

Issue: Group I Written Notice (failure to follow policy); Hearing Date: 06/30/10;
Decision Issued: 07/02/10; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9353; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9353

Hearing Date: June 30, 2010
Decision Issued: July 2, 2010

PROCEDURAL HISTORY

On September 14, 2009, Grievant was issued a Group I Written Notice of disciplinary action for subjecting a female staff member to inappropriate and offensive comments of a sexual nature.

On October 13, 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 June 15, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 30, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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 Department of Juvenile Justice employs Grievant as a Senior Juvenile Correctional Officer at one of its Facilities. He has been employed by the Agency for approximately 8 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On May 17, 2009, Grievant was working in a pod where residents live. The Resident lived on the pod. The Resident did not obtain his medication during the "pill call". The LPN went to the pod to give the Resident his medication. The LPN was escorted by a Juvenile Correctional Officer. A Juvenile Correctional Officer opened the secured door to the pod and let the LPN inside. The door was closed and the LPN was locked inside. Inside the pod were several residents who were locked in their rooms. Grievant met the LPN and she asked to see the resident who needed medication. The Resident had not yet returned to the pod. Grievant and the LPN began a conversation. During the conversation, Grievant asked the LPN if she had any STDs so that he would not have to ask later when her husband "pissed [the LPN] off" and she ran to Grievant to give him a chance. The LPN stated to Grievant to "stop it!". The LPN said she was loyal to her husband. Grievant stated there was no such thing as loyalty, only honor. The LPN stated that she had both for her husband and that there would never be anything with anyone else. Grievant then started talking about "writing up" the resident to his immediate left who was standing at the door listening to the conversation. Grievant stated that the resident was his buddy and would not stay mad at him for writing him up. Grievant then told the resident to go find something to do other than

listening to his conversation. The resident stayed where he was. Grievant told the LPN that she must get "stung by the kids" because he thinks about it but cannot act on it because he would get arrested. Being "stung" refers to when a male resident exposes his genitals to a female. The LPN told Grievant she had written up a kid in maximum security the prior week and Captain J was with her when it happened. Grievant made the statement that if "pimp daddy [Captain J]" was escorting the LPN around then Grievant had no chance. The LPN told Grievant he had no chance anyway. Grievant stated that Nurse T had a "[race] man" and that is why she was "spread the way she was". Grievant said that if the LPN had a man of that race (because men of that race had "bigger" genitals), then LPN would be "spread like that" as well. Grievant was referring to the LPN's rear end as being spread like that. At that point, Officer S arrived with the resident who needed to receive medication. The LPN administered the medication and told Officer S to "let me out of the pod now!" Officer S asked if it was "that bad?" The LPN responded by saying "yes" several times.

The LPN expressed her concerns to other staff and the matter was reported to the Agency managers. As a result of the LPN's experience with Grievant in a locked pod, the LPN quit working at the Facility and did not return.¹

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."² Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation or disability." DHRM Policy 2.30 defines sexual harassment as:

Any unwelcome sexual advance, request for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-workers or non-employee (third party).

- **Quid pro quo** – A form of sexual harassment when a manager/supervisor or a person of authority gives or withholds a work-related benefit in exchange for sexual favors. Typically, the harasser

¹ The LPN was an "agency nurse". She did not work for the Department of Corrections but provided services to the Agency pursuant to a contract between the Agency and the LPN's employer.

² The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

requires sexual favors from the victim, either rewarding or punishing the victim in some way.

- **Hostile environment** – A form of sexual harassment when a victim is subject to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

“Any employee who engages in conduct determined to be harassment, or who encourages such conduct by others, shall be subject to corrective action under Policy 1.60, Standards of Conduct, which may include discharge from employment.”³

Grievant made repeated comments of a sexual nature to suggest that he wished to have a sexual relationship with the LPN. His comments were unwelcome. The LPN did not take any actions that could be construed as inviting Grievant's comments. The LPN told Grievant to stop his behavior several times but Grievant continued making offensive comments. Grievant upset the LPN so much that she could no longer work at the Facility. Based on a subjective standard, it is clear that the LPN sincerely believed Grievant created an intimidating or offensive place for her to work. Based on an objective standard, it is clear that Grievant's repeated innuendos regarding having a sexual relationship would make a reasonable woman believe she was subject to an intimidating and offensive place to work. Based on the evidence presented, Grievant created a hostile work environment for the LPN thereby acting contrary to DHRM Policy 2.30.

Failure to follow written policy is a Group II offense. In this case the Agency mitigated the disciplinary action to a Group I Written Notice. The Group I Written Notice issued to Grievant must be upheld.

Grievant argued that he did not make any offensive comments to the LPN. The evidence is overwhelming that Grievant in fact made offensive comments to the LPN. The LPN's testimony was credible. The LPN's reaction to Grievant's comments was consistent with Grievant having made offensive comments. The LPN demanded to be let out of the pod immediately after finishing giving medication to the resident. When she expressed her concerns to another nurse, she was upset and on the verge of crying. The LPN was initially reluctant to report Grievant because she feared there could be consequences to her.

Grievant argued that several Agency employees had initiated the action against him in order to retaliate against him. Although Grievant established that he had some conflict with other employees at the Facility, he did not establish that he had any ongoing conflicts with the LPN. The LPN only had a limited interaction with Grievant prior to May 17, 2009 and there was no basis for her to seek revenge against Grievant.

³ DHRM Policy 2.30.

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 I Written Notice of disciplinary action 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

⁴ Va. Code § 2.2-3005.

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.