

Issues: Group II Written Notice (inappropriate relationship with subordinate), Demotion and Pay Reduction; Hearing Date: 03/05/10; Decision Issued: 03/18/10; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 9259; Outcome: No Relief; **Administrative Review: AHO Reconsideration Request received 04/01/10; Reconsideration Decision issued 04/12/10; Outcome: Original decision modified; Administrative Review: DHRM Ruling Request received 04/01/10; DHRM Ruling issued 04/14/10; Outcome: Request is moot due to reconsideration decision.**

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 9259

Hearing Date: March 5, 2010
Decision Issued: March 18, 2010

APPEARANCES

Grievant
Agency Representative
7 Witnesses for Agency
3 Witnesses for Grievant

ISSUE

“Was the Group III Written Notice issued to Grievant on October 14, 2009, for Acts that undermine the ability of the Agency Head to manage and violation of OP 101.3, Standard of Ethics proper?”

FINDINGS OF FACTS

1. On October 20, 2009, Grievant was issued a Group III Written Notice for an act that undermines the ability of the Agency Head to manage: violation of OP 101.3 Standards of Ethics.
2. Grievant admitted to the Warden on October 14, 2009, that he was having an ongoing, lengthy, romantic and sexual relationship with a Corrections Officer at his place of employment.
3. Due to personnel shortages and staff rotations to fill empty supervisory jobs, Grievant, a Sergeant, ended up as Supervisor with his girlfriend in his chain of command.
4. Grievant did not rate his girlfriend or assign her jobs.
5. Off post, Grievant denied the on-going relationship to two of his supervisors.

6. The female subordinate was in Grievant's chain of command and Post Orders showed him to sign on as her supervisor.

7. During the time of the relationship, the female subordinate gave birth to a child which Grievant admitted could be his.

8. The female subordinate refused to name the father of her child.

9. The Warden testified that when he learned of Grievant's actions, it adversely affected his confidence in Grievant's ability to function as a Sergeant Supervisor.

10. Mitigation was considered by the Department's Regional Director, who changed the Group III to a Group II Written Notice with 5% pay reduction and demotion.

11. Grievant was afforded full Due Process.

APPLICABLE LAW OR POLICY AND OPINION

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

Department of Corrections Human Resources Memorandum HR-2006-1, March 28, 2006, defines "subordinate" as "...anyone in a supervisor's direct chain of command", and also prohibits supervisors from "initiating, participating in or maintaining an intimate romantic or dating relationship with a subordinate."

Department of Corrections Operating Procedure 101.3, April 1, 2008, Section E, 1a., states, "In those instances where the unit head determines that the routine work environment is adversely affected by the romantic, intimate or sexual relationship of a supervisor and subordinate who is in an indirect line of supervision (i.e. corrections officer and sergeant on different shifts and breaks), such relationships may be deemed inappropriate for the workplace and may be grounds for discipline under the DOC Standards of Conduct."

DECISION

This is clearly a case of an admitted, on-going, lengthy, romantic and sexual relationship with a female subordinate. He was a Sergeant and she was a Corrections Officer. Grievant admitted that he may have caused the female's medical problem (pregnancy).

Mitigation was considered due to Grievant's 20 years of unblemished employment, except for a speeding ticket.

While Grievant's two denials to Lieutenants was "off post", it does indicate that the relationship was known to department staff. Grievant's truthfulness to the institution Warden was laudable, but it did not restore the Warden's confidence in Grievant as a Sergeant with supervisory duties.

From the evidence, I agree with the Regional Director's ruling at the Second Resolution step of this grievance, reducing the Group III Written Notice to a Group II offense with the reduction in rank and a 5% salary reduction.

The Group II Written Notice was proper and is sustained.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia, 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street

Centre, 600 East Main, Suite 301, Richmond, Virginia, 23219 or faxes to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and **received** by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Thomas J. McCarthy, Jr.
Hearing Officer

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
RECONSIDERATION OF DECISION OF HEARING OFFICER

In re: Case Number 9259

Hearing Date: March 5, 2010
Decision Issued: March 18, 2010
Reconsideration Date: April 12, 2010

This Hearing Officer has been requested to reconsider and change the decision in the above matter. Since the decision was based on approval of the actions of the Department, i.e. demotion and reduction in pay, and this Hearing Officer found that to be proper also from the evidence presented and still does, from the letter from the Deputy Director for Human Resources from the Department, which says "While we do believe that the end result of the Hearing Officer's decision is appropriate, i.e. the demotion and loss of pay; we do not believe the Hearing Officer can make such a finding based on a first Group II offense."

Upon reconsideration, since this was Grievant's first Group II offense, and such penalties are authorized only with a Group III Written Notice or a second Group II Notice. I will change my decision to approving the actions of the employing department to finding that their Group III Written Notice was proper with reduction in rank and 5% reduction in pay.

I decline to change my Findings of Fact

Thomas J. McCarthy, Jr., Esquire
Hearing Officer

April 14, 2010

RE: **Grievance of [Grievant] v. Department of Corrections**
Case No. 9259

Dear [Agency] and [Grievant]:

The agency head of the Department of Human Resource Management (DHRM) has asked that I respond to the Department of Corrections' (DOC) request for an administrative review of the hearing officer's decision in the above referenced case. Based on the hearing officer's reversal of his decision, DOC has stated that the agency is withdrawing its appeal. The DHRM, therefore, has no basis to interfere with the application of this decision.

Sincerely,

Ernest G. Spratley
Assistant Director, Office of
Equal Employment Services

cc: Sara R. Wilson, Director, DHRM
Claudia T. Farr, Director, EDR
Thomas J. McCarthy, Jr., Esq.