Principal misled Grievant about the content of his character and his availability for a committed relationship. Grievant rightfully was insulted and offended by the Principal’s behavior. The Principal also sent inappropriate text messages including one in which he called Grievant a “c—t.” The Principal’s behavior was not so extreme and ongoing as to justify Grievant’s response.

The Principal did not expressly tell Grievant to stop sending him text messages. He communicated this request through his behavior of blocking Grievant’s cell phone number. Grievant confirmed she understood his action by stating that the Principal had gone silent.

Grievant argued that all of her text messages were sent to the Principal after work hours and that her interaction with the Principal during work hours was always professional. Grievant’s argument does not undermine the Agency’s disciplinary action. The Agency has established a nexus between Grievant’s behavior and the Agency’s workplace. Grievant’s behavior undermined the Principal’s ability to perform his work duties without distraction. Grievant’s behavior caused the Principal to seek assistance from the Administrator who sought assistance from the Developmental Specialist. Grievant’s behavior after work hours affected the Agency’s operations.

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”⁶ 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

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

⁶ Va. Code § 2.2-3005.

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 EEDR before filing a notice of appeal.