

Issue: Group III Written Notice (conduct which undermines Agency's reputation/mission), and Termination; Hearing Date: 05/09/08; Decision Issued: 05/13/08; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 8830; Outcome: No Relief – Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8830

Hearing Date: May 9, 2008
Decision Issued: May 13, 2008

PROCEDURAL HISTORY

On February 19, 2008, Grievant was issued a Group III Written Notice of disciplinary action with a 15 workday suspension, and transfer for engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities.

On February 21, 2008, 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 March 28, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 9, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
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 Department of State Police employs Grievant as a Senior Trooper. He has been employed by the Agency for approximately 17 years. Grievant's prior work performance has been satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant knew the Special Agent before she joined the Agency. Deputy Sheriff B married the Special Agent in June 1999.

On May 10, 2000, the Agency hired the Special Agent¹. She began Phase I of the Agency's training which consisted of approximately 12 to 17 weeks of study at the Agency's Academy. Grievant and the Special Agent had a sexual relationship during the time she was a trainee and as she advanced through the various phases of training. During Phase II, the Special Agent was assigned to accompany Grievant for four weeks as Grievant worked in the Area². Although Grievant was a Field Training Officer during that time, Grievant was not responsible for evaluating the Special Agent's work

¹ The Hearing Officer will refer to the Special Agent by the title she held at the time of the hearing. She held other titles with the Agency prior to becoming a Special Agent.

² State Troopers work in different parts of the State which are referred to as Areas.

performance. He was merely responsible for showing her the nature of the duties of a Trooper. The Special Agent told Agency Investigators that the first time the Special Agent and Grievant had sexual relations was in Grievant's police car while Grievant was working radar. Grievant and the Special Agent also had sexual relations in the Fraternal Order of Police building. Grievant had keys to the building. During Phase III, the Special Agent returned to the Academy for additional classroom training. In December 2000, the Special Agent graduated from the Academy and was assigned to a Field Training Officer as part of Phase IV. The Special Agent remained a probationary employee while she worked with the Field Training Officer. The Field Training Officer was not a supervisor but was responsible for evaluating Grievant's work performance and recommending whether she should be retained by the Agency as a Trooper. On several days when the Field Training Officer was not able to work with the Special Agent, the Special Agent was assigned to work with Grievant. Grievant served as her Field Training Officer on those days. Grievant did not write any evaluative reports regarding the Special Agent's performance during those few days.

In July 2001, the Special Agent separated from Deputy Sheriff B. In August 2001, the Special Agent ended her relationship with Grievant. In July 2002, the Special Agent and Deputy Sheriff B divorced. Deputy Sheriff B had suspected that the Special Agent was having an affair with Grievant. After his divorce, the Deputy Sheriff B confronted Grievant. Grievant denied having an affair with the Special Agent but said that she had been having an affair with Deputy Sheriff G, who was her current husband.

Deputy Sheriff G was having an affair with the Special Agent while she was married to the Deputy Sheriff B.³ Deputy Sheriff G believed that when he began dating the Special Agent, her affair with Grievant ended.

From approximately August 2001 to December 2006, Grievant and the Special Agent had little interaction.

In December 2006, Grievant and the Special Agent resumed their sexual relationship following the death of a Trooper they both knew and admired. Grievant, the Special Agent, and several other Agency employees went on a retreat following the Trooper's death. While on the retreat, Grievant and the Special Agent had oral and sexual intercourse. When they returned from the retreat, Grievant and the Special Agent continued their sexual relationship. They had sexual relations while Grievant was on duty, at the Area headquarters, and at the Fraternal Order of Police building. Grievant and the Special Agent continued their sexual relationship until August 2007 when the Special Agent ended the relationship.

On September 23, 2007, Deputy Sheriff G confronted the Special Agent regarding whether she was having an affair with Grievant. She admitted to having an affair with Grievant, but said she had ended it.

³ The Special Agent told investigators she ended her relationship with Grievant in August 2001 when she started dating Deputy Sheriff G.

On October 12, 2007, the Agency received an anonymous complaint alleging Grievant and Special Agent were having a sexual relationship. The complaint stated:

There is a problem with 3 officers in the state police. They involve these 3 people ([Grievant, Special Agent, Trooper W]). They are all working in the [Area]. It is all over the community for a good [while] that when [Special Agent] came to our community that while married to [Deputy Sheriff] she had and still is having an affair with [Grievant]. Her marriage broke up. She and [Grievant] kept seeing each other on and off work. They were 2 peas in a pod. She then married [Deputy Sheriff G]. But was still seeing [Grievant]. Now she has [an] affair with [Trooper W]. Both spouses know about it but [were] told not to speak to investigator. [Grievant's] wife does not know about affair. I have always respected the state police troopers. These affairs are common talk in our community. Please bring back the respect that you have with us.⁴

The Agency's Internal Affairs section began an investigation.

Grievant was married while engaging a sexual relationship with the Special Agent. He knew she was married to Deputy Sheriff B and to Deputy Sheriff G.

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." 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).

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 engaged in conduct which might impair the department's reputation as well as the reputation or performance of its employees for several reasons. Having sexual relations while on duty and in uniform and on Agency property might impair the

⁴ Agency Exhibit 6.

department's reputation for the enforcement of laws, regulations, and appropriate behavior by citizens of Virginia. Grievant's behavior exposed the Agency to the risk of ridicule in the event Grievant's behavior became widely known in the community where Grievant worked.⁵ The Agency attempts to maintain positive relations with local law enforcement agencies and their law enforcement officers because when a crime occurs, officers from the State Police and local law enforcement agencies may respond jointly. Cooperation among the State Police and local law enforcement agencies is an essential part of effective law enforcement. Grievant had a sexual relationship with a woman who was married to two local law enforcement officers. Grievant may have undermined the possibility of a cooperative relationship with those local law enforcement officers. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

Upon the issuance of a Group III Written Notice, the Agency may remove an employee from employment. In lieu of removal, the Agency may take disciplinary action including suspending the employee for up to thirty workdays and transferring the employee to another location. In this case, the Agency suspended Grievant for 15 workdays and transferred him to an adjoining area. He did not have to relocate his residence because of the transfer. The Agency's suspension and transfer is authorized by General Order 19 and must be upheld.

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..."⁶ 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 argues that the Agency's discipline is too harsh. Under the *Rules*, once the Agency has met its prima facie case to establish a Group III offense, it is entitled to deference as to the type of consequences permitted to be taken in response to a Group III offense. Even if the Hearing Officer were to agree with the Grievant that the discipline was too harsh, the Hearing Officer would not be authorized to change that discipline based on harshness alone.

⁵ The anonymous complaint suggested Grievant's actions were already known in the community.

⁶ *Va. Code § 2.2-3005.*

Grievant contends that the Agency inconsistently disciplined its employees regarding days suspended. Trooper W received a five work day suspension for having an off-duty sexual relationship with the Special Agent. The Special Agent received a 10 work day suspension for her relationship with Grievant. Grievant received a 15 work day suspension. The Major testified that Grievant was given an additional five work day suspension because during Phase IV he was the Special Agent's Field Training Officer for a limited time. Although the Major recognized that Grievant was not the Special Agent's direct supervisor while briefly serving as her Field Training Officer, because he held a "quasi-supervisor" relationship, Grievant should be held to a higher standard.⁷ In accordance with the *Rule's* expectation for Hearing Officers to give deference to an Agency's selection of the consequences upon the issuance of a Group III Written Notice, the Hearing Officer finds that the Agency has articulated a reasonable distinction between the suspension he gave to Trooper W, the Special Agent, and to Grievant.

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 with 15 workday suspension and transfer 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

⁷ Grievant took no action to suggest someone else should be her temporary Field Training Officer or articulate that he might have any conflict being her FTO.

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.