

Issues: Group I Written Notice (unsatisfactory performance), and Termination (due to accumulation); Hearing Date: 04/07/16; Decision Issued: 04/08/16; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 10772; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10772

Hearing Date: April 7, 2016

Decision Issued: April 8, 2016

PROCEDURAL HISTORY

On January 5, 2016, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. He was removed based on the accumulation of disciplinary action.

On February 2, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 22, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 7, 2016, a hearing was held at the Agency's 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 Corrections employed Grievant as a Corrections Officer at one of its facilities. His responsibilities included supervising offenders. Grievant had prior active disciplinary action. On March 25, 2014, Grievant received a Group III Written Notice with a three workday suspension.

A "fluffer" is a person employed to keep a male adult film performer aroused on the set. A fluffer performs sex acts. Grievant knew the definition of a fluffer.

On October 3, 2015, Grievant was inside the housing unit with several offenders. The offenders were discussing a pornographic website. An offender asked Grievant if he was familiar with the website and if Grievant would allow him access to the website. Grievant said he was not familiar with the website and turned to walk away. He stopped and asked Offender K, "Do you know what a fluffer is?"

Grievant later went to Offender K and told Offender K that Grievant did not intend to call Offender K a fluffer.

Offender K filed a complaint against Grievant and the Agency began an investigation.

On November 19, 2015, Grievant met with the Warden and several other employees. Grievant admitted asking Offender K if he knew what a fluffer was.

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.”¹ 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.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁴ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On October 3, 2015, Grievant asked Offender K an inappropriate question involving a person who performs sex acts as part of the pornography business. His question did not relate to his duties of supervising inmates. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

An employee who has an active Group III Written Notice and receives a Group I Written Notice may be removed from employment based on the accumulation of disciplinary action. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that the disciplinary action was too severe. He asserted he was a good officer who can do his job. The disciplinary action is consistent with the Standards of Conduct. There is no basis to reduce the disciplinary action based on its severity.

Grievant argued that Offender K complained against him in retaliation for performing his work duties. Offender K’s motivation for complaining does not affect the outcome of this case. The Agency was obligated to investigate the complaint and it did so.

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 Human Resource

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

² Virginia Department of Corrections Operating Procedure 135.1(V)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

Management”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.

Grievant argued that the Agency inconsistently applied disciplinary action. He pointed to Officer G, Sergeant L, and Sergeant P as examples. The evidence showed that Officer G resigned in lieu of termination before disciplinary action was taken. Agency managers were not informed of any inappropriate actions by Sergeant L and Sergeant P. Based on the evidence presented, the Hearing Officer cannot conclude that Grievant was singled out for disciplinary action in this case. In light of the standard set forth in the Rules, 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**. Grievant’s removal is **upheld** based on the accumulation of disciplinary action.

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.

⁵ Va. Code § 2.2-3005.

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.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 EDR before filing a notice of appeal.