

Issues: Group III Written Notice (inappropriate relationship with subordinate), Demotion and Transfer; Hearing Date: 05/05/09; Decision Issued: 05/11/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8959; Outcome: No Relief – Agency Upheld in Full. **Administrative Review: EDR Ruling Request received 05/22/09; Outcome pending; Administrative Review: DHRM Ruling Request received 05/22/09; DHRM Ruling issued 06/11/09; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9059

Hearing Date: May 5, 2009
Decision Issued: May 11, 2009

PROCEDURAL HISTORY

On December 15, 2008, Grievant was issued a Group III Written Notice of disciplinary action with demotion to the position of Corrections Officer, disciplinary pay reduction and disciplinary transfer to another Facility for engaging in an inappropriate relationship with a subordinate.

On January 8, 2009, 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 1, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 5, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
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 Department of Corrections employed Grievant as a Captain at one of its Facilities until his demotion to a Corrections Officer. The Job Summary for a Captain was:

It is the responsibility of this post to directly supervise the Security Operations Supervisor and to ensure all essential posts are adequately manned and function properly on shift. Will perform personnel job functions for the shift such as timekeeping duty rosters and perform other security tasks as assigned by the Chief of Security.¹

When the Warden first arrived at the Facility in 2006, she began hearing rumors that superiors were having affairs with subordinates at the Facility. She called six or seven supervisors into her office and asked them if they were engaged in relationships with subordinates. Grievant was one of those supervisors. Grievant informed the Warden that he was not having an affair with a particular subordinate.² The Warden indicated to Grievant that such relationships would be inappropriate.

¹ Agency Exhibit 5.

² It is not clear whether the Warden referred to Ms. S as the subordinate.

Ms. S is a Corrections Officer at the Facility. She began working for the Agency in June 2005. She met Grievant in 2006 when he began working on A-Break, Day Shift. Grievant was working as a Lieutenant in the watch office when he and the Corrections Officer met. The Corrections Officer was subject to Grievant's direction and supervision.³ While the Corrections Officer was working at her post, Grievant would visit her and talk about his interests, family and other non-business-related matters. The Corrections Officer would also discuss her interests, family, and other non-business-related matters. Grievant would call her most of days that she worked and talk to her for about 10 to 15 minutes to further their friendship. When Grievant met the Corrections Officer on her post, he would flirt with her and she would flirt with him. On one occasion, Grievant visited the Corrections Officer while she was working in the Control Room. Grievant asked her if she could trust him and she said "yes". He said they could have a relationship. He asked her if he could give her a hug and she said "yes". They went into the bathroom attached to the Control Room and began hugging and kissing. They had sexual intercourse.⁴

On other occasions, they would agree to meet at a location and then drive to another location to have sex.

In October or November 2006, the Corrections Officer left her husband and moved to a separate home against the husband's wishes. The Corrections Officer and her husband were fighting verbally. At one point the husband punched a hole in the wall of the Corrections Officer's apartment and attempted to assault her. Grievant encourage the Corrections Officer not to be with her husband. The relationship between Grievant and the Corrections Officer became more serious.

On December 25, 2006, Grievant was promoted from Lieutenant to Captain. As a Captain, Grievant would sometimes be in charge of the entire Facility as the Shift Commander. He no longer worked on the same shift as the Corrections Officer. On two or three occasions when Grievant was serving as Captain, the Corrections Officer's regular shift was extended by a few hours. During those few hours, the Corrections Officer and Grievant worked on the same shift at the Facility.

In 2007, the relationship between Grievant and the Corrections Officer became more "on-again, off-again".⁵ They continued to have sexual relations. Sometimes the Corrections Officer would call Grievant but he would not return her calls for days or weeks at a time. The Corrections Officer suspected her relationship with Grievant was

³ Grievant signed the Correction Officer's 28 day cycle sheets.

⁴ When the Corrections Officer initially informed the Warden of the relationship, she did not tell the Warden that she had sex with Grievant at the Facility. She was afraid she and Grievant might be fired. The Corrections Officer first disclosed this information during the hearing.

⁵ In June 2007, Grievant and the Corrections Officer visited the Corrections Officer's mother who lived in another state.

ending so she began dating another man who worked as a car salesman. She had sexual relations with the car salesman. Grievant attempted to resume his relationship with the Corrections Officer. She told him about the car salesman. Grievant became angry and attempted to confront the car salesman at the auto dealership. Grievant told the Corrections Officer that they could work out their differences given the length of their relationship.

On July 4, 2008, Grievant attended a cookout at the Corrections Officer's grandmother's house located in another state. In July or August of 2008, the Corrections Officer ended her relationship with Grievant. She returned to her husband. Grievant continued to call the Corrections Officer to restore the relationship.

On December 9, 2008, the Corrections Officer reported the relationship to the Warden. The Warden wanted to verify that such a relationship existed prior to speaking to Grievant. The Warden instructed the Intelligence Officer to listen while the Corrections Officer called Grievant on the phone. The Intelligence Officer observed the Corrections Officer call Grievant's telephone number. The Corrections Officer asked Grievant if he would consider dating her again. Grievant indicated he might consider doing so. At the conclusion of the telephone conversation, Grievant told the Corrections Officer "I love you". Sometime after this conversation, the Warden called Grievant into her office. The Warden asked Grievant "Have you ever or are you now involved with any correctional officer?" Grievant said, "No ma'am." The Warden said, "I will ask you again. Have you or are you now involved with any corrections officer?" Grievant said, "No ma'am." At this point the Warden lost confidence in Grievant's ability to tell the truth. The Warden told Grievant that she knew the details of his relationship with the Corrections Officer. Grievant admitted to the relationship.

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."⁶ 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."⁷ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁸

Memorandum HR-2006-1 effective March 28, 2006, modified the Agency's policy entitled Consensual Personal Relationships in the Workplace. This memorandum stated:

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

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

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

Procedure: 5-4.9.1, Consensual Personal Relationships in the Workplace: the Department should provide a workplace that reflects its values and that is equitable, fair and free from pressure and sexually harassing conduct and intimidation. Dating or intimate romantic relationships between supervisors and subordinates undermine the respect for supervisors with other staff, undermine the supervisor's ability to make objective decisions, may result in charges of favoritism or perceived favoritism, may lower morale among coworkers, or open supervisors to future charges of harassment or retaliation claims. Additionally, supervisory/subordinate relationships may bring about complaints from coworkers and create a liability for the Department. The Department will not condone acts of sexual harassment or inappropriate behavior by any staff. Appropriate action will be taken against persons who engage in sexual harassment.

Therefore, the Department is adopting a policy prohibiting supervisors from dating their subordinates.

1. A subordinate includes anyone in a supervisor's direct chain of command.
2. A supervisor shall not initiate, participate in, or maintain an intimate romantic or dating relationship with a subordinate. Such behavior is a violation of the Standards of Conduct and will be treated as a Group I, Group II, or Group III offense depending upon its effect on the work environment.
3. All employees are responsible for compliance with the above policy regarding consensual personal relationships in the workplace. The organizational unit head will determine the appropriate disciplinary action to be taken and the reassignment or transfer of the supervisor or employee will alleviate the supervisor/subordinate work problems the relationship may create.

Grievant engaged in a consensual personal dating and sexual relationship with the Corrections Officer. Grievant acted contrary to the Agency's standards of ethics. His behavior formed the basis for the Agency to take disciplinary action against him.

The Agency contends Grievant should receive a Group III Written Notice. This conclusion is supported by the evidence. When Grievant was a Lieutenant he assigned the Corrections Officer to post locations enabling him easy access to her for conversation. His behavior created rumors among staff about the relationship. Grievant exposed the Agency to the risk of a sexual harassment complaint by pursuing the relationship at time when the Corrections Officer was reluctant to continue it.

Upon the issuance of a Group III Written Notice, the Agency may demote, transfer and reduce Grievant's pay.

Grievant argues that he did not violate the policy because the Corrections Officer was not his subordinate during a time period they were having sexual relations. If the Hearing Officer assumes for the sake of argument that Grievant's interpretation of the policy is correct, his argument is irrelevant. The evidence showed that Grievant had an emotionally intimate and sexual relationship with the Corrections Officer when he was a Lieutenant. Grievant and the Corrections Officer worked on the same shift when he was a Lieutenant.

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..."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.

Grievant contends that the Agency inconsistently disciplined employees. In particular, Grievant contends that the Corrections Officer should have been disciplined and the Agency's failure to do so reflects the Warden's choice to side with the Corrections Officer because of her gender.

The Warden did not discipline the Corrections Officer because the Warden considered the Corrections Officer to be a victim. The Warden considered her to be a victim because the Corrections Officer alleged that Grievant had taken pictures of her without her clothing and was threatening to disclose those pictures and because Grievant had contacted the Corrections Officer's husband.

The Agency's failure to take any disciplinary action against the Corrections Officer constitutes the inconsistent application of disciplinary action. The relationship between Grievant and the Corrections Officer was consensual. The Corrections Officer entered that relationship knowing that she should not have done so. To the extent the Corrections Officer was a "victim", her victim status is not an excuse to avoid disciplinary action. One of the purposes of the Agency's policy was to avoid relationships where subordinates could be victimized. If the Corrections Officer had complied with the policy, she could have avoided the hardships that she experienced. The Agency's failure to take disciplinary action against the Corrections Officer is a mitigating circumstance.

⁹ Va. Code § 2.2-3005.

Aggravating circumstances exist to counter the mitigating circumstances in this case. In December 2008, the Warden confronted Grievant and asked him if he had had a relationship with a corrections officer. Grievant lied and said he had not currently or in the past been involved in a relationship with a corrections officer. As a Captain, Grievant held a position requiring absolute honesty at all times. Since he often was in charge of the entire Facility, Agency managers relied on him to be honest regarding all aspects of the Facility's operations. Grievant's dishonesty destroyed the trust the Warden had for him.

The aggravating circumstances in this case are sufficient to counter the mitigating circumstances in this case. Accordingly, the disciplinary action against Grievant must be upheld.

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 pay reduction 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 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
600 East Main St. STE 301
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

[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

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

June 11, 2009

RE: **Grievance of Grievant v. Department of Corrections**
Case No. 9059

Dear Grievant:

The agency head of the Department of Human Resource Management 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, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review within 15 calendar days from the date the original decision was issued if any of the following applies:

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 EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, your request does not identify any such policy. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and his resulting decision. We must therefore respectfully decline to honor your request to conduct the review.

Sincerely,

Office of Employment Equity Services