



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11566

Hearing Date: September 24, 2020

Decision Issued: October 13, 2020

PROCEDURAL HISTORY

On June 9, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to report an inappropriate relationship with a subordinate. On June 9, 2020, Grievant also was issued a Group II Written Notice for failing to disclose a relation with a subordinate.

On June 26, 2020, Grievant timely filed a grievance to challenge the Agency's actions. The matter advanced to hearing. On July 13, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 24, 2020, 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 Notices?
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 Sergeant at one of its facilities. She had been employed by the Agency for approximately 13 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Corrections Officer reported to Grievant. On February 9, 2020, Grievant and the Corrections Officer began sending messages by text or social media to each other. Grievant sent messages that included sexual innuendo and sexually explicit content. For example, on March 24, 2020, Grievant sent the Corrections Officer a picture of a partially nude male performing a lewd bodily motion.¹ Grievant did not disclose to the Agency the nature of her relationship with the Corrections Officer.

The Corrections Officer and the Inmate engaged in a heated argument on April 12, 2020. Both men directed profanity at each other. Following the initial argument, Grievant interviewed Officer K who said she was not paying attention to the entire argument but heard the Inmate call the Corrections Officer a "p—see mother—Ker." Another disturbance occurred and Grievant went into the pod floor. She described what happened in an incident report:

¹ The image was not included in the Agency's exhibits but was reported by the Agency's investigator who observed the image. Grievant did not contest sending such an image.

I immediately went on the floor and heard and overheard [Corrections Officer] and [Inmate] yelling at each other. I instructed [Corrections Officer] to leave so I could count. After my instruction [Corrections Officer] stated "Get me out of here before I kill this [N-word ending in "a"]. I instructed [Corrections Officer] to go to the watch office. No other incidents occurred after this. End report.²

On April 13, 2020, the Corrections Officer met with the Warden and Grievant and several other employees to discuss the incident. The Corrections Officer admitted cursing and using profanity but adamantly denied using the N-word towards the Inmate. Based on Grievant's statement and comments, the Warden decided to terminate the Corrections Officer. The Warden chose to believe Grievant's account of the incident instead of the Correction Officer's version because the Warden believed Grievant had no motive or reason to express anything but the truth. The Warden told the Corrections Officer he believed Grievant because "she did not have a dog in this fight." Later in the day, the Corrections Officer sent the Warden an email alleging the existence of an inappropriate relationship between Grievant and the Corrections Officer.

On April 14, 2020, the Warden received additional statements from other employees. He did not believe those statements corroborated Grievant's statement about the Corrections Officer's behavior.

On April 15, 2020, the Corrections Officer filed a complaint with Agency alleging he was sexually harassed by Grievant. The Agency investigated the complaint and concluded it was unfounded. The Agency learned of the relationship between Grievant and the Corrections Officer through this investigation.

When the Warden learned of Grievant's relationship with the Corrections Officer he decided to reinstate and transfer the Corrections Officer.

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

Group III Written Notice

² Agency Exhibit p. 47.

³ See, Virginia Department of Corrections Operating Procedure 135.1.

DOC Operating Procedure 135.3 governs Standards of Ethics and Conflict of Interest. This policy provides:

Romantic or sexual relationships between supervisors and subordinates undermine ... the supervisor's ability to make objective decisions. ***

Supervisors are prohibited from dating or engaging in personal romantic or sexual relationships with subordinates. ***

Initiation of, or engagement in an intimate 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.

Grievant engaged in an inappropriate intimate relationship with the Corrections Officer that involved exchanging inappropriate messages. The impact of this relationship was to undermine her credibility with respect to describing the Corrections Officer's behavior. Because she failed to disclose this relationship to the Warden, the Warden was unable to accurately assess the credibility of Grievant's account of the Corrections Officer's behavior towards the Inmate. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action. 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 she did not have a romantic or sexual relationship with the Corrections Officer. Although Grievant and the Corrections Officer were not dating or emotionally committed to one another, their relationship involved inappropriately intimate communications of a sexual nature. This was sufficient to meet the prohibitions expressed in the Agency's Operating Procedure 135.3.

Grievant argued that her work relationship with the Corrections Officer was not affected by their messaging and that she accurately reported to the Warden the behavior she observed by the Corrections Officer. This argument is not persuasive because the Agency's policies specifically address behavior between superiors and subordinate occurring outside of working hours. The Warden no longer believed Grievant's account after he learned of her behavior with the Corrections Officer.

Group II Written Notice

The Agency's issuance of a Group II Written Notice is not materially different from the Agency's issuance of a Group III Written Notice. The Group II Written Notice and Group III Written Notice involve the same set of facts, parties, and time periods. The Group III Written Notice was issued for, "failing to report relationship of an inappropriate nature with a subordinate." The Group II Written Notice was issued because, "[a]t no time did you disclose the relationship (which was deemed inappropriate) between you and [Corrections Officer]." The Group II Written Notice is a

description of the impact on the Agency because Grievant failed to disclose the relationship. The impact on the Agency was an element of the Group III Written Notice. According, the Group II Written Notice must be reversed.

Mitigation

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**. The Agency’s issuance of a Group II Written Notice of disciplinary action is **rescinded**.

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.

⁴ *Va. Code § 2.2-3005.*

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.