

Issue: Group III Written Notice with suspension, demotion and salary reduction (violation of workplace violence policy); Hearing Date: 05/23/06; Decision Issued: 06/08/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8332; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8332

Hearing Date: May 23, 2006
Decision Issued: June 8, 2006

PROCEDURAL HISTORY

On January 23, 2006, Grievant was issued a Group III Written Notice of disciplinary action with suspension from January 25, 2006 through February 3, 2006 and role change to a lower pay band with 10% salary reduction and demotion to Corrections Officer Senior. The Agency alleged Grievant violated DHRM Policy 2.30, *Workplace Harassment*.

On February 19, 2006, 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 April 20, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 23, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

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. 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 Corrections Sergeant until his demotion to a Corrections Officer Senior effective January 23, 2006. He was promoted to Sergeant on December 12, 2005. Grievant received "in-service" training regarding interpersonal relationships and workplace violence and harassment on September 15, 2003, September 20, 2004, and September 12, 2005.¹

When Officer J began working at the Facility in December 2004, she met Grievant and became friends. Grievant told Officer J he might be interested in dating her and asked for her telephone number. He presented Officer J with his address book. She wrote her name and mobile telephone number in the book. Grievant did not further pursue Officer J.

¹ Agency Exhibit 4.

Officer J and Officer H had an ongoing friendship or relationship that ended abruptly. Officer J persuaded Officer H to co-sign on a note for a car she was purchasing.² On a day she drove the vehicle to the Facility, Officer H arrived with a tow truck and towed the vehicle away in full view of other employees entering the Facility. Employees at the Facility began talking about the incident and Grievant knew of the incident. Some employees speculated about the nature of the relationship between Officer J and Officer H.

On December 31, 2005, Officer J was working in the control booth.³ Grievant approached the control booth and said he was looking for Sergeant M.⁴ Officer J said she did not know Sergeant M's location.⁵ She called Sergeant M on the radio and asked for his location. Grievant entered the control booth and sat down to wait for Sergeant M. Grievant raised the topic of Officer J and her relationship with Officer H.⁶ At one point, Grievant said Officer J "needed to step my game up." Officer J asked Grievant what he meant. Grievant responded, "You need a nigga like me." Officer J said "I'm not feeling that and not into that stuff." Sergeant M arrived at his office a short distance from the control booth. Officer J informed Grievant of Sergeant M's location. Sergeant M approached the control booth and said to Grievant through the door, "Come out of my control booth" Grievant left the control booth.⁷

As the work shift ended, employees left their posts and exited the prison into the parking lot. As Officer J was walking in the parking lot, Grievant approached her and said "I know where you live; I can come to your front door at any time." Officer J asked Grievant what he was doing in her area. Grievant laughed and said, "I will put this dick

² Officer H's name was also on the title to the vehicle.

³ Grievant and Officer J worked from 6 p.m. until 6 a.m.

⁴ Grievant was in the process of addressing an issue regarding an inmate's property.

⁵ Officer J reported to Sergeant M.

⁶ Grievant described his understanding of the interaction between Officer J and Officer H as, "I had been made aware of an incident which had occurred earlier during the shift whereby there had been talk of a married ... supervisor having financed a car for [Officer J]. Apparently, his wife had found out about the arrangement and the car which [Officer J] was driving was then confiscated from the institution's parking lot by the supervisor himself. In light of what had happened, I was trying to tell her that, in essence, she needed to be careful about people "... you deal with ... and that she [perhaps] needed [someone]else ..." – someone who was available to pursue a relationship with her rather than a married man. This in no way was my way of offering myself to her – I simply meant perhaps she should deal with those not likely to take advantage of her and who [were] free to be open about their relationship. I meant this as advice and nothing more. I had thought that while we might not be friends, I knew her well enough to offer her advice."

⁷ In Grievant's written statement, he stated he did not remember much of his conversation with Officer J in the control room. Compare this assertion to footnote 6.

all up in your guts girl.”⁸ Officer J then asked Officer K if she could walk him to his vehicle. Officer J then walked away from Grievant.

On January 5, 2006, Officer J approached Sergeant M as he was making rounds and said she wanted to talk to him about Grievant. Officer J told Sergeant M she did not feel comfortable working around him because of some statements Grievant made to her. Sergeant M asked Officer J if she would speak with Captain T and she agreed. Officer J and Sergeant M spoke with Captain T and Officer J described the statements Grievant made to her. Officer J told Captain T that Grievant’s comments made her feel cheap, as if a sexual object.

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.”⁹ 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.”¹⁰ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”¹¹

Group III offenses include, “violation of DHRM Policy 2.30 *Workplace Harassment* (considered a Group III offense depending upon the nature of the violation.”¹² DHRM Policy 2.30 *Workplace Harassment* defines hostile environment as:

A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendos, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

Grievant made an unwelcome sexual comment to Officer J. His comment was severe because he said he would have sexual relations with her as if it was a certainty. Grievant created an intimidating or offensive place for Officer J to work as evidenced by her reluctance to work on his shift. Grievant’s behavior was contrary to DHRM Policy 2.30, *Workplace Harassment*.

⁸ Officer J interpreted Grievant’s statement to be a “macho” way of saying he intended to have sexual intercourse with her.

⁹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

¹⁰ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

¹¹ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

¹² VDOC Operating Procedure 135.1(XII)(B)(19).

The Agency believes Grievant's behavior rises to the level of a Group III offense. The evidence as presented is sufficient to support the Agency's conclusion.¹³ Upon the issuance of a Group III Written Notice, an employee may be demoted with a pay reduction and suspension. Since the Agency's demotion, pay reduction, and suspension of Grievant is consistent with the Agency's Standards of Conduct, it must be upheld.

Grievant argues that the Officer J lacks credibility and should not be believed. The Hearing Officer finds that parts of Officer J's testimony lacked credibility while other parts were credible. In addition, parts of Grievant's testimony were credible and parts were not credible. For example, Grievant credibly testified that he presented his address book to Officer J and asked that she write her name and telephone in the book. Officer J testified that she believed she was writing her name and telephone number in the address book of Officer A. Officer J said that Officer A later said Grievant had given her \$100 to obtain Officer J's telephone number and, thus, Officer A clandestinely presented Grievant's address to Officer J. Officer J's testimony regarding this incident lacked credibility. In addition, Officer J's testimony regarding her interaction with Officer H lacked credibility. Officer J testified that she gave Officer H \$1,000 and in return he co-signed a loan for a vehicle she purchased. Although it is clear Officer J somehow persuaded Officer H to co-sign a note on her vehicle, there is no reason to believe Officer J gave Officer H \$1,000 (based on Officer J's demeanor).

Grievant's demeanor was markedly different when he credibly testified about presenting his address book to Officer J and when he testified about what he said to Officer J in the parking lot. Based on Grievant's demeanor, it is clear to the Hearing Officer that Grievant presented his address book to Officer J and Officer J wrote her mobile telephone number in the book. Grievant testified he did not make the statement Officer J said he made in the Facility parking lot. Grievant's denial is not sufficiently credible to rebut Officer J's credible testimony about the statement Grievant made to her in the parking lot.

The evidence showed Officer J could be manipulative of others.¹⁴ What was not established was how her actions were manipulative of Grievant. She had nothing to gain from falsely describing Grievant's statements to her in the parking lot.

Grievant contends the disciplinary action should be mitigated. *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

¹³ In particular, Grievant held the rank of Sergeant at the time thereby making Officer J a subordinate employee and subject to his supervisory authority.

¹⁴ One witness testified credibility that she overheard Officer J talking to another employee. During this conversation, Officer J said she took money from men all the time. Officer J bragged she gets work checks and Army checks from men by going out with them.

rules established by the Department of Employment Dispute Resolution....”¹⁵ Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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,¹⁶ and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” 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 demotion, pay reduction, and 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.
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

¹⁵ Va. Code § 2.2-3005.

¹⁶ The Warden testified that the discipline issued to Grievant was consistent with the discipline issued to other employees at the Facility who engaged in similar behavior. No evidence was presented to counter this assertion.

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 all of your appeals to the other party and to the EDR Director. 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.¹⁷

[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

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.