

Issues: Group II Written Notice (failure to follow policy), Group II Written Notice (workplace harassment), and Demotion with salary reduction; Hearing Date: 10/16/12; Decision Issued: 10/18/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9930, 9931; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9930 / 9931

Hearing Date: October 16, 2012

Decision Issued: October 18, 2012

PROCEDURAL HISTORY

On June 20, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. On June 20, 2012, Grievant was issued another Group II Written Notice for failure to follow policy. He was demoted to the position of Corrections Officer Senior with a ten percent salary reduction.

On July 19, 2012, Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On September 5, 2012, the Office of Employment Dispute Resolution (EDR) issued Ruling No. 2013-3428, 2013-3429 consolidating the two grievances for a single hearing. On September 24, 2012, EDR assigned this appeal to the Hearing Officer. On October 16, 2012, 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 Notices?
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 Sergeant at one of its Facilities until his demotion to a Corrections Officer effective June 20, 2012. The purpose of his position as a Sergeant was:

To provide first line supervision to Corrections Officers and to provide security over adult offenders at the institution and while in transport; supervises the daily activities of offenders while observing and recording their behavior and movement to ensure their safe and secure confinement.¹

Grievant has been employed for approximately 13 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant engaged in a romantic sexual relationship with the Corrections Officer beginning in November 2011. The relationship soured. Conflict arose between Grievant and the Corrections Officer, and between Grievant's wife and the Corrections Officer.

¹ Agency Exhibit 4.

On May 23, 2012, the Corrections Officer sent Grievant an email stating:

You are disgusting! That ugly pathetic slut took your lying cheating ass back are you serious. I have over 700 emails from you, don't think I won't send them to her. I don't know how she took your fat lying ass back. And believe we, she aint got nothing on me. Just know that most of [Facility name] know what you did.

On May 28, 2012, the Corrections Officer sent Grievant a text message saying:

Looks like u the only one crying themselves to sleep! Your son don't ev[rest of message not displayed]

Grievant sent the Corrections Officer a text message saying:

Eat a D—k bitch

The Corrections Officer replied:

Wow u so classy. Yea you'll be [rest of message not displayed]

Grievant sent the Corrections Officer a text message saying:

B—ch ya p—y is trash and [First name of Grievant's wife] still look better [than] your troll looking ass. Just drop dead.

The Corrections Officer wrote:

Yea you the only one that thinks so and that's why u kept [rest of message not displayed]

The Corrections Officer was verbally counseled by the Warden but did not receive any disciplinary action.

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

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

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

“[F]ailure to ... comply with applicable established written policy” is a Group II offense.⁵ DOC Operating Procedure 101.3 governs Standards of Ethics and Conflict of Interest. Section IV(E)(2) provides:

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.

e. Regardless of the supervisory/subordinate or peer/peer working relationship, staff involved in a romantic relationship with a co-worker should advise the work unit head of their involvement to address potential current or future employment issues.

Grievant engaged in a six month romantic sexual relationship with a subordinate thereby acting contrary to this policy and justifying the issuance of a Group II Written Notice subject to consideration of mitigating circumstances.

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.”

Grievant sent messages to the Corrections Officer to exacerbate the dissolution of his relationship with her. His comments reflected personal and vulgar insults further damaging his relationship with the Corrections Officer. He compromised his ability to work alongside the Corrections Officer at the Facility. In the Agency’s judgment, Grievant’s behavior rises to the level of a Group II offense. The Agency’s judgment is supported by the evidence and the Group II Written Notice must be upheld subject to consideration of mitigating circumstances.

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

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

⁵ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

The Agency argued that Grievant should be disciplined for creating a hostile work environment based on sex for the Corrections Officer. DHRM Policy 2.30 governs Workplace Harassment. This policy provides:

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, age, veteran status, political affiliation or disability.

Workplace Harassment is defined as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

Sexual harassment is defined 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 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 subjected 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.

The purpose of DHRM Policy 2.30 is “prevention of illegal workplace harassment”. Although Grievant sent text messages containing references to sex, his behavior was not related to discriminating against her because of her gender. His actions were designed to insult her because of the dissolution of their relationship. Grievant did not act contrary to DHRM Policy 2.30 even though his behavior otherwise formed a basis for disciplinary action.

Grievant argued that the two written notices should be combined into one written notice. This argument fails. The facts supporting the written notices are different. The first written notice was because Grievant engaged in a prohibited relationship with a subordinate. The second was for the vulgar and insulting text messages he sent her.

These actions are sufficiently separate so as to justify the issuance of separate written notices.

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....”⁶ 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.

Grievant contends the disciplinary action should be mitigated because the Corrections Officer engaged in the same behavior. The only action taken against the Corrections Officer was verbal counseling. The Warden explained that the, “officer was not disciplined as she was subordinate to you. It was your responsibility, as a supervisor, to display the values of the DOC in conducting your duties.”

The Corrections Officer lied to the Warden about her relationship with Grievant. She violated DOC Operating Procedure 101.3 because she failed to advise the work unit head of her involvement with Grievant. The Corrections Officer sent messages to Grievant containing vulgarity and intended to insult Grievant, Grievant’s wife, and Grievant’s son. The disparity of treatment between Grievant and the Corrections Officer is so great as to justify mitigation of the disciplinary action against Grievant.

The Hearing Officer will not mitigate the Group II Written Notice for engaging in a romantic relationship with a subordinate. The disciplinary action against Grievant could have been a Group III Written Notice.⁷ The Agency issued Grievant a Group II Written Notice. Although both Grievant and the Corrections Officer violated DOC Operating Procedure 101.3, they violated different sections of the policy. Section IV(E)(2)(a) is specifically directed at the behavior of supervisors. The Corrections Officer did not violate that section because she was not a supervisor. There is a sufficient basis for the Hearing Officer to uphold this Group II Written Notice as issued.

The Hearing Officer will mitigate the Group II Written Notice with respect to the inappropriate language used by Grievant. The severity of the behavior engaged in by

⁶ Va. Code § 2.2-3005.

⁷ The Written Notice states that the Agency considered Grievant’s “13.5 years satisfactory service” as a mitigating circumstance.

the Corrections Officer was similar to the severity of the behavior demonstrated by Grievant. The sanction imposed by the Agency should also have been similar. Because of the disparity of the Agency's treatment of Grievant and the Corrections Officer, the Hearing Officer will reduce the Group II Written Notice to a Group I Written Notice. Grievant was demoted based upon the accumulation of disciplinary action. Because Grievant no longer has two Group II Written Notices, he must be reinstated to his former position with the disciplinary pay reduction reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for violating DOC Operating Procedure 101.3 is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for workplace harassment is **reduced** to a Group I Written Notice. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to demotion, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of demotion and credit for leave and seniority that the employee did not otherwise accrue.

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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution

Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.