

Issues: Group III Written Notice (conduct which undermines agency's objective and effectiveness), Demotion, Transfer, Salary Reduction; Hearing Date: 01/29/08; Decision Issued: 02/01/08; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 8770; Outcome: No Relief – Agency Upheld in Full; **Administrative Review:** **EDR Ruling Request received 02/13/08; EDR Ruling #2008-1961 issued 02/27/08; Outcome: Decision Affirmed; Administrative Review: DHRM Ruling Request received 02/14/08; Ruling issued 03/20/08; Outcome: Decision Affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8770

Hearing Date: January 29, 2008
Decision Issued: February 1, 2008

PROCEDURAL HISTORY

On November 2, 2007, Grievant was issued a Group III Written Notice of disciplinary action with demotion, transfer, and a disciplinary pay reduction for engaging in conduct that undermined the effectiveness or efficiency of the Department's actions.

On November 13, 2007, 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 December 26, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 29, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

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 Virginia State Police employed Grievant as a Sergeant until his demotion to Senior Trooper effective November 10, 2007. The purpose of Grievant's position as a Sergeant was:

Coordinate and supervise area personnel which requires the review and approval of mandatory reporting, the evaluation of individual personnel, training subordinates, managing discipline, preparing and approving work schedules to provide efficient services, maintaining building, grounds, equipment and supplies issued to the area, and perform other tasks assigned by supervision to meet organizational requirements resulting in a functional unit.¹

Grievant had been employed by the Agency for approximately 10 years. His work performance was otherwise satisfactory to the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

Sergeant A and Ms. H shared a residence in County 1. Ms. H raised two handicapped children and Sergeant A's 14-year-old child from a prior marriage. They had been living together at least since 2006. Sergeant A considered Ms. H to be his girlfriend and ultimately became his fiancée and wife. Sergeant A was transferred to

¹ Agency Exhibit 1.

County 2 and could no longer regularly reside at his residence in County 1. This strained his relationship with Ms. H.

Grievant and Sergeant A shared a townhouse in County 2. They did so in order to reduce the financial burden on each of them. Grievant and Sergeant A worked in the same division but in different areas. They had similar chains of command. Sergeant A considered Grievant to be a friend and shared his concerns about his relationship with Ms. H. Sergeant A confided in Grievant to help them get through the rough times. He did not realize that Grievant was gathering information in order to get to know Ms. H on a more personal basis.

Grievant met Ms. H for the second time on May 20, 2007 when she arrived at the townhouse to go to dinner with Sergeant A. Ms. H asked Grievant if he wanted to have dinner with them. Grievant accepted the invitation. Grievant initiated his personal relationship with Ms. H on May 27, 2007. He communicated with her by telephone, text messages and in person.

At Grievant's suggestion and without Sergeant A's knowledge, Grievant and Ms. H met at a local hotel on May 29, 2007. They had sexual intercourse. On June 27, 2007, Grievant and Ms. H met again at a local hotel and had sexual intercourse without Sergeant A's knowledge.²

Grievant's liaisons with Ms. H occurred while he was off-duty and out of uniform. During work hours, however, Grievant called Ms. H and sent her text messages. For the period May 17, 2007 through June 28, 2007, Grievant and Ms. H spoke 17 times by cell phone for a total of 7 hours and 9 minutes and made 611 text messages during Grievant's work hours.

The consequence of Grievant's behavior was to destroy his working relationship with Sergeant A and to be the reason for rumors and scorn among Division troopers including Grievant's subordinates.

Sergeant A submitted a SP103 form to the Agency on July 2, 2007. The Investigator was assigned to investigate the allegations on July 3, 2007. He completed the investigation on August 17, 2007.

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

² Sergeant A discovered the affair when he drove to his residence with Ms. H and found her asleep but with her cell phone beeping. He opened the cell phone and discovered Grievant had sent her text messages. Sergeant A confronted Ms. H and she confessed to the affair but initially denied having sexual relations with Grievant.

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).

The Virginia State Police is a paramilitary organization with employees holding rank, wearing uniforms, and exercising law enforcement authority on behalf of the Commonwealth. An important element enabling the Agency to carry out its mission is the trust among its law enforcement officers. One witness described the Agency as a profession of trust with a trooper’s safety possibly depending on that trust. In times of great stress, conflict, or danger, a trooper must be able to trust that a fellow trooper will provide needed assistance. In short, the need for and type of interaction among troopers is essential to the Agency’s activities.

Group III offenses 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.

Grievant undermined the effectiveness and efficiency of the Department’s activities because of his affair with Ms. H. Grievant destroyed his working relationship with Sergeant A forcing the Agency to keep them separated in their work assignments and creating tension and distraction during Division staff meetings. Grievant undermined his ability to supervise troopers by reducing their respect for him. As a result of Grievant’s behavior, many troopers lowered their opinions of and respect for Grievant. Several troopers spoke poorly of Grievant and sometimes described him in unpleasant terms such as making jokes about Grievant and giving him nicknames.³ One Agency witness expressed his opinion that Grievant’s ability to supervise in the Division had been dramatically diminished. The Agency has presented sufficient evidence to show that Grievant engaged in behavior giving rise to a Group III Written Notice. A disciplinary salary reduction and disciplinary demotion are authorized under the Agency’s Standards of Conduct.⁴

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

³ No evidence was presented showing how other employees in the Division learned of Grievant’s affair with Ms. H. The Agency’s investigation was not a source of those rumors.

⁴ The Agency also charged Grievant with abuse of state time because of the amount of time he spent during work hours communicating with Ms. H. An abuse of State time is a Group I offense.

Resolution....”⁵ 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 (1) the level of discipline is too harsh, (2) the Agency has inconsistently disciplined its employees, (3) Grievant's favorable length of service and otherwise satisfactory work performance, and (4) Grievant was honest and cooperated fully with the Agency throughout the investigation.

The issuance of disciplinary action that is too harsh in the opinion of the Grievant or in the opinion of the Hearing Officer is not a basis to mitigate disciplinary action. Discipline that is too harsh is not necessarily discipline that exceeds the limits of reasonableness. The Agency met its burden of proof to show a Group III offense.

The inconsistent application of disciplinary action is a basis to mitigate disciplinary action. Grievant presented a list showing 17 examples of individuals who had received discipline similar to his discipline but were given lesser discipline.⁶ For example employee number 4 was a sworn supervisor who engaged in sexual misconduct and unauthorized or misuse of a State cell phone. Employee number 4 received a written counseling and was required to reimburse the Agency. Employee number 17 engaged in sexual misconduct, unauthorized or misuse of state cell phone, and abuse of work time. That employee received a Group II Written Notice.

The information presented in the list is insufficient for the Hearing Officer to determine whether the Agency has inconsistently disciplined employees. In order to show the inconsistent application of discipline, an employee must show that other employees were similarly situated. The list describes offenses as "sexual misconduct". It does not describe the facts surrounding that misconduct. The hearing Officer cannot determine whether any of the 17 employees were similarly situated to Grievant. Agency Managers testified they were aware of only one other instance similar to Grievant's case. In that case, a First Sergeant had a sexual relationship with a Trooper's spouse. The Agency initiated disciplinary action with the intent to demote and transfer the First Sergeant. The Agency did not implement the disciplinary action because the First

⁵ Va. Code § 2.2-3005.

⁶ Grievant obtained a list from the Agency through the Freedom of Information Act and not pursuant to the procedures authorized under the grievance procedure.

Sergeant resigned from the Agency before the Agency could issue the Written Notice. Based on the evidence presented, the Hearing Officer finds that the Agency did not inconsistently discipline employees.⁷

Grievant has been employed by the Agency for approximately 10 years. His work performance has been otherwise satisfactory. In this case, neither the Grievant's length of service nor his otherwise satisfactory work performance are so extraordinary as to justify mitigation of the Agency's decision to issue Grievant a Group III Written Notice.

Grievant's honesty and cooperation are admirable characteristics of Grievant; however, they are not so extraordinary as to justify mitigation of the disciplinary action in this case.⁸ In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued that the Agency failed to timely investigate the case against him and to issue the disciplinary action. The Agency presented testimony showing that its investigation lasted for 32 days, which was within the 90 day time requirement for an investigation. The Hearing Officer finds that the Agency timely investigated the allegations against Grievant. If the Hearing Officer assumes for the sake of argument that the Agency failed to timely investigate Grievant, Grievant has not presented any argument showing that the Agency's failure to timely investigate is a basis to reduce or reverse disciplinary action.⁹

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion, transfer, and disciplinary salary reduction is **upheld**.

⁷ Grievant also argued that Captain C issued the disciplinary action against Grievant based on personal feelings against Grievant. The evidence showed, however, that Captain C had little interaction with Grievant prior to the disciplinary action and that Captain C was not the individual who determined what level of disciplinary action to take.

⁸ Grievant pointed out that Ms. H met with Agency investigators on two occasions. On the first occasion she was untruthful with the investigators. Grievant, however, was truthful in all aspects of the Agency's investigation.

⁹ Grievant expressed concern that the Agency had not properly investigated a threat by Sergeant A to kill Grievant. The evidence showed, however, that Sergeant A had not threatened to kill Grievant. Sergeant A told First Sergeant B "you better keep him (Grievant) away from me." If the Hearing Officer assumes for the sake of argument that the Agency had not properly investigated a threat against Grievant, the Agency's inaction would not be a basis to reduce disciplinary action although other remedies might be unavailable depending upon the issue qualified for hearing.

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

March 20, 2008

RE: **Grievance of Grievant v. Virginia State Police**
Case No. 8770

Dear Grievant:

The Agency head, Ms. Sara R. Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, as advised on page 7 of the hearing decision and in the Grievance Procedure Manual, either party to the grievance may file for an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of the Department of Employment Dispute Resolution (EDR) to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You have not identified any Department of Human Resource Management policy with which the hearing officer's decision is inconsistent or violates. While you state that the agency violated certain sections of Virginia State Police Manual General Order 2 and General Order 19, you failed to demonstrate how the hearing decision violated those Orders. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and what weight he placed on that evidence. The authority of DHRM is restricted to reviewing issues related to the application and interpretation of policy. Because you have not identified how any DHRM human resource policy or Virginia State Police policy that was either violated or misapplied by the hearing officer in making his decision, this Agency has no basis to interfere with the application of this decision.

If you have any questions regarding this correspondence, please contact me at (804) 225-2136.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity Services