

Issues: Group III Written Notice (hostile work environment/workplace harassment), Group III Written Notice (fraternization), and termination; Hearing Date: 01/09/07; Decision Issued: 03/14/07; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 8483/8484; Outcome: Group III for hostile work environment/workplace harassment – Full relief, written notice rescinded; Group III for fraternization – partial relief, written notice reduced to Group II; Termination – Full relief, employee reinstated.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8483 8484

Hearing Date: January 9, 2007
Decision Issued: March 14, 2007

PROCEDURAL HISTORY

On September 26, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for creating the appearance of a hostile work environment for staff. Grievant also was issued a Group III Written Notice of disciplinary action with removal for creating the appearance of fraternization. On October 2, 2006, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 4, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 9, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

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 actions, 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 Lieutenant at one of its Facilities until his removal effective September 26, 2006. Grievant had been employed by the Agency for approximately ten years. The purpose of his position was to "[p]rovide first line supervision to correctional officers."¹ No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Sergeant E began his shift at approximately 5:45 a.m.

On July 19, 2006, Nurse P began her first day of work at the Facility. As part of her orientation, she accompanied Nurse T while Nurse T was distributing medication to inmates locked in their cells. Officer M accompanied the two nurses while they handed out pills to inmates living in the housing unit. The housing unit consisted of an open floor area with two floors of cells facing the open area. A stairway permitted access between the floors.

¹ Agency Exhibit 4.

At approximately 12:30 p.m., Nurse T, Nurse P, and Officer M began walking from cell to cell in the housing unit. At approximately 1:03 p.m., Nurse T, Nurse P, and Officer M walked up the stairs from the first floor to the second floor. An unidentified inmate walked below where the group was located and said that they needed to see an inmate in a particular cell because there was an emergency.² This inmate was referring to the cell in which Inmate F was located. Since the nurses had not missed giving out medication to any inmate entitled to medication, the nurses ignored that inmate's request and continued what they were doing. This inmate walked to the cell door where Inmate F resided alone inside and spoke with Inmate F.

At approximately 1:06 p.m., Officer D, who is working in the control room, unlocked Inmate F's cell door and Inmate F opened the cell door.³ Inmate F walked directly below Nurse T, Nurse P, and Officer M and began yelling upwards towards them. Inmate F questioned Nurse T as to what she told the other inmate. Inmate F asked why they did not come by to see what he wanted. Nurse T said she did not know Inmate F was in the cell to which the other inmate referred. Inmate F continued to yell at the nurses. Nurse T thought she realized what Inmate F was concerned about and said that she could not renew his medication order and that Inmate F needed to see the doctor. Inmate F yelled towards the nurses for approximately a minute and a half before walking away. Officer M did not speak to Inmate F to tell him to stop yelling. Nurse P felt threatened by Inmate F.

At approximately 1:08 p.m., Inmate F finished talking to the nurses and then walked near the control booth. Sergeant E entered the housing unit pod and spoke to Inmate F. At approximately 1:09 p.m., Inmate F and Sergeant E entered the Interview Room. The Interview Room was on the ground floor at the end of a row of cells. At approximately 1:10 p.m., Sergeant E and Inmate F exited the Interview Room and stood in front of the control room.⁴

At approximately 1:11 p.m., Nurse T, Nurse P, and Officer M descended the stairs from the second floor to the first floor. Officer M walked behind the two nurses. The bottom step of the stairs is close to the control booth where Inmate F and Sergeant E were standing. In order to exit the pod, the nurses must walk past Inmate F. As the nurses walked towards the exit door, Inmate F turns and asks Nurse T if he can talk to her. Inmate F continued to ask about his medication. Nurse T told Inmate F that she was having a bad day and that she did not want to argue with him. Inmate F asked Nurse T who was bothering her and said that he would handle the situation. Nurse T responded no one was bothering her. Inmate F was able to position himself so that Nurse T was isolated from the group standing next the control booth. During the altercation, Nurse T felt threatened by Inmate F's body language and tone of voice.

² There was no emergency or reason for the nurses to have visited Inmate F's cell.

³ Inmate F used the intercom located inside his cell to ask Officer D to let him outside of the cell.

⁴ At approximately 1:10 p.m., the Control Room Officer closed Inmate F's cell door even though Inmate F was not inside.

Sergeant E watched portions of the interaction between Nurse T and Inmate F and did not take any action to stop Inmate F. At one point, he turned his back to talk to Officer M and told Officer M to go on her break.

After leaving the pod, Nurse T and Nurse P were upset and shaken because of their interaction with Inmate F. They were concerned because none of the security staff were watching them close enough to recognize that Inmate F was creating a problem for them. Nurse T and Nurse P were so upset that they brought their concern to their supervisor, Ms. O. Nurse P told Ms. O that she was so upset by the encounter with Inmate F that she was not sure she wanted to continue working at that Facility. Ms. O contacted Captain B. Captain B told the nurses they should file a charge against Inmate F.

Grievant reported to work at the Facility at approximately 1:18 p.m. He was scheduled to assume his post at 1:45 p.m. but began working earlier.

Nurse T filled out a Disciplinary Offense Report listing Inmate F's offense as a 129. Under DOC Operating Procedure 861, inmate offenses are described by the level of the offense. Category I offenses include the offense of 129 which is listed as, "Gathering around, or approaching, any person in a threatening or intimidating manner."

At approximately 1:30 p.m., Captain B told Sergeant E to "lock up" Inmate F. This meant that Inmate F was to be moved from his cell to a segregation unit for prehearing detention.

Grievant and Sergeant S approached Nurse T and Nurse P regarding the charge against Inmate F. Grievant asked Nurse T to repeat what happened. Grievant continued to ask Nurse T if she was sure she felt intimidated by Inmate F because he watched the tape and Inmate F was down stairs and she was upstairs. Nurse T said she felt intimidated. Sergeant E asked Nurse T if she was sure she wanted to go through with submitting the charge. Grievant asked Nurse T if she would allow him to talk to Inmate F instead of filing the charge and if he did anything like that again, Inmate F would be locked up. Grievant said "[Inmate F] is going to put up a fight." Nurse P asked Grievant if she also needed to write a statement and Grievant said she did not have to make a statement.

The officer in charge (OIC) is responsible for serving charges against an inmate. An OIC is expected to investigate a charge prior to serving it. Grievant was instructed to serve the charge against Inmate F. He conducted an investigation consisting of reviewing the video of the pod showing the interaction between Inmate F and the nurses. He only reviewed the part of the video showing Inmate F standing on the first floor yelling up towards the nurses on the second floor.

Grievant called Captain B and said that Sergeant E had briefed him when he came on duty and that Grievant had checked the video of the incident. Grievant said

the charge put on Inmate F did not warrant placing Inmate F in lock up. Grievant said the proper charge was not issued. Captain B told Grievant to let the DOC Hearings Officer decide whether the charge was proper. Captain B told Grievant that the inmate was to be placed in prehearing detention.

At 5:29 p.m., Grievant "signed off" on the charge against Inmate F by signing the disciplinary offense report form on the line intended for the "Officer-in-Charge investigating report." Grievant did not immediately comply with Captain B's prior instruction to place Inmate F in prehearing detention.

At approximately 6 p.m., Grievant spoke with Inmate F and told him that he might be locked up in the segregation unit and he should pack his property. According to the Warden, the proper procedure would have been to serve the charge on Inmate F, restrain him, and then have his property inventoried. Instead, Grievant told Inmate F to pack his own property. Since Inmate F could exit his cell at that time, Inmate F packed his property but put items in the trash. Grievant was not present when Inmate F was packing his property and throwing out some of his belongings.

When an employee writes a charge against an inmate, the charge must be served on the inmate with the inmate being advised of certain rights and procedures. At 8:50 p.m., Grievant served the charge on Inmate F. The date for Inmate F's hearing was initially written as "pending." At 8:55 p.m., Grievant took Inmate F out of the pod and moved him to the segregation unit. Only at that time was Inmate F in "lock up."

Sergeant E left the Facility at approximately 9:40 p.m. Grievant left the Facility at approximately 10:15 p.m.

On July 28, 2006, the DOC Hearings Officer received a letter from Inmate F asking that witness statements be provided by Grievant, Sergeant E, Officer M and Officer D.

On August 2, 2006, the DOC Hearings Officer held a hearing with Inmate F present. Nurse T testified. The DOC Hearings Officer found Inmate F guilty and wrote:

The [reporting officer] gave testimony that [Inmate F] made her feel threatened by the way she was approached and the way that he was screaming and yelling at her.⁵

Inmate F was sentenced to 30 days in isolation with credit for time already served in isolation.

On August 7, 2006, Captain M reviewed the DOC Hearings Officer's decision and approved it. At some later time, a rehearing was authorized. It is unclear who

⁵ Agency Exhibit 3, p. 22.

authorized the rehearing, but there is no evidence Grievant was involved in the decision.

On August 11, 2006, Grievant received a partially completed form advising him that he had been requested to be a witness for a disciplinary charge. The form indicated that Inmate F's hearing was set for August 17, 2006 and that Grievant was supposed to return his written statement about the incident to the DOC Hearings Officers no later than August 15, 2006. Grievant completed the form on August 17, 2006. He wrote:

Based on the incident reports I read from the officers who were present at the scene. I did not feel that the charge was appropriate and a lock up not needed. I reviewed the tape and the charge of approaching and gathering in a threatening manner did not fit.⁶

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."⁷ 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."⁸ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁹

Creating the Appearance of a Hostile Work Environment

DHRM Policy 2.30, *Workplace Harassment*, defines a hostile work environment as, "[a] form of sexual harassment when a victim is subject to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work."

The Agency contends Grievant created the appearance of a hostile work environment because:

On September 22, 2006, after a meeting with the Warden, you were informed that the medical staff felt you and other security staff did not take the appropriate actions in dealing with this inmate as you kept questioning

⁶ Agency Exhibit 3.

⁷ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁸ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

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

them about “are you sure you want this charge written” which created a hostile work environment for them. You left my office and confronted the Nurse about telling her supervisor about this situation and reported today that she said to you that she did not say that. You failed to realize that if she was uncomfortable or fearful of you, she would not have told you so. Instead your concern appears to have been trying to find a way to justify your actions.

No evidence was presented showing Grievant’s actions were actually based on the Nurse’s gender or based on any instance of a sexual nature. No evidence was presented showing Grievant’s actions created the appearance that his actions were based on the Nurse’s gender or for any reason of a sexual nature. Indeed, the evidence showed that Grievant’s actions were based on his concern “to find a way to justify” his actions as stated by the Agency. The Group III Written Notice for creating the appearance of a hostile work environment must be reversed.

Appearance of Fraternization

Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(25), *Standards of Conduct*, states that Group III offenses include “[v]iolation of DOC Procedure 130.1, *Rules of Conduct Governing Employees’ Relationships with Offenders*.

Fraternization is defined as:

The act of, **or giving the appearance of**, association with offenders, and/or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include excessive time and attention given to one offender over others, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing staffs’ personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.¹⁰ (Emphasis added).

The Agency contends Grievant created the appearance of fraternization based on nine reasons.

1. “Did not deal with staff for opening the cell door.” Although the Agency has established that Grievant should have taken action against Officer D by issuing a written or oral counseling, this fact does not create the appearance that Grievant fraternized with Inmate F. It shows that Grievant failed to properly supervise an employee.

¹⁰ Virginia Department of Corrections Operating Procedure 130.1(III), *Rules of Conduct Governing Employees’ Relationships with Offenders*.

2. "Your statement that you did not feel the charge was appropriate and you stated you were forced to serve it under protest." Grievant's opinion was based on an incomplete review of the video tape of the incident. He only observed the first part of the interaction between the nurses and Inmate F where Inmate F was standing on the ground floor yelling up to the nurses. Grievant did not watch the video with respect to the second interaction when the nurses were attempting to leave the pod. Grievant's actions showed that he performed a poor investigation of the charge against Inmate F.

3. "Approximately 28 days later, after the charge was heard and the inmate was found guilty, you wrote a witness statement to support [Inmate F]." The reason Grievant wrote the statement to support Inmate F was because he only watched the first part of the video and did not agree with the charge. The reason he wrote the statement after Inmate F had already been convicted was because a blank witness statement form was left in his mailbox with a request for him to comment. He commented as requested and did not do so on his own.

4. "Confidential statements with regards to an inmate sending information to the Warden that [Inmate F] was strong arming the pod was disclosed to you and you went to a known informant and discussed the information, thereby, placing another inmate in jeopardy." Although Grievant's decision to speak with an informant may not have been appropriate from the Agency's viewpoint, it did not show that Grievant had created the appearance of a relationship with Inmate F.

5. "On September 22, 2006, after meeting with the Warden you were informed that the medical staff felt you and other security staff did not take the appropriate actions in dealing with this inmate as you kept questioning them about 'are you sure you want this charge written' which created a hostile work environment for them. You left my office and confronted the Nurse about telling her supervisor about this situation and reported today that she said to you that she did not say that. You failed to realize that if she was uncomfortable or fearful of you, she would not have told you so. Instead your concern appears to have been trying to find a way to justify your actions." If Grievant's concern was trying to find a way to justify his actions, he was not creating the appearance of fraternizing with Inmate F.

6. "You allowed an inmate assigned to PHD out in the pod to pack his property with assistance [from] other inmates and moved the status inmate from Building #2 to SHU without restraints." Although the Agency has shown that Grievant was inattentive when moving Inmate F from the housing unit into prehearing detention, the evidence showed that Grievant was following his customary practice. He was not treating Inmate F any differently than he would have treated any other inmate in a similar situation.

7. "From the time you came on duty on July 19th, you allowed the pod to be out of control. You did not make rounds in the pod but felt it necessary to come by [Inmate F's] cell at 6:11 p.m. to tell [him] according to you that you knew he was going to get a charge and he may want to pack his property. It was not until 8:13 p.m. that

you received that charge.” Allowing the pod to be out of control was poor supervision not the appearance of fraternization. The Agency has not established that Grievant acted improperly by telling Inmate F he would be getting a charge and to start packing his property prior to actually being given the charge.

8. “You went over to SHU and discussed with [Inmate F] “why she got you locked up.”

9. “[Inmate F] had knowledge that you discussed with [Captain B] your resentment to lock [Inmate F] up.”

Grievant’s objection to locking up Inmate F was based on his conclusion that a charge of an offense 129 was not appropriate. Offense 129 is defined as “Gathering around, or approaching, any person in a threatening or intimidating manner.” Grievant did not believe the charge fit because he only watched the part of the video where Inmate F was standing on the first floor yelling towards the second floor and thus would not be close enough to gather around or approach the nurses. Grievant believed offense 212 more appropriately fit because it is defined as, “Threatening bodily harm to any person verbally, by gesture or actions, or in writing.” Inmate F gestured several times while he was on the first floor. Agency witnesses testified that Grievant should not have discussed his objections to the charge with Inmate F especially if Grievant was concerned about whether the charge would “stick”. Grievant’s actions reflect poor judgement. There is no reason to believe he would not have acted the same with any other inmate than as he did with Inmate F. Thus, items 8 and 9 could create the appearance of fraternization but they also could simply reflect poor judgement.

In conclusion, upon considering the evidence as a whole, the evidence is insufficient to establish Grievant created the appearance of fraternization with Inmate F. Grievant made many errors but his many errors are more likely the result of poor work performance.

Failure to Follow a Supervisor’s Instructions

“[F]ailure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.¹¹ Shortly after Grievant arrived for work, Captain B instructed Grievant to lock up Inmate F. Grievant delayed doing so for three hours and twenty-one minutes. Nothing in Captain B’s instruction granted Grievant discretion to determine when to lock up the inmate. Grievant knew or should have known to immediately place the inmate in detention. By failing to act immediately to the order of an employee holding superior rank, Grievant failed to comply with a supervisor’s instruction thereby justifying the issuance of a Group II Written Notice. A ten workday suspension is authorized upon the issuance of a Group II Written Notice and such suspension is appropriate in this case.

¹¹ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

Grievant contends he had to wait until he investigated the matter and received the charge to serve it. The evidence showed that Captain B did not authorize Grievant to delay locking up the inmate or expect Grievant to take any actions other than immediately locking up the inmate.

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 Employment Dispute Resolution....”¹² 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 contends the disciplinary action should be mitigated because he was justified in delaying locking up Inmate F. Captain B gave Grievant an order to lock up Inmate F. Grievant lacked the discretion to delay the lock up and, thus, his need to investigate was not a mitigating circumstance. In light of the standard set forth in the *Rules*, 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 for creating the appearance of a hostile work environment is **reversed**. The Agency’s issuance to the Grievant of a Group III Written Notice for creating the appearance of fraternization is **reduced** to a Group II Written Notice with a ten workday suspension.

The Agency is ordered to **reinstate** Grievant to his former position, or if occupied, to an objectively similar position. Grievant is awarded full **back pay** (after accounting for suspension), from which interim earnings (including unemployment compensation) must be deducted. Grievant’s full **benefits** and **seniority** are restored.

¹² *Va. Code § 2.2-3005.*

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 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.¹³

[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].

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer