

Issue: Group II Written Notice with Suspension (vulgar and insolent comments to inmate); Hearing Date: 04/28/14; Decision Issued: 04/29/14; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10323; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 05/20/14; EDR Ruling No. 2014-3894 issued 05/23/14; Outcome: Request denied – untimely.**

**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION**

In the matter of: Case No. 10323

Hearing Date: April 28, 2014

Decision Issued: April 29, 2014

PROCEDURAL HISTORY

Grievant is a corrections officer for the Department of Corrections (“the Agency”). On October 24, 2013, the Grievant was charged with a Group II Written Notice for engaging in a conversation with an offender that was vulgar and insolent in nature, in violation of Policy 038.3 PREA. The discipline also included suspension for one day. Agency Exh. 1.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On April 4, 2014, the Office of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. During a pre-hearing conference with the parties, the hearing was scheduled for the first date available between the parties and the hearing officer, April 28, 2014, on which date the grievance hearing was held, at the Agency’s facility.

The Agency submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency’s Exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant  
Representative/witness for Agency  
Advocate for Agency  
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?

Through his grievance filings, the Grievant requests rescission or reduction of the Group II Written Notice.

### BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee’s ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth’s grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency’s Standards of Conduct, Operating Procedure 135.1, defines Group II offenses to 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. Agency Exh. 5. Examples of a Group II offense include failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy.

Agency Operating Procedure No. 038.3, "Prison Rape Elimination Act," (PREA), provides at ¶ IV.A.1.b.:

DOC has a zero tolerance for offender-on-offender sexual assault or abuse, or sexual misconduct or harassment towards offenders by staff, volunteers and contractors.

Agency Exh. 3. The policy, at ¶ IV.B.2., states:

Any behavior of a sexual nature between employees and offenders is prohibited. Employees are subject to a Group III offense under Operating Procedure 135.1, *Standards of Conduct*, (termination is the presumptive discipline for violations) and may be prosecuted under the Code of Virginia.

The Policy, at ¶ III, Definitions, provides:

**Abuse** – The improper use or treatment of an individual that directly or indirectly affects an individual negatively; any intentional act that causes physical, mental, or emotional injury to an individual.

#### The Offense

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

The Agency employed Grievant as a corrections officer, and he had no prior active Written Notices.

The Agency's witnesses, the warden and assistant warden, testified consistently with the charge in the Written Notice. They testified that the Grievant admitted the conduct during the investigation and grievance process. In response to provoking words from an offender, the Grievant responded with reference to an oral sex act between men.

The Grievant testified that his actions and words had no malice or actual sexual threat against the offender. The Grievant testified that the offender made an offensive remark with reference to the Grievant's mother, who had been ill and has since died, and the Grievant admitted that he made a regrettable, non-professional comment to the offender, but that it was an isolated event in his otherwise commendable work history with the Agency.

The Agency witnesses testified that mitigation was exercised because the Grievant was issued a Group II Written Notice instead of a Group III, and that the Group II Written Notice included only one day of suspension when a Group II notice may carry up to 10 days suspension.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The

task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting *Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy... "the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." 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.

The evidence is un rebutted and establishes the Grievant made the offensive comment to an offender. There may be a close question as to whether this isolated comment constitutes abuse or otherwise invokes PREA. I give deference to the Agency's finding that the vulgar and insolent comment of a sexual nature meets the minimum reach of the conduct PREA and the Agency policy prohibits. Further, I find the offense is appropriately a Group II offense, unless mitigating circumstances render such discipline outside the bounds of reasonableness.

The agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

The Grievant presented evidence of mitigation—the isolated nature of the offense and his lack of malice with the comment. The Grievant asserts that, given his record and the nature of this offense, a counseling memorandum would be a more appropriate level of discipline. The Grievant also asserts the discipline was issued by improper motive because it was issued at a time he was being considered for a promotion. The promotion was rescinded because of this disciplinary action. Other than the temporal connection, however, the Grievant presented no evidence of an improper motive by the Agency in issuing the discipline.

There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that the chosen discipline was its only option. The level of discipline for the offense is fairly debatable. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness. The Agency had leeway to impose discipline along the permitted continuum. While the Agency could have justified or exercised lesser discipline, I find no additional mitigating circumstances that render the Agency's action of a Group II Written Notice outside the bounds of reasonableness. The Hearing Officer, thus, lacks authority to reduce or rescind the disciplinary action.

### DECISION

Accordingly, for the reasons stated herein, the Agency's issuance to the Grievant of the Group II Written Notice with one day suspension 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 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>1</sup>

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.  
Hearing Officer

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<sup>1</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.