

Issues: Group III Written Notice (undermining the effectiveness of the facility) and Demotion; Hearing Date: 05/04/09; Decision Issued: 05/11/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9060; 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: 9060

Hearing Date: May 4, 2009
Decision Issued: May 11, 2009

PROCEDURAL HISTORY

On December 31, 2008, Grievant was issued a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction for "undermining the effectiveness of the employee and the facility."

On January 21, 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 4, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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 Lieutenant. Grievant had been employed for approximately seven years prior to the disciplinary action. The purpose of this position was: "Supervision of daily shift of security and administrative operations." Two of Grievant's Core Responsibilities included:

Manages and directs the daily activities of security supervisors and inmates. ***

Communicates with management, supervisors, staff, inmates-offenders and the public.

Because of Grievant's high rank at the Facility, the Agency expected him to maintain the highest level of honesty at all times.

On November 19, 2008, Grievant sent the Corrections Officer a text message from his cell phone to her cell phone stating, "A penis says to his balls "I'm taking y'all to a party." The balls says "F—kin liar!" U always go inside and leave us outside knockin like hell."

On December 14, 2008, Grievant sent the Corrections Officer a text message from his cell phone to her cell phone stating, "everybody got what they wanted for Christmas ... blacks got Obama, whites got OJ."

Grievant also sent the Corrections Officer a cartoon depicting Superman having sex. The date and time this message was sent to the Corrections Officer could not be determined.

On December 7, 2008, the Intelligence Unit staff at the Facility searched the cellular phone of the Corrections Officer. The Corrections Officer had consented to the search. The Corrections Officer's cell phone contained an address book with Grievant's cell phone number. The Corrections Officer had assigned the name "Hulk" to Grievant's cell phone number. When the Corrections Officer received a text message from Grievant's cell phone number the message would read as having been sent by "Hulk".

On December 15, 2008, the Assistant Warden met with the Corrections Officer to discuss the contents of the text messages she received from Grievant. The Corrections Officer stated that she and Grievant had not engaged in a personal consensual relationship. The Corrections Officer said she and Grievant engaged in something called "text wars" in which people send jokes to one another trying to "outdo" one another. The Assistant Warden asked the Corrections Officer if she felt as though these messages were inappropriate and she responded "no".

On December 17, 2008, Grievant met with the Chief Warden, Warden Senior, Assistant Warden, and Special Agent. The text messages were read to Grievant. Grievant denied ever sending any messages to the Corrections Officer. He admitted that he forwarded numerous messages to male staff employed at the Facility but stated that he did not send any messages to the Corrections Officer. The Chief Warden described Grievant's answer as a "categorical denial" that he sent the messages to the Corrections Officer.

On December 18, 2008, Grievant met with the Special Agent to discuss the text messages sent to the Corrections Officer. In a written statement provided to the Special Agent, Grievant wrote:

I do not recall sending the message but [the Special Agent] asked me from 1 to 10 of the probability of me sending [those] messages to [the Corrections Officer] and I told him it would be a 5. The reason I stated 5 was that I don't know if I sent the message, but if I stated 1 or 10 it could have been a lie. But on the scale of 1 to 10 of having knowledge of sending the message it would be a 1, but I don't remember. I am not trying to be evasive, but I just do not recall. I take full responsibility for these messages because they were sent to me and I did in fact send them to numerous other people, who I don't recall who they are, and there is the probability that [the Corrections Officer] could have been a recipient.

Grievant did not engage in a consensual personal relationship with the Corrections Officer as defined by Operating Procedure 101.3. The Agency did not discipline

Grievant for violating that procedure and, thus, it as no bearing on the outcome of this case.

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.”¹ 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.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, “[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”

The Agency contends Grievant was untruthful and/or deceptive in his response to questions about whether he sent the offensive text messages to the Corrections Officer. The Agency’s assertion is supported by the evidence. On December 17, 2008, three days after he sent the second offensive message to the Corrections Officer, Grievant met with the Chief Warden, Warden Senior, Assistant Warden and Special Agent. Grievant told them that he was certain he did not send the text messages to the Corrections Officer. One day later he told the Special Agent that he might have sent the text message to the Corrections Officer. Grievant has not offered evidence of any material change in his understanding of the allegations from December 17th to December 18, 2008. Either Grievant was untruthful on December 17, 2008 or on December 18, 2008. Grievant’s explanation on December 18, 2008 was deceptive. By answering that the probability of his sending the message to the Corrections Officer was a 5, Grievant offered an answer so nuanced that gave the appearance he was answering the question but without actually answering the question.

The Agency contends that the position of Captain at the Facility is sufficiently important that complete honesty by a Captain at all times is essential to the Facility’s operations. As a Captain, Grievant often served as Watch Commander responsible for all aspects of the Facility. He often served as Watch Commander when the Chief

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

² Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

Warden, Warden Senior and Assistant Warden were not at the Facility. Having complete trust in Grievant to report accurately problems at the Facility to senior managers was an essential part of the Facility's operations. By being untruthful and/or deceptive, Grievant undermined his effectiveness as a Watch Commander. 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 demote Grievant and reduce his salary.

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..."⁴ 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion 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:

⁴ *Va. Code § 2.2-3005.*

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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.