

Issues: Group III Written Notice with termination (refusal to follow instructions that could result in weakening of security); Hearing Date: 03/12/07; Decision Issued: 04/04/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8519; Outcome: Employee granted partial relief on Written Notice. Employee granted full relief on termination. **Administrative Review: HO Reconsideration Request received 04/19/07; Outcome pending**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8519

Hearing Date: March 12, 2007
Decision Issued: April 4, 2007

PROCEDURAL HISTORY

On November 21, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for refusal to obey instructions that could result in a weakening of security. On November 27, 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 she requested a hearing. On January 30, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 12, 2007, 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 Corrections Officer at one of its Facilities. She had been working for the Agency for approximately six years until her removal effective November 21, 2006. The purpose of her position was to "provide security and supervision of adult offenders"¹ Grievant had prior active disciplinary action consisting of a Group I Written Notice issued on July 25, 2005 and a Group I Written Notice issued on June 26, 2006.²

Grievant reported to Lieutenant B. Lieutenant B had a sexual relationship with Inmate M from June 1, 2005 to September 30, 2005 that was discovered by the Agency when Inmate M became pregnant.

On March 6, 2006, Grievant met with Special Agent T and Special Agent M and informed them that she had observed suspicious activity involving a former Lieutenant B and Inmate M. Grievant was asked to write a statement and she wrote, in part:

¹ Agency Exhibit 5.

² Agency Exhibit 6.

I have been a corrections officer for 6 years and have spent my entire time at the [Facility]. I started on [Lieutenant B's] shift at the end of August 2004. I have always suspected that [Lieutenant B] and the female he got pregnant had something going on, but I never actually saw anything. I had seen [Lieutenant B] go out of the compound on several occasions after midnight with the girl he got pregnant and a couple of other females, whose names I don't know. Where they went or what they did I don't have any idea. I never had any inmates approach me on [Lieutenant B's] behavior with this specific inmate. I believe that Inmate [R] [O] knows where some unknown type pictures are buried on the yard. Also, inmates [J], [D], [C], [H], [T], [H] and [Counselor J] may have knowledge about [Lieutenant B] and my perceptions of his behavior, because the problems I had with [Lieutenant B]. I was written up by [Lieutenant B] for insubordination because he stated I slammed the phone down on him in front of some inmates. However, I got written up because I called him an "inmate lover" but [Lieutenant B] did not want to put that in any of the documentation. I always worked on the inside and I don't have any knowledge of the [Building WH], the [Building CS] or the [Building UT]. I would be willing to take a polygraph examination on any of the information I have provided.³

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."⁴ 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."⁵ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁶

Agency Allegation

The Agency argues Grievant should receive a Group III Written Notice for "refusal to obey instructions that could result in a weakening of security." No evidence was presented by the Agency showing who gave an instruction to Grievant, the nature of that instruction, and Grievant's refusal to obey the instruction. The Agency has not

³ Agency Exhibit 2.

⁴ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁶ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

presented sufficient evidence to support its issuance to Grievant of a Group III Written Notice for refusal to obey instructions that could result in a weakening of security.

Failure to Comply With Written Policy

DOC Directive 038 governs “Incident Reporting.” This policy provides:

Any employee or volunteer who has reason to suspect, or has direct knowledge (including offender self-report), that an incident has occurred will report the information to their immediate supervisor or Organizational Unit Head. Reports of alleged incidents shall describe the incident(s) as fully as possible, giving the names of persons involved, time, date, and location of the incident and the names of any witnesses.

Directive 038 defines “Incident” as:

An actual or threatened event or occurrence outside the ordinary routine that involves the life, health and safety of employees, volunteers, guests, or offenders (incarcerated or under Community supervision), damage to state property, or disrupts or threatens security, good order and discipline of facility or organizational unit.

A sexual relationship between a security employee and an inmate places the inmate in control of the employee thereby reversing the Department’s custodial relationship with the inmate. Fraternalization is contrary to DOC policy. A sexual relationship between an employee and an inmate would be an occurrence outside the ordinary routine that involves the safety of employees.

“[F]ailure to ... comply with applicable established written policy” is a Group II offense.⁷ Grievant suspected Lieutenant B was involved in a sexual relationship with Inmate M but she failed to report this to the Organizational Unit Head, namely the Superintendent. Grievant’s failure to act was contrary to Agency Directive 038.⁸ A suspension of up to ten workdays is appropriate upon the issuance of a Group II Written Notice.

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

⁷ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

⁸ Grievant also failed to comply with DOC Procedure Number 10-1 regarding the Inspector General’s Office. Section 10-1.12 required Grievant to notify the Inspector General if she became aware of any criminal activity. A sexual relationship between a Lieutenant and an inmate is a felony.

Resolution....”⁹ 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.

Grievant contends the disciplinary action should be mitigated. She contends her comments to the Special Agents were based on reading newspaper accounts of Lieutenant B’s criminal proceedings for his sexual relationship with Inmate M and rumors among Facility employees. Grievant’s argument fails because it is clear from the evidence that Grievant had a long-standing suspicion that Lieutenant B was having a sexual relationship with inmates. In her written statement she says, “I have always suspected that [Lieutenant B] and the female he got pregnant had something going on.” Grievant’s use of the word “always” shows her suspicion arose prior to the relationship being discovered by the Agency. In addition, Grievant asked to speak with Agency Special Agents because she believed she had some new information to tell them.

Attorney’s Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys’ fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney’s fees unjust. Accordingly, Grievant’s attorney is advised to submit an attorneys’ fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director’s *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice with a ten workday suspension.

The Agency is ordered to reinstate Grievant to Grievant’s former position, or if occupied, to an objectively similar position. The Agency is directed to provide the

⁹ *Va. Code § 2.2-3005.*

Grievant with **back pay** less a ten workday suspension and less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.¹⁰

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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