

Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 02/08/18; Decision Issued: 03/12/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11142; Outcome: No Relief – Agency Upheld;
Administrative Review: Ruling request received 03/27/18; EEDR Ruling No. 2018-4695 issued 04/12/18; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11142

Hearing Date: February 8, 2018
Decision Issued: March 12, 2018

PROCEDURAL HISTORY

On November 17, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of the Prison Rape Elimination Act and DOC Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Offenders.

On November 17, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 18, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 8, 2018, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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. She had been employed by the Agency for approximately 19 years. She worked in a unit with female inmates.

Offender T identified as a transgender male.

On September 21, 2017, Grievant was assigned to clear the recreation yard in preparation for grass cutting. Grievant called out to the offenders in the yard to move into the housing unit. Grievant called out to Offender T several times, but Offender T did not respond. Offender S, Offender K, and Offender M told Grievant that Offender T may not have heard Grievant because "he" was wearing ear buds. Grievant said, "What." Grievant asked the offenders why they were referring to Offender T as "he." Grievant said, "That is not a he. Does he have a d--k." One offender responded, "He is a man to me." Grievant said, "Has he had sex with you yet."¹ Offender T did not hear Grievant's comments.

¹ Grievant later told the Unit Manager she asked the offenders, "Does she have a d--k? Have you had sex with her?" Grievant told Sergeant M she said to the offenders "Does she have a d--k?" and "Has she screwed you yet?"

Offender K approached Offender T. Offender M and Offender S also approached Offender T. Offender K was visibly upset. Offender K told Offender T what Grievant said to the three offenders. Hearing this made Offender T feel “extremely dehumanizing and prejudiced.” Offender T approached Sergeant M and asked Sergeant M to speak with Offender S, Offender K, Offender M about a disrespectful comment made about Offender T. Sergeant M approached the offenders and they told her what Grievant told them.

Grievant apologized to Offenders S, K, and M. Grievant wanted to apologize to Offender T but was moved to another unit before having the opportunity to meet with Offender T.

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

DOC Operating Procedure 135.2 addresses Rules of Conduct Governing Employees Relationships with Offenders. Section IV(B)(5) provides:

While performing their job duties, employees must model a professional, healing, and supportive relationship when interacting with persons under DOC supervision, which involves respecting the rights of offenders as individuals, acting in a trustworthy and responsible manner, helping and supporting offenders and other staff members to the extent possible and ensuring that the employee’s conduct does not harm others.

DOC Operating Procedure 038.2 governs the Prison Rape Elimination Act (PREA).⁵ Sexual misconduct includes sexual harassment. Sexual harassment includes:

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁵ Grievant received training regarding the Agency’s policy in May 2017.

Verbal comments ... to an offender by a staff member ... including demeaning, reference to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures.

Section IV(A) provides:

DOC has zero tolerance for ... sexual misconduct or harassment towards offenders by staff

Section IV(B) provides:

DOC prohibits and will not tolerate any ... sexual misconduct by staff ... with offenders. ***

Employees are subject to a Group III offense under Operating Procedure 135.1 Standards of Conduct (termination is the presumptive discipline for violations.)

On September 21, 2017, Grievant made a demeaning reference to Offender T's gender by saying, "That is not a he. Does he have a d--k." and "Has he had sex with you yet." Grievant's reference was sexual harassment and, thus, sexual misconduct under DOC Operating Procedure 038.2. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

It was reasonably foreseeable that at least one of the three offenders who heard Grievant's comment would tell Offender T of Grievant's comments. Thus, Grievant's failure to address her comment directly to Offender T does not affect the outcome of this case.

Grievant argued that she was not aware Offender T was transgender even though other staff had been briefed about Offender T's status. This does not affect the outcome of this case. The comments of the three offenders were sufficient to inform Grievant that Offender T was transgender.

It is clear that the Agency could have addressed Grievant's behavior with a level of disciplinary action lower than removal. This is especially true given Grievant's 19 years of service to the Agency. Grievant's behavior had nothing to do with rape or sexual assault. Her behavior involved using inappropriate words that were insulting and demeaning to a person convicted of a felony and under the Agency's supervision. The Agency's decision to remove Grievant, however, was authorized by its policies.

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

Management”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 argued that she failed to take depression medication on September 21, 2017 and this affected her judgment. Grievant did not present sufficient evidence to show that her lack of medication caused her to make the inappropriate comments. 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 III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

⁶ Va. Code § 2.2-3005.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.