

Issues: Group II Written Notice (failure to follow policy), and Termination due to accumulation; Hearing Date: 10/30/18; Decision Issued: 11/13/18; Agency: DOC; Hearing Officer: Carl Wilson Schmidt, Esq.; Case No. 11250; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Request received 11/14/18; EDR Ruling No. 2019-4810 issued on 12/13/18; Outcome: AHO’s decision affirmed; Judicial Review: Appealed to Pittsylvania County Circuit Court; Outcome: AHO’s decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11250

Hearing Date: October 30, 2018
Decision Issued: November 13, 2018

PROCEDURAL HISTORY

On June 22, 2018, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. Grievant was removed from employment based on the accumulation of disciplinary action.

On July 18, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 1, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 30, 2018, a hearing was held at the Agency's office.

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 Food Operations Supervisor. Grievant had prior active disciplinary action. On January 27, 2017, Grievant received a Group I Written Notice for unprofessional conduct and inappropriate use or misuse of State equipment. On August 3, 2017, Grievant received a Group I Written Notice for conviction of a moving traffic violation in a State vehicle. On May 11, 2017, Grievant received a Group II Written Notice for failure to report fraternization.

Grievant received training regarding the Agency's Prison Rape Elimination Act policy.

Grievant complained to her two supervisors about Offender S. Offender S had been fired from his position in the kitchen and Grievant did not want Offender S to be returned to the kitchen where she worked. The two supervisors disregarded Grievant's request and returned Offender S to work in the kitchen.

On April 11, 2018, Grievant was in an office working using a computer. Offender S approached Grievant and said he needed to show her something. Grievant told him that he had nothing that she wanted to see. Grievant said, "I go by the 3F rule which is you don't feed me, finance me, and you can figure the other [one]." Grievant told Offender S, "You need to stay the hell away from me."

On April 12, 2018, Grievant filed a Disciplinary Offense Report because Offender S, "called me over to the dish room where he was working because he said he needed

to talk to me. He let me know that his interest in me was to f—k me because he heard I give good head.”¹

During the inmate’s disciplinary hearing, the Alternate Hearings Officer learned of the allegation that Grievant told Offender S about her 3F rule. She referred the matter to the Agency’s PREA Investigator and the Agency began an investigation.

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.”² 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.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

DOC Operating Procedure 038.3 governs the Agency’s implementation of the Federal Prison Rape Elimination Act of 2003. The Agency has a Zero Tolerance Policy for violations of this policy. Sexual Harassment is defined to include:

Verbal comments or gestures of a sexual nature to an offender by a staff member ...

On April 11, 2018, Grievant made a comment to Offender S. She said, “I go by the 3F rule which is you don’t feed me, finance me, and you can figure the other [one].” The Agency contends the third “F” was “f—k”. No credible evidence was presented to contradict the Agency’s assertion. The Agency’s assertion is logical since Grievant was referring to a relationship with a male and a sexual relationship would be consistent with a man who provided financial and other support. Moreover, if the third F referred to something innocuous such as “feed” and “finance” then Grievant would have said the word. Although Grievant did not say “f—k”, she implied “f—k” which would make her comment of a sexual nature. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow Operating Procedure 0.38.3.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has now accumulated two Group II Written Notices.

¹ Agency Exhibit 6.

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

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

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

Accordingly, the Agency's decision to remove Grievant from employment must be upheld.

Grievant argued that she never said the third "F". Grievant implied the third F thereby making her comment of a sexual nature. Offender S believed Grievant was referring to "f—k."

Grievant argued that she did not rape any offender and thus, the Agency's Prison Rape Elimination Policy was not applicable. The Agency's policy is entitled Prison Rape Elimination Act but it includes provisions governing behavior other than rape. The policy's definition of sexual harassment does not fit the traditional standard of sexual harassment in employment law, but it is the definition found in the policy for which Grievant received training. Although it is not clear whether Grievant violated the Federal Prison Rape Elimination Act, it is clear that Grievant violated a DOC policy with the name Prison Rape Elimination Act.

Grievant argued that if her supervisor had followed her request that Offender S not be returned to the kitchen to work, she would not have been in a situation to be disciplined. Although Grievant's assertion is correct, it does not affect the outcome of this case. Grievant could not control the placement of Offender S, but she could control what she said to Offender S. Grievant used language of a sexual nature with Offender S thereby justifying the Agency's decision to take disciplinary action.

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"⁵ 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.

Grievant argued that other employees were treated differently from her when they violated Operating Procedure 038.3. Grievant did not present sufficient evidence to show that nature of the behavior of the other employees and how the Agency treated those employees. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁵ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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]

[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].

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer