

Issues: Group III Written Notice (failure to follow policy), Group II Written Notice (workplace harassment), and Termination; Hearing Date: 06/04/13; Decision Issued: 06/28/13; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 10080; Outcome: No Relief – Agency Upheld.

**DECISION OF HEARING OFFICER
IN RE: CASE NO. 10080
HEARING DATE: JUNE 4, 2013
DECISION ISSUED: JUNE 28, 2013**

PROCEDURAL HISTORY

Between approximately March 15, 2013 and April 2, 2013 there were three meetings in which both Agency and Grievant were present. Grievant received two Written Notices on April 2, 2013. On April 3, 2013 Grievant filed a grievance to challenge the Agency's action. The matter was disputed and a Hearing Officer was appointed on April 25, 2013. The matter was scheduled for hearing during a pre-hearing telephone conference on May 7, 2013 at 11:45 am during which time the case was set for June 4, 2013 at 10:00 am.

APPEARANCES

Grievant
Grievant Counsel
Agency Representative
Agency Advocate
Agency Witness (1)

ISSUES

1. Did Grievant violate Virginia Department of Corrections Operating Procedure 030.4 section (F) (#4) (f) by lying about texting on a cell phone to another officer?
2. Did Grievant violate Virginia Department of Corrections Operating Procedure 101.2 section (VII) (C) regarding conduct encouraging harassment?
3. Was Grievant given procedural due process before disciplinary action?

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance

of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. Grievant Procedure Manual (GPM) § 5.8. A preponderance of the evidence is evidence which shows that what is sought is to be proved is more probable than not. GPM §9. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM § 5.8.

CONCLUSION 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.” 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.”¹

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

On or about February 28, 2013 during an investigation by Special Investigations Unit (SIU) it was determined that Grievant “... gave false information about the use of a cell phone used to text another corrections officer.” in violation of Virginia Department of Corrections Operating Procedure (OP) 030.4 section (F) (#4) (f).² During the same investigation by SIU on February 28, 2013, it was discovered that Grievant “... engaged in a conspiracy to have another corrections officer make a false allegation of harassment.” in violation of OP 101.2

¹ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees, June 1, 2011 revision.

² Agency Exhibit 5.

section(VIII)(C).³

On April 2, 2013, Grievant was issued two Written Notices. The first Written Notice was a Group III Written Notice for Grievant's violation of OP 030.4 section (F) (#4) (f). The second Written Notice was a Group II Written Notice for Grievant's violation of OP 101.2 section (VII) (C).

In response to a question during investigation, Grievant denied that he ever owned a cell phone. Grievant also denied ever text messaging another officer.⁴ Later it was determined that Grievant lied about ever text messaging an officer by reviewing one hundred forty-nine (149) pages of Grievant's Facebook records which Grievant willingly submitted to SIU.⁵ On November 4, 2012 at 6:18 pm, Grievant sent the following Facebook message to another officer,

“got to run down to the bank around 1 or 2 and take my w2s to get copied from last yesr so my paperwork can hurry and get thru i hope we can at least text tonight i was getting better u should have got my message by now i resent it again i have full bars well gotta make a round we will text”⁶

By reviewing Grievant's Facebook records, it was also determined that Grievant encouraged an officer to fabricate a sexual harassment claim. Sometime between October 6, 2012 and November 13, 2012, Grievant sent the following Facebook message to another officer,

“if he keeps messing with u tell someone higher up he s mad at u because u would not meet him off the mtn somewhere 1 lie deserves another then u can watch him cry because word spread wife would run him off u can play dirty too”⁷

On April 2, 2013 Grievant was terminated from state service at Keen Mountain Correctional Center after receiving the two Written Notices mentioned above.

Grievant argues that he was not given procedural due process and was not given a

³ Agency Exhibit 7.

⁴ Agency Exhibit 1.

⁵ Agency Exhibit 2.

⁶ Agency Exhibit 2.

⁷ Agency Exhibit 2.

correct Operating Procedure cite for which he was being terminated.

Grievant had no prior disciplinary actions during his five (5) years of service.

OPINION

OP 030.4 section (F) (#4) (f) states, “Employees are expected to cooperate fully during the course of administrative investigations and to respond with truthful and complete answers to all proper questions of official interest and provide Special Agents with any and all information or evidence that may pertain to the specific matter under investigation.”⁸ Although Grievant cooperated with the investigation by providing 149 pages of Facebook records, it is proven by records from the SIU’s investigation and Grievant’s Facebook records that Grievant failed to respond with truthful and complete answers by lying about text messaging an officer. While grievant was also charged with owning a cell phone there was no credible evidence that Grievant, in fact, was the owner of a cell phone. However, evidence would clearly point to his use of a cell phone to text message, which Grievant denied. This behavior is a violation of OP 030.4 section (F) (#4) (f) and does warrant a Group III discipline.

OP 101.2 (VII) (C) states, “Any employee who engages in conduct determined to be harassment, or who encourages such conduct by others, will be subject to corrective action under Operating Procedure 135.1, Standards of Conduct, which may include discharge from employment.”⁹ There was no evidence found that Grievant engaged in a conspiracy to make false allegations of harassment. However, Operating Procedure 101.2 (VII) (C) does not require “conspiracy” as part of the offense. The Facebook records show that the Grievant did encourage an officer to fabricate a sexual harassment claim against another corrections officer in violation of OP 101.2 (VII) (C).

⁸ Agency Exhibit 6.

⁹ Agency Exhibit 8.

The following procedural due process is required before disciplinary action is taken:

Prior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

Employees must be given a reasonable opportunity to respond after receiving notification of pre-disciplinary or disciplinary actions. *Normally*, a 24 hour period is a sufficient period of time, however, a “reasonable opportunity to respond” should not be based solely on the quantity of time provided but also on the nature of the offense, which may or may not require more or less time to refute or mitigate the charge.”¹⁰

As stated in the Procedural History, there were three meetings prior to the Written Notice being issued. Grievant chose not to make any inquiry or response. If Grievant was confused about the charges against him, he had an opportunity to request clarification. Therefore, Grievant was given procedural due process.

DECISION

For the above reasons, the Group III discipline of Grievant is **UPHELD** and the Group II discipline is **UPHELD**.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.¹¹ Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

¹⁰ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees, June 1, 2011 revision.

¹¹ See Section 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.

Administrative Review: This decision is subject to three (3) types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state policy or Agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.

Requests should be sent to:

Director, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

Requests should be sent to:

Director, Department of Employment Dispute Resolution
600 East Main Street, Suite 301
Richmond, VA 23219

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of administrative review when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided, and if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within **thirty days** of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the Circuit Court in the jurisdiction in which grievance arose.¹² You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute

¹² An appeal to Circuit Court may be only on the basis that the decision was contradictory to law, and must identify the specific Constitutional provision, statute, regulation or judicial hearing that the Hearing Decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

Sondra K. Alan, Hearing Officer