

Issues: Group III Written Notice (appearance of impropriety), Demotion and Transfer;  
Hearing Date: 10/21/09; Decision Issued: 10/26/09; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 9187; Outcome: Full Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9187**

Hearing Date: October 21, 2009  
Decision Issued: October 26, 2009

**PROCEDURAL HISTORY**

On June 4, 2009, Grievant was issued a Group III Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction for the appearance of an inappropriate relationship with an officer.

On June 5, 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 September 8, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 21, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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 Corrections Lieutenant at one of its Facilities until his demotion to a Corrections Officer and transfer effective June 8, 2009. He began working at the Facility in May 2006. The purpose of this position was, "Provides supervision to Correctional Sergeants and Correctional Officers."<sup>1</sup> Grievant had prior active disciplinary action. On February 25, 2008, Grievant received a Group I Written Notice.

Grievant worked as a supervisor in Housing Unit 2. He reported to the Housing Unit Manager, a person who held the rank of Captain or higher. Corrections Officer M worked in the Support Unit. Grievant never worked as the Watch Commander in charge of the Facility. No evidence was presented to suggest that Grievant ever was in a position to give Officer M her post assignments or coordinate her daily activities. Officer M did not directly report to Grievant.

Grievant and Officer M began seeing each other in September 2008. Grievant was staying in temporary housing provided by the Agency. One night in September 2008, Officer M and a friend picked up Grievant at the temporary housing and they drove to a nightclub. They returned to the temporary housing. Grievant and Officer M went to Grievant's room and had sex. They spoke with each other on a daily basis over

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<sup>1</sup> Agency Exhibit 4.

the telephone but did not meet again until December 2008. On one night in December 2008, Grievant and Officer M went to dinner at a restaurant. Grievant rented a hotel room. Grievant and Officer M went to the hotel room and had sex. On another night, they went to see a movie and then went to a hotel room and had sex.

Grievant's cell phone records showed that he and Officer M spoke approximately 134 times from January 15, 2009 to February 24, 2009. Officer M's cell phone records showed that they spoke approximately 62 times from February 17, 2009 until March 17, 2009. Calls were made before, during, and after work. Grievant and Officer M talked about their mutual interests such as music. They sometimes talked about the workplace, but Grievant did not give Officer M any instructions that would be consistent with a supervisor giving a subordinate instructions.

### **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."<sup>2</sup> 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."<sup>3</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>4</sup>

DOC Operating Procedure 101.3 governs Standards of Ethics and Conflict of Interest. Section IV(E)(1)(b) states that:

Supervisors are prohibited from dating or engaging in personal romantic or sexual relationships with subordinates. Initiation of or engagement in an intimate romantic or sexual relationship with a subordinate is a violation of the Standards of Conduct and will be treated as a Group I, Group II, or Group III offense depending on its effect on the work environment.

Grievant argues the disciplinary action should be reversed for two reasons. First, he argues he did not have an inappropriate relationship with Officer M. They were merely friends. Second, even if he is deemed to have had an inappropriate relationship with Officer M, his actions were not contrary to DOC Operating Procedure 101.3. Grievant's first argument is not supported by the evidence. Grievant's second argument is a logical interpretation of the Agency's policy.

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

Grievant denies he was in a romantic and sexual relationship with Officer M. The Agency has presented sufficient evidence to support its assertion that Grievant was in such a relationship. This conclusion is based on several factors. First, Officer M's testimony was credible. In addition, Grievant did not present any credible evidence to establish why Officer M would lie about having a sexual relationship with him. Second, the number and frequency of telephone calls between Grievant and Officer M suggests they had a close relationship consistent. For example, on March 2, 2009, Grievant called Officer M 15 times for a total of approximately 250 minutes. Grievant's infatuation with Officer M is consistent with someone in a romantic relationship rather than merely a friendship.

Section IV(E)(1)(a) of the policy provides that a "subordinate includes anyone in a supervisor's direct chain of command." Grievant argues that because Officer M was not in Grievant's direct chain of command, he cannot be disciplined under this policy. Grievant points out that the Agency modified the policy in June 2009 to expand coverage to employees in an indirect chain of command such as supervisors and subordinates working on different breaks. Grievant argues that subsequent reference to indirect reporting relationships confirms that the prior policy did not cover indirect reporting relationships.

Grievant's argument is supported under the principle of statutory construction *expressio unius est exclusio alterius*, "where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute."<sup>5</sup> In this case, the Agency specifically referred to subordinates in a supervisor's direct chain of command. Accordingly, it is appropriate to interpret DOC Operating Procedure 101.3 to exclude indirect reporting relationships. Grievant did not directly supervise Officer M at any time. His reporting relationship to Officer M was indirect. There is no basis in policy to discipline Grievant.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. Grievant's demotion, transfer, and disciplinary salary action are **reversed**. The Agency is ordered to **reinstate** Grievant to his former position as a Lieutenant, or if occupied, to an objectively similar position. Grievant is awarded full **back pay** representing the compensation he would have received had he not been demoted. Grievant's full **benefits** and **seniority** as Lieutenant are restored.

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<sup>5</sup> See, *Nyal Lee Cline III v. Commonwealth of Virginia*. 53 Va. App. 765, 675 S.E.2d 223 (VA 2009).

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>6</sup>

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<sup>6</sup> 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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer