

Issue: Group III Written Notice with Termination (inappropriate conduct); Hearing Date: 03/30/15; Decision Issued: 04/20/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10557; 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: 10557

Hearing Date: March 30, 2015
Decision Issued: April 20, 2015

PROCEDURAL HISTORY

On February 2, 2015, Grievant was issued a Group III written Notice of disciplinary action with removal for violation of DHRM Policy 2.30, Workplace Harassment and Neglect of Duty.

On February 2, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 17, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 30, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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 Behavioral Health and Developmental Services employed Grievant as a Security Officer III at one of its Facilities. The purpose of his position was:

Protects hospital-controlled properties and equipment and provides a safe and secure environment for patients, staff and visitors on rotating shifts to ensure 24-hour coverage. Also, provides "First response" to all emergencies and patient elopements, and facilities communications through the hospital switchboard, as needed.¹

Grievant had been employed by the Agency of for approximately 7 years.

Grievant was employed by the Agency at the Facility when the Security Officer began working for the Agency. They worked well together and began a friendship. The Security Officer told Grievant about her sexual activity. She told Grievant that she had been on a cruise ship with her sister and that the Security Officer had sex with a man and another woman. The Security Officer sometimes flirted with Grievant. Grievant would also flirt with the Security Officer. On one occasion, the Security Officer lifted her shirt and bra to expose her breasts. Grievant felt her breast for several seconds. Grievant attended some sporting events with the Security Officer and her husband. They considered each other to be close friends. When they Security Officer and her husband were having difficulties with their marriage, the Security Officer asked Grievant

¹ Agency Exhibit K.

to pick her up and take it to her marriage counseling appointment with her husband. The Security Officer discussed the Counselor's comments with Grievant. The Security Officer separated from her husband on September 27, 2014.

On November 29, 2014, Grievant and the Security Officer were working at the switchboard. The Security Officer told Grievant she had a headache.² She went into the communications room to lie down. Approximately 5 minutes later, Grievant entered the communications room and told the Security Officer that he had something to show her. Grievant showed the Security Officer a picture on his cell phone. Picture was of Grievant's penis. The Security Officer pushed the phone away and said "That's gross." Later in the day, Grievant used his cell phone to show the Security Officer a video of two people having sex. The video did not show the faces of the two people. Grievant told the Security Officer that it was a video of him having sex with a woman. The Security Officer asked Grievant not to show her videos like that.

On November 29, 2014, Grievant and the Security Officer exchanged several electronic messages. Grievant wrote:

In all seriousness I don't go around showing my d--k to everyone. I just for some reason really wanted u to see it.

The Security Officer sent Grievant a message:

[Grievant's first name], I want to let you know that I think you are a really awesome friend. I enjoy talking to you and hanging out with you. I couldn't have imagined going through what I've gone through without you by my side. With all that I would never want to lose you as a friend. I know you have feelings for me and I know you expect a lot from me. I just don't have the same kind of feelings for you that you do me. I think you go a little overboard at work with me. I know it's all fun and games but I just want to be friends. I would love to hang out with you as friends but that is all it will be. I hope you find this in good faith and understanding. I still want to be friends and look forward to our friendship.

Grievant responded:

no offense but I only look as a friend also I never saw us as being in any kind of serious relationship. I just thought we could have fun together. Sorry if I gave the wrong impression. So we are on the same page.

The Security Officer replied:

so we can still hang out on the eighth?

² Grievant asserted that the Security Officer had a headache because she was "hung over" from excessive drinking the prior night.

Grievant replied:

we can hang any time. Like I said even though I don't see us being more than friends we still have fun. Don't understand y people feel they have to be in a relationship to have fun. Now as far as how I act that work to be honest whether friends or enemies I'm gonna be sexually attracted to you. Can't help that lol.

Can I be honest about one less thing?

The Security Officer wrote "Sure!"

Grievant wrote:

I am so sexually attracted to u. I know u take that as me wanting to be more [than] friends. I slept with my best friend and it made our relationship better cause there was no more sexual tension. I want u bad. U know this. I want it out of my system.

The Security Officer wrote:

I'm flattered really. But there's no chance I'm going to sleep with you! Just friends no benefits.

Grievant replied:

Then I will leave you alone at work.

On December 13, 2014, Grievant sent the Security Officer a message:

True statement. All my best friends I have had sex with. It wasn't a ongoing thing. It was a one time thing or a whole thing but once we did it was no sexual tension or desire anymore. But I will leave u alone.³

The Security Officer had encouraged others in the division to have a Christmas party at the Facility. Other employees had spent money and devoted time to arranging a Christmas party at the Security Officer's request. On or about December 16, 2014, division staff held a Christmas party at the Facility but the Security Officer did not appear. She claimed she was sick. Later that day, the Security Officer posted pictures of herself at a Christmas party. Grievant became annoyed with the Security Officer because she caused the division to hold a Christmas party, she did not attend that party, but she was able to hold another Christmas party. Grievant considered the Security Officer to be selfish and egotistical. He stopped speaking to her regarding

³ Agency Exhibit J.

matters other than their work. On one occasion, the Security Officer asked Grievant to take pictures of patients because she believed they were to be taken annually. Grievant responded negatively to her request because she was not his supervisor and he knew that the Facility's practice was not to automatically take patient pictures without appropriate authorization from the unit head.

On January 9, 2015, the Security Officer complained to the Supervisor about Grievant's behavior. She alleged that Grievant had engaged in sexual harassment at the end of November 2014.

CONCLUSIONS 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."⁴ 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."

Department of Human Resource Policy 2.30 prohibits Workplace Harassment. 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, sexual orientation, 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.

Applying an objective standard, the Hearing Officer cannot conclude that Grievant's behavior was unwelcome to the Security Officer. She often discussed her sexual activity with Grievant at work. She flirted with Grievant. She showed her breasts to Grievant and allowed him to touch them while she and Grievant were supposed to be working. She pulled the top of her shirt down to show Grievant her bra while they were at work. She created and perpetuated a workplace sometimes focused on sex. When the Security Officer showed Grievant private parts of her body, Grievant interpreted this as permission to show her private parts of his body. When the Security Officer discussed her sexual behavior and desires, Grievant interpreted this as permission to discuss his sexual desires including his desires for her. The Security Officer continued to want to "hang" with Grievant after November 29, 2014. The Security Officer reported

⁴ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Grievant after he began to limit his personal conversations with her and when he was sometimes mean to her. Grievant changed his behavior towards the Security Officer primarily because she failed to attend a Christmas party but had a Christmas party on her own later that day. Although the Agency has not established that Grievant engaged in workplace harassment, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice with removal.

There are no circumstances where it would be appropriate for an employee to show another employee a picture of his penis or a video of him having sex while the two employees are supposed to be working. Even if the Security Officer had openly encouraged Grievant to show her the images, Grievant should have refrained from doing so. Authorization by a co-worker to engage in inappropriate behavior would not be the same as authorization by the Agency to engage in inappropriate behavior. The severity of such behavior is sufficient 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.

Grievant argued that his behavior was out of character and that he only behaved in the way he did because of the Security Officer's influence and enticement. Even though this statement appears to be true, the influence of a co-worker would not form a basis to excuse Grievant's behavior.

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"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.

The inconsistent application of disciplinary action is a mitigating circumstance. In this case, the Agency did not discipline the Security Officer even though she exposed private parts of her body to Grievant while she was at work. The Security Officer engaged in behavior sufficient to justify her removal. The Agency removed Grievant from employment. Although it might appear that the Agency inconsistently applied disciplinary action, the Security Officer and Grievant were not similarly situated. When the Security Officer engaged in inappropriate behavior, Grievant did not report her behavior to Agency managers. At the time the Agency took disciplinary action against

⁵ *Va. Code § 2.2-3005.*

Grievant, it was not aware or did not believe the Security Officer had engaged in inappropriate behavior. 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 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.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.