

Issues: Group I Written Notice (actions unbecoming a Captain) and Group III Written Notice with suspension (failure to be truthful); Hearing Date: 10/12/05; Decision Issued: 10/14/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8176



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8176**

Hearing Date: October 12, 2005  
Decision Issued: October 14, 2005

**PROCEDURAL HISTORY**

On June 16, 2005, Grievant was issued a Group I Written Notice of disciplinary action for:

*Actions unbecoming a Captain – On May 16, 2005 it was reported to you that [Sgt. W] had written in his book that you had harassed [Officer T]. You called [Officer T] into the Watch Office and questioned her about whether you had harassed her. Policy is very clear that under no circumstances shall the individual alleging harassment be required to file a complaint with the alleged harasser. You have been trained on harassment policies and admitted to the Warden that you handled this inappropriately. This conduct is unacceptable and does not support the Goals and Objectives of [the Facility].*

On June 16, 2005, Grievant was issued a Group III Written Notice of disciplinary action with five workday suspension for:

*Failure to be truthful – On May 16, 2005, you were questioned about an allegation of harassment by [Officer T]. You were asked why you questioned [Officer T] rather than reporting the incident to the Major or Assistant Warden. You advised the Warden and Human Resource Officer*

*that neither one of those individuals were available until late afternoon. In truth, they were both at the Institution at the time that you questioned [Officer T]; in fact, [Assistant Warden] walked into the watch office while you were questioning her. There is no question that you were untruthful and deliberately evasive. This conduct is unacceptable and does not support the Goals and Objectives of [the Facility].*

On July 13, 2005, 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 7, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 12, 2005, a hearing was held at the Agency's regional office.

### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

### **ISSUE**

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

### **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 Department of Corrections employs Grievant as a Captain at one of its Facilities. He has been working for the Agency for approximately 24 years. No

evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On July 21, 2003, the former Warden presented Grievant with a memorandum stating in part:

As a Captain, you need to be very cognizant of your behavior towards subordinate employees. You need to be especially careful in your interactions with female staff to ensure that your actions cannot be misconstrued to be anything but professional. Whenever possible you should meet with female staff when there is another employee in attendance.<sup>1</sup>

Officer T reported to her supervisor, Sergeant W, that she believed she was being harassed by Grievant.<sup>2</sup> Sergeant W made a notation in his day planner. He wrote “[Officer T] and [Grievant] harassment.”

On May 16, 2005, Sergeant W was escorting Sergeant C around the Facility. Sergeant C was new to the Facility although she had known Grievant for approximately 7 years. As they walked to the time keeper’s office, Sergeant W pulled out his day planner and began a discussion with the time keeper regarding his work hours. Sergeant C happened to look at Sergeant W’s day planner and noticed the reference to Officer T and Grievant and harassment. Sergeant C asked Sergeant W if he had reported the allegation. Sergeant W said “no” and angrily stated “This is for future reference!” Sergeant C felt uncomfortable with Sergeant W’s response. She decided to tell Grievant.

Sergeant C walked to the watch office to speak to Grievant who was working as Shift Commander in charge of the Facility.<sup>3</sup> The Lieutenant was also in the office so Sergeant C asked Grievant if it was all right to speak. Grievant said she could speak at that time. Sergeant C told Grievant and the Lieutenant what she read in Sergeant W’s planner. Sergeant C felt deeply that Sergeant W was trying to set up Grievant for failure.

After Sergeant C left, Grievant and the Lieutenant discussed what to do. They agreed they should report the matter. The Lieutenant suggested Grievant speak with Officer T. Grievant called Officer T to the watch office.<sup>4</sup> Officer T sat down. Grievant

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<sup>1</sup> Agency Exhibit 8.

<sup>2</sup> Agency Exhibit 2.

<sup>3</sup> Although Grievant was Shift Commander, he continued to report to the Major and to the Assistant Warden.

<sup>4</sup> Agency Exhibit 4. The Lieutenant’s statement says “Later she [Officer T] was called over to the watch office by [Grievant].”

and the Lieutenant stood, but not directly over Officer T. Grievant asked Officer T if she had told Sergeant W that Grievant sexually harassed her.<sup>5</sup> Officer T said “no.” During their meeting, the Assistant Warden walked into the watch office. He had entered the watch office to tell the Captain that he would be out of the Institution for a few minutes to drive to a bank located less than a mile away. He made a “quip” to Officer T and asked what she did to get herself in trouble. He then left. Shortly thereafter, Officer T left the watch office.

The Lieutenant felt that “something was not right” after observing the demeanor of Officer T. After the meeting and without Grievant being present, he called Officer T by telephone and asked her what was going on. Officer T made several statements that concerned the Lieutenant so he decided to bring the matter to the Warden’s attention. The Lieutenant spoke with the Warden and the Warden became concerned and felt it was necessary to investigate the matter. The Warden interviewed Officer T, Grievant, the Lieutenant, the Major, and Sergeant W. He was attempting to determine whether there was any substance to Officer T’s claim that Grievant sexually harassed her. When the Warden spoke with Grievant, the Warden asked why Grievant questioned Officer T rather than reporting the matter to the Major or Assistant Warden. Grievant responded that the Major and Assistant Warden were not available. Both the Major and Assistant Warden were working on May 16, 2005 and could have been reached by radio.

At the conclusion of his investigation, the Warden found that he could not “confirm or contradict that the alleged incident took place, therefore this investigation is concluded.”<sup>6</sup>

### **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.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. 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.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

#### Group I Written Notice

It was inappropriate for Grievant to confront Officer T regarding her allegation against him. Since he was her superior and the target of her allegation, Grievant should

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<sup>5</sup> Agency Exhibit 3. Grievant’s statement says, “I made the mistake and asked [Officer T] had she made statement like this to [Sergeant W].” The “statement like this” was whether Grievant had sexually harassed Officer T.

<sup>6</sup> Agency Exhibit 7.

have known that he would appear to be pressuring her or retaliating against her for making her allegation to her immediate supervisor, Sergeant W. He also should have known that since he was the target of the allegation, he could not have objectively investigated the allegation. Grievant had received training on preventing workplace harassment and knew or should have known that his actions would be contrary to the spirit of DHRM Policy 2.30 which states that under “no circumstances shall the individual alleging harassment be required to file a complaint with the alleged harasser.”<sup>7</sup> Grievant’s behavior constituted inadequate or unsatisfactory job performance thereby justifying the issuance of a Group I Written Notice.<sup>8</sup>

### Group III Written Notice

DOCPM § 5-10.7(C) states, “The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head, although not listed in the procedure, undermines the effectiveness of the agency’s activities or the employee’s performance, should be treated consistent with the provisions of this procedure.”

The Agency believes being untruthful during an administrative investigation is a Group III offense. The Hearing Officer agrees. Falsifying records is a form of untruthfulness and it is a Group III offense. Being untruthful when Agency managers who are attempting to determine important and specific facts, may undermine an entire investigation and lead to incorrect conclusions affecting the Agency’s operations and liability. The Warden asked Grievant why he questioned Officer T rather than reporting the matter to the Major or Assistant Warden. Grievant replied because they were unavailable. Grievant’s statement was false. Grievant could have called the Major and/or the Assistant Warden by radio to determine what to do. Grievant knew his statement was false because the Assistant Warden physically appeared in the watch office during Grievant’s questioning of Officer T. Grievant could have pulled the Assistant Warden aside at that time and reported his concerns to the Assistant Warden. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice.<sup>9</sup> A suspension of up to 30 workdays is permitted upon the issuance of a Group III Written Notice. Grievant was suspended for five workdays.

The Lieutenant was with Grievant when Sergeant C advised them of Sergeant W’s notation and when Grievant questioned Officer T. The Lieutenant did not testify that he observed Grievant make any attempt to contact the Major or Assistant Warden

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<sup>7</sup> Although Grievant was not requiring Officer T to file a complaint with him, the policy reveals a preference for the alleged victim not to be forced to interact with the alleged harasser. Grievant knew or should have known of this preference. His statement acknowledges this by referring to his questioning of Officer T as a mistake.

<sup>8</sup> DOCPM § 10.15(B)(4).

<sup>9</sup> No credible evidence was presented to justify mitigation of the Group I and Group III disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

by radio or other means. Grievant's statement does not identify any attempt by Grievant to radio the Major or Assistant Warden. There is no evidence to suggest Grievant made any attempt whatsoever to contact the Major or Assistant Warden to determine whether either was available.

Grievant argues that at the time he spoke with Sergeant C, he did not know the nature of Officer T's allegation. He claims he did not know whether Officer T was claiming he had harassed her. Grievant contends that he had to interview Officer T first in order to determine the facts surrounding the claim before reporting this to the Major or Assistant Warden. He says he if had known the person claiming to be harassed was Officer T, he would not have first interviewed her. Grievant's assertion, however, is contradicted by his written statement that he made on May 17, 2005. Grievant wrote, "She, [Sergeant C], told us that she had seen in [Sergeant W's] book that on some date that I [Grievant] had sexually harassed [Officer T]."<sup>10</sup> Grievant's statement is confirmed by the Lieutenant's statement which states, "[Sergeant C] asked if she could speak to us about what she had seen in [Sergeant W's] book about an officer who alleged had been harassed, and that person was [Grievant]. \*\*\* [Officer T] was the officer's name."<sup>11</sup> The Hearing Officer finds that the mostly likely scenario is that at the time Grievant spoke with Officer T, he believed she had alleged to Sergeant W that Grievant had harassed her. Grievant's assertion that he did not want to speak with the Major or Assistant Warden until he found out the nature of Sergeant W's notation is not supported by the evidence. Grievant already knew Officer T had alleged he had harassed her.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension is **upheld**.

## 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.

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<sup>10</sup> Agency Exhibit 3.

<sup>11</sup> Agency Exhibit 4.

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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>12</sup>

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.