

Issue: Group I Written Notice (failure to follow policy); Hearing Date: 10/05/11;
Decision Issued: 10/06/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9664; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9664

Hearing Date: October 5, 2011
Decision Issued: October 6, 2011

PROCEDURAL HISTORY

On May 4, 2011, Grievant was issued a Group I Written Notice of disciplinary action for violating policy 101.3 governing relationships between superiors and subordinates.

On May 18, 2011, 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 August 8, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On October 5, 2011, a hearing was held at the Agency's 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 employs Grievant as a Corrections Lieutenant at one of its Facilities. The purpose of this position is, "to provide line supervision and direction to security supervisors and inmates."¹ Except with respect to the facts giving rise to this grievance, Grievant's work performance was satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing. Grievant earned the reputation of being an honest and hard-working employee at the Facility.

The Officer worked at the Facility and was within Grievant's chain of command.

The Warden testified that the Agency prohibited relationships between superiors and subordinates because it could undermine security at the Facility. He explained that when a superior has a relationship with a subordinate, the relationship could affect the superior's ability to make independent decisions regarding the subordinate and it could affect the perception of other employees regarding favoritism by the superior.

On March 29, 2011, Grievant spoke with the Major. He told the Major that he wanted to start a relationship with the Officer. He stated that he wanted to share the same residence with her. He stated that there was no relationship at that time but that

¹ Agency Exhibit 4.

he did in fact want to pursue a relationship and he was notifying his supervisor of that desire.

Grievant met with the Warden as part of the grievance Step Process. The Warden asked Grievant about the extent of his relationship with the Officer. Grievant said that he and the Officer had gone to dinner. Grievant said that he had taken the Officer to his mother's home because he wanted the Officer to meet his mother. Grievant told the Warden that he and the Officer had discussed living together. Based on this conversation, the Warden concluded that Grievant had dated the Officer.

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

Operating Procedure 101.3 governs Standards of Ethics and Conflict of Interest. The purpose of this policy is:

The Department of Corrections is an organization that conforms to high professional, ethical, and moral standards of conduct. All organizational units of this agency will ensure that all employees, contract personnel, consultants, hourly wage employees, volunteers, interns and any other person providing services to offenders under the purview of DOC will be advised of and comply with policies, procedures, protocols and regulations governing standards of ethics and conflict of interest.

This operating procedure ensures that all staff and service providers understand and comply with requirements to act professionally and ethically, and respect the privacy of fellow employees and individual offenders.

Section E of Operating Procedure 101.3 addresses "Consensual Personal Relationship/Sexual Harassment in the Workplace." Under this section:

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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

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.

The Agency has presented sufficient evidence to show that Grievant acted contrary to Operating Procedure 101.3 based on several factors. First, Grievant told the Major that he wanted to start a relationship with the Officer and that he wanted to share the same residence with her. Grievant's expression that he wanted to share a residence with the Officer suggests he was sufficiently knowledgeable about the Officer that he was compatible with her and able to live with her. It is likely that Grievant could only have reached this conclusion based upon conversations and interactions with the Officer that were not related to his work duties. Second, Grievant told the Warden that he and the Officer had gone to dinner. This behavior is consistent with dating. Third, Grievant told the Warden that he had taken the Officer by his mother's home because he wanted his mother to meet the Officer. No evidence was presented that Grievant had taken other employees to see his mother at her home. By singling out the Officer to take the Officer to meet his mother, Grievant engaged in behavior suggesting he had a unique relationship with the Officer. That unique relationship is consistent with the expression of a romantic interest. When the facts of this case are considered as a whole, Grievant, at a minimum, initiated a romantic relationship with the Officer.

Operating Procedure 101.3 authorizes the Agency to take disciplinary action including issuing a Group I Written Notice. Accordingly, the Agency's issuance of a Group I Written Notice must be upheld.

Grievant argued that he was not in a relationship with the Officer. It may be the case that Grievant was not in a relationship as he defined a relationship. However, the Agency has established that he was in a relationship that was contrary to its policies.

The Written Notice given to Grievant on May 4, 2011 showed that he was being given a Group I and that his Offense Code was "99". Offense Code 99 stands for "Other". The Written Notice presented as Agency Exhibit 1 showed that someone had marked through the number 99 and had written the number 13. The Offense Code for number 13 is "Failure to follow instructions and/or policy." The Agency asserted that a human resource employee may have changed the number on the Written Notice.

Grievant objected to the revised Written Notice because it had not been served on him and he first learned of it when he received the hearing exhibits from the Agency. Although Grievant's concern is understandable, a change in the offense code does not affect the outcome of this case. Grievant received adequate notice of the Agency's allegations against him. The Written Notice describes Grievant's offense as:

On March 29, 2011, you informed [the Major] that you wanted to start a relationship with an officer and move in the same residence. According to policy 101.3, supervisors are prohibited [from] this type of conduct.

By changing the Offense Code from 99 to 13, the Agency did not change the nature of its allegations against Grievant or its notice to him of those allegations.

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....”⁵ 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

⁵ *Va. Code § 2.2-3005.*

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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.