

Issue: Group III Written Notice with transfer (conduct undermining Agency's effectiveness); Hearing Date: 10/27/04; Decision Issued: 11/24/04; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 7883



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7883

Hearing Date: October 27, 2004
Decision Issued: November 24, 2004

PROCEDURAL HISTORY

On August 20, 2004, Grievant was issued a Group III Written Notice of disciplinary action with transfer for:

Between May 2002 and March 2004, you have had an ongoing sexual affair with one individual, and between September 2003 and October 2003, you had another sexual affair with a separate individual on two occasions. You had these affairs while still legally married and living with your wife. Your actions are in violation of General Order 19, paragraph 14.b.(20) of the State Police Manual, "engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees."

On August 25, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 23, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 27, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with transfer for conduct undermining the effectiveness or efficiency of the Agency's activities.

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. 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 Virginia Department of State Police employs Grievant as a Sergeant at one of its offices. He began working for the Agency on September 1, 1977. Part of Grievant's duties include appearing in local courts to testify as a witness in criminal prosecutions. His duties also include assisting local police when his help is needed or available. Grievant's reputation is an important factor in his ability to testify credibly in court and to work with local law enforcement officers. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

Grievant is actively involved in his community. He is the treasurer of an organization helping children in his community. He was treasurer of a local transportation board. He is on a crime-stoppers board. He serves as the State Police representative for an emergency planning commission. Grievant has received numerous commendations for his work with the Virginia State Police.

Grievant was the supervisor of a former trooper who was under administrative investigation but elected to resign rather than face disciplinary action.¹ Grievant participated in that termination thereby creating animosity between Grievant and the former trooper. On January 29, 2004, the former trooper complained to the State Police that Grievant had had sexual relations with the former trooper's ex-wife on two occasions² and that Grievant had an ongoing sexual affair with another woman. The former trooper was attempting to get even with Grievant for causing the former trooper to resign his employment. The Agency investigated these allegations. Other than the former trooper's complaint, the Agency had not received complaints from anyone else about the circumstances of Grievant's marriage.

Grievant and Wife are married. They have known one another for 30 years, since they were in High School. In 1997, the Wife was involved in an automobile collision that had devastating consequences to her life. She was in a coma for 45 days. She suffered severe injuries to her spinal cord and brain. She is disabled and incapacitated. She has had numerous surgeries and will continue to have them throughout her life. She can walk no more than twenty yards before having to sit down to rest. She uses a wheelchair while in her home. She uses a walker when she is away from her home. Her gait is slow and deliberate. Her hands tremor constantly. Grievant attentively cared for the Wife from the time of her injury. Over time, their emotional relationship, however, changed from husband and wife to patient and caregiver.

In December 2001, Wife filed for divorce. Grievant also filed for divorce in January 2002.³ On January 23, 2002, Grievant and the Wife entered into a separation agreement stating that the parties would have:

1. In-house separation.
2. Possession of upstairs to the Wife. Possession of downstairs to Husband. The kitchen, computer room and downstairs laundry area will be jointly shared by both parties.
3. The Husband will not have any female companions to whom he is not related in the house at any time.
4. The Husband will pay the normal household expenses with both parties continuing to use charge card as has been accustomed in the past.
5. The Husband pays \$125/week for Wife's health care sitter.

¹ The former Trooper resigned November 2002. He and his ex-wife separated in February 2002 and were divorced in May 2003. Grievant was not involved in the divorce.

² Grievant admitted to having sexual relations with the former Trooper's ex-wife. She had dated another man and ended that relationship sometime in August or September 2002 before she and Grievant had sexual relations in September 2003. The woman was divorced at the time of her relationship with Grievant.

³ Grievant and the Wife had separate attorneys.

6. The Husband maintains health insurance as provided by his employer on the Wife and maintains Wife as beneficiary on employer's life insurance policy.
7. The Husband nor the Wife shall dissipate any marital assets.
8. The Husband will pay for any reasonable non-covered unreimbursed medical expense of the Wife.
9. **It is specifically understood that Husband shall be entitled to "date" and to have relationships with female companions. Said relationships shall not provide a grounds for divorce. Husband shall be discreet and not embarrass Wife.**
10. This Agreement is temporary and non-prejudicial in nature.
11. Since this Agreement is temporary in nature, each party reserves all their rights under Virginia Code §§ 20-107.1 and 20-107.3. (Emphasis added.)

Wife testified that she interpreted this agreement to permit Grievant to engage in on-going romantic and sexual relations with other women despite being married. Wife was advised by her attorney that she is bound by the agreement.

Grievant had discussed the agreement with several attorneys. He was advised that the agreement permitted him to have romantic and sexual relations with other women even though he lived on the bottom floor of the house and Wife lived above.

Grievant provided a copy of his separation agreement to his supervisor in 2002.

Although the agreement states that it is temporary, neither Grievant nor Wife have attempted to modify the agreement or taken any further legal action towards divorce. Wife has not chosen to pursue a divorce because she fears the consequences to her from losing benefits under Grievant's health insurance.

Grievant and his Wife live at the same address but not as husband and wife. Grievant created an apartment in the bottom of the house.⁴ His apartment has its own entrance. Wife resides upstairs in the house. They do not interact except when Wife needs assistance due to her physical limitations. Grievant handles financial matters for Wife. He maintains the yard around the house and brings in firewood for the Wife during the Winter. Because of Wife's reduced short-term memory, Grievant must often attend to her business affairs. The Wife has many injuries requiring on-going frequent specialized medical treatment. She often relies on Grievant to transport her to and from her numerous medical appointments in a neighboring city. If Wife falls down, she cannot get up. She has to call Grievant to help her get up. The Wife does not have any family nearby. Her father lives more than a hundred miles away and is incapacitated. He cannot help Wife.

⁴ In the summer of 2000, Grievant and the Wife's feelings towards one another began changing. They agreed that Grievant would build an apartment downstairs and that he would have a separate life but would provide financial support for Wife and oversee her care.

Ms. S is Grievant's girlfriend. He has been dating her since May 2002. When an Agency investigator asked Grievant whether he was engaging in sexual relations with Ms. S, Grievant admitted being in a romantic and sexual relationship with Ms. S.

Wife and Ms. S are friends.⁵ Wife knows that Grievant is dating and having a sexual relationship with Ms. S. When Grievant is out-of-town and Wife needs someone to transport her to a medical appointment, Wife will ask Ms. S to assist her. The Agency presented evidence that the Wife had gone to Ms. S's place of work, a market, on two occasions. Although the Agency suggested the Wife was attempting to confront Ms. S, the nature of the conversation between the Wife and Ms. S remains undefined. No evidence was presented suggesting the two women were loud, hostile, or uncivil when they met. The Wife testified that the two sat in a booth and talked amicably for a few minutes. Wife and Ms. S met at Ms. S's place of employment in 2002.⁶

Grievant called as a witness a Lieutenant in the local county's Sheriff's Office. Grievant frequently interacts with the Lieutenant and the Sheriff's Office staff. The Lieutenant described Grievant's reputation in the community as a "good reputation." She had not heard anything negative about Grievant. She and Grievant served on a committee for the benefit of local children. She knew Grievant had gone to businesses in the community to seek donations for the organization. Grievant often collected more money than did others on the committee. The Lieutenant testified that Grievant had been elected by police officers, highway department representatives, and a local trucking company to serve as treasurer on a local highway traffic safety board. The Lieutenant was aware of Grievant's relationship with his Wife. She viewed his actions as reflecting positively on Grievant because he stood behind the Wife to help her rather than divorce her after their romantic relationship ended.

Grievant called as a witness a Safety Director with a local trucking company. The Safety Director lived in Grievant's neighborhood for approximately ten years. He knew of Grievant's current circumstances with the Wife. The Safety Director testified that Grievant's reputation and the Agency's reputation in the community are good. He always heard others in the community say good things about Grievant.

Grievant called as a witness a Vice President of a local automobile dealership in Grievant's community. Grievant and the Vice President met because Grievant brought his police vehicle to the dealership for service. A number of other troopers also bring their vehicles to the dealership for service. The Vice President knows of Grievant's relationship with the Wife and that Grievant has a girlfriend. Grievant is the one who told the Vice President of Ms. S. The Wife has been a customer of the dealership and the Vice President knows her. The Vice President has heard others in the community discuss the State Police. He has not heard anything negative spoken about Grievant or

⁵ Ms. S told an Agency investigator, "I go out to dinner and drinks with his wife."

⁶ Ms. S resigned her employment at the market in May 2002.

the State Police. He considers Grievant to be among the hardest working people he knows.

Grievant presented a letter from the local Sheriff which the Sheriff wrote after learning of the charges against Grievant. The Sheriff wrote that he had known and worked with Grievant for over 25 years and believed Grievant:

Is an asset to the Virginia State Police and to [the locality]. He is known by all of my deputies as someone that will assist them if at all possible and within his control. His service has been and is still appreciated by our agency.⁷

Grievant presented a letter from the Clerk of a local court. The Clerk writes:

As far as [Grievant's] private life, I feel that he has been dealt a hand that many of us cannot even imagine having to cope with. I worked with [Grievant's] estranged wife ... for approximately ten years. She resigned per position with the Court just months before the accident that left her disabled. Although it has been a while since I have chatted with [Wife], she did tell me some time ago that she and [Grievant] were "legally" separated and that he was maintaining a separate apartment in the basement of their house. She told me that [Grievant] had met someone and was *dating*. At that time, [Wife] told me that this arrangement worked well for them both because it enabled [Grievant] to provide her health insurance and to assist her with chores and bills. As I previously stated, [Grievant's] situation is an unusual one. Under the circumstances, [Grievant] seems to have chosen the best solution available to try and have some semblance of a personal life and at the same time attempt to do as much as possible to help his estranged wife. He is to be commended for the compassion and care that he continued to show [Wife] despite their legal separation.⁸

Grievant submitted a letter from the President of a local all volunteer rescue squad on behalf of its approximately 30 members. After being made aware of the charges against Grievant and that Grievant would be reassigned to another locality, the President wrote:

[Grievant] has been a guest at our rescue squad functions many times and has always presented himself, his profession, and [the Agency] with the utmost professionalism. ***
Our membership asks that you reconsider [Grievant's] reassignment. It would be a great loss to our organization and this community if he were to

⁷ Grievant Exhibit 6.

⁸ Grievant Exhibit 8.

be reassigned. [Grievant] is an excellent example of what a Virginia State Trooper should be and we are proud to have him serving us.⁹

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” General Order 19(12)(a). Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” General Order 19(13)(a). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” General Order 19(14)(a).

General Order 19, paragraph 14(b)(20) of the State Policy Manual defines Group III offenses to include “engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department’s activities. This includes actions which might impair the Department’s reputation as well as the reputation or performance of its employees.”

In order to meet its burden of proof under General Order 19, paragraph 14(b)(20), the Agency must not show merely that Grievant violated a State law, the Agency must show that Grievant’s violation of State law caused some impairment to the Agency’s reputation. No credible evidence was presented suggesting Grievant has caused any material damage to his reputation or to that of the Agency.

Grievant’s behavior has not undermined the effectiveness or efficiency of the Department’s activities. Grievant’s behavior has not impaired the Department’s reputation or the reputation or performance of its employees. The Agency has not presented evidence that Grievant’s behavior has materially altered the Agency’s operations in any way. The evidence is clear that the Agency’s reputation in the community has not been harmed by Grievant’s behavior even though that behavior is known in the community.

The evidence is overwhelming that Grievant’s reputation in his community is excellent. Among those who know of Grievant’s adultery and work with Grievant on a daily basis in the courts or in law-enforcement, Grievant’s reputation remains favorable. Grievant has presented evidence suggesting that, in the opinion of some members of the community, Grievant’s reputation has been enhanced because he has remained married to Wife. For example, the local Clerk of Court stated, “He is to be commended for the compassion and care that he continued to show [Wife] despite their legal separation.”

⁹ Grievant Exhibit 9.

Not only has the Agency been unable to show any damage to its reputation, Grievant has presented credible evidence of damage to his community if he is reassigned to another community. It is likely that the Agency's reputation will suffer more by removing Grievant from the locality than it will by permitting Grievant to remain in an adulterous relationship within the community.

The Agency contends Grievant adversely affected its reputation by bringing Ms. S to his place of work on occasion thereby diverting attention to his adulterous relationship. Grievant also arranged for Ms. S to stay at the same hotel where Grievant was residing while he and several other troopers were working away from their area for a several months period.¹⁰ The Agency instructed Grievant not to permit Ms. S to come to the Agency's facility to assist him. The Agency also could have prohibited Grievant from openly "dating" Ms. S by prohibiting them from staying at the same hotel. In either event, the Agency can control any perceived risk of injury to its reputation. No evidence was presented, however, suggesting Grievant's actions created some inconvenience, dissention, or disruption within the Agency. Those actions do not serve as a basis for disciplinary action.

Grievant's Wife has suffered no injury or damage because of Grievant's behavior. Grievant and his Wife entered into a separate agreement providing that each could date even though remained married. The Wife construed this document to permit Grievant to engage in sexual intercourse with other women. From a factual standpoint, the question of whether an employee who engages in adultery creates some injury to his spouse need not be raised since the question has already been answered. Grievant's adultery has not harmed the Wife. What would harm the Wife would be for Grievant to divorce her so that he could marry Ms. S.

Grievant's actions have not damaged the institution of marriage in the context of Wife's right to obtain a divorce on the grounds of adultery. *Va. Code § 20-91(A)(1)* establishes adultery as a grounds for divorce. When adultery is condoned, however, a spouse may not be divorced on the grounds of adultery.¹¹ Wife interpreted the separation agreement to constitute her agreement that Grievant could engage in adultery. The agreement states that Grievant's dating "relationships shall not be a grounds of divorce." Thus, a court would not likely grant her a divorce on the grounds of adultery if she were to seek a divorce.¹²

While Grievant's actions on the surface may appear to raise doubts about his behavior, the substance of his actions reflect significant personal sacrifice in order to benefit someone with whom he once lived as husband and wife. It would be easy for

¹⁰ The evidence is unclear whether Ms. S stayed in Grievant's room or had her own room.

¹¹ See, *Va. Code § 20-94*.

¹² This rationale would not apply if a trooper were to engage in adultery without his or her spouse's knowledge. The institution of marriage would be damaged as evidenced by the injured spouse's right to pursue divorce on the grounds of adultery.

Grievant to divorce the Wife. Grievant chooses to remain married to the Wife despite no longer loving her in order to avoid the physical trauma to her of losing “full service” medical treatment and causing her to suffer the helplessness that would result if she had to experience her physical limitations alone. When all of the circumstances of Grievant’s actions are known, his decisions reflect personal sacrifice to benefit another person that some may consider as noble.

The Agency has not presented evidence suggesting it interprets General Order 19 as setting a *per se* or *zero tolerance* rule prohibiting adultery. In other words, the Agency does not contend that merely engaging in adultery without any discernable consequences would be a Group III offense.¹³

In the absence of a *per se* or *zero tolerance* rule, engaging in adultery does not, in itself, form a basis for disciplinary action. Adultery is more complex in its application than are other crimes because the underlying behavior involves individual liberty and privacy rights.¹⁴ In Lawrence v. Texas, 539 U.S. 558 (2003), the Court addressed the liberty and privacy of individuals involved in private sexual conduct. “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places.” Lawrence at 562. The Court added, the “petitioners are entitled to respect to their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.” Lawrence at 576. As part of its rational to distinguish between the State’s and an individual’s interest, the Court wrote:

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries **absent injury to a person or abuse of an institution the law protects.** (Emphasis added.)¹⁵

Although the Lawrence case involved criminal prosecution, the Court expressed concern about State action that had “collateral consequences ... such as notations on job application forms” Lawrence at 576. A Group III Written Notice remains active for four years and would have to be disclosed by a State employee seeking promotion within his Agency. Accordingly, the Agency’s issuance of a Group III Written Notice has a non-trivial impact on Grievant’s liberty and privacy interest.

¹³ Compare General Order 19 with Department of Mental Health Mental Retardation and Substance Abuse Services Departmental Instruction 201 which establishes patient abuse as a *per se* basis for taking disciplinary action.

¹⁴ A trooper could be deemed to have waived his liberty and privacy rights as a part of his employment contract with the Agency. If the Agency had specifically described adultery as a basis for disciplinary action and stated that the Agency has no level of tolerance for adultery, the trooper would be bound by that policy provision upon receiving adequate notice of the policy.

¹⁵ Lawrence at 567.

The Agency argues Lawrence v. Texas, does not apply because that case involved two individuals of the same sex charged with “deviate sexual intercourse” contrary to Texas State statute. Although the case did not involve adultery, the dissenting opinion concludes that “State laws against ... adultery” are “called into question by today’s decision.” Lawrence at 590. The Hearing Officer need not conclude that Virginia’s law against adultery cannot be enforceable under Lawrence v. Texas. The framework under which adultery is evaluated, however, is changed by Lawrence. The Lawrence decision means that adultery, without more¹⁶, cannot form a basis for disciplinary action.

The Agency argues that its policy addresses action which “might” impair the Agency’s actions. It is not necessary for the Hearing Officer to analyze whether Grievant’s behavior “might” impair the Agency’s reputation. Grievant’s adultery is known in the community and, thus, whether Grievant’s behavior actually has consequences for the Agency is what must be considered. Although it is possible that Grievant, in the future, may engage in behavior relating to his marital status that could damage the Agency’s reputation, he has not done so at this point in time.

The Agency’s concern about its employees engaging in adultery is understandable. Troopers are held to very high standards for several reasons including their obligation to enforce criminal laws. When a trooper acts contrary to law, he or she may bring criticism to the Agency and/or disrupt its operations.

The Hearing Officer is not excluding any circumstance under which the Agency may discipline an employee engaging in adultery. A trooper may be disciplined for engaging in adultery when his adultery causes some material consequences to the Agency. For example, a trooper could be disciplined for engaging in adultery with another trooper’s spouse (while they are living as husband and wife) thereby disrupting the second trooper’s marriage and creating conflict within the Agency. Another example would be where a trooper engages in adultery with the spouse of someone living in the trooper’s locality thereby disrupting that marriage and creating resentment against the Agency. The key to justifying disciplinary action is not the adultery but the consequences of the adultery.¹⁷

Although not cited by the Agency in support of its action, the United States District Court for the Western District of Virginia addressed in 1982 the removal of a State Trooper who engaged in adultery. In Suddarth v. Slane, a married State Trooper with two daughters had a sexual and romantic relationship with a neighbor, a married

¹⁶ Such as evidence of actual injury to the Agency or the Agency having adopted a *zero tolerance* policy.

¹⁷ Indeed, a trooper could engage in legal behavior but engage in that behavior in a way that creates scandal within the community thereby justifying disciplinary action. For example, a trooper could secretly pursue the spouse of another trooper (but not engage in adultery) thereby creating dissension within the Agency.

woman with two children. During the course of the affair, the woman gave birth to a third child who she claimed was fathered by the trooper.

Grievant's case is distinguishable from the Suddarth case. Grievant did not have an affair with a married neighbor thereby disrupting her marriage with her husband. Grievant's actions did not damage his romantic relationship with his Wife since she agreed in writing, in essence, that the marriage was in name only and that either party could seek sexual relationships despite being marriage. The Suddarth case has every indication that the trooper created a scandal that adversely affected the Agency's reputation.

The Agency argues it is free to transfer its employees and, thus, the transfer may not be rescinded. Although the Agency is free to transfer its employees, when it does so pursuant to disciplinary action and that disciplinary action is rescinded, the transfer is likewise rescinded.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with transfer is **rescinded**. The Agency is ordered to reinstate Grievant to his former position, or if occupied to and objectively similar position located in his prior locality.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must

state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

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.¹⁸

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.