

Issue: Group III Written Notice with demotion and pay reduction (other issue);
Hearing Date: 07/16/13; Decision Issued: 07/22/13; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10124; Outcome: Partial Relief; **Administrative
Review**: EDR Ruling Request received 07/31/13; EDR Ruling No. 2014-3667,
2014-3668 issued 08/15/13; Outcome: AHO's decision affirmed; **Administrative
Review**: DHRM Ruling Request received 07/31/13; DHRM Ruling issued 09/20/13;
Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10124

Hearing Date: July 16, 2013

Decision Issued: July 22, 2013

PROCEDURAL HISTORY

On April 2, 2013, Grievant was issued a Group III Written Notice of disciplinary action for failing to report an allegation of sexual harassment and failing to report his consensual romantic relationship with a corrections officer at the Facility. Grievant was demoted to the position of corrections officer with a five percent disciplinary pay reduction.

On April 27, 2013, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 19, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 16, 2013, 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 Sergeant at one of its Facilities until his demotion to Corrections Officer with a five percent disciplinary pay reduction effective April 20, 2013. The purpose of his position as Corrections Sergeant was to "provide security, custody, and control of adult offenders resulting in a safe and secure environment for staff, inmates and citizens of the Commonwealth of Virginia."¹ He has been employed by the Agency for approximately 18 years. No evidence of prior active disciplinary action was introduced during the hearing.

Officer K lent Officer D money. Officer K sent Officer D several text messages that Officer K interpreted to mean that if she had sex with Officer K, Officer K would forgive the debt. In December 2012, Officer D told Grievant about the text messages and how she interpreted the messages.

In December 2012, Officer D told Grievant that Officer K approached her in the parking lot of the Facility and confronted her about having a relationship with him. Officer D believed Officer K's actions were sexual harassment.

¹ Agency Exhibit 2.

Upon hearing from Officer D about the two incidents, Grievant advised Officer D to report Officer K to the Agency for further investigation. Two days later, Officer D informed Agency managers of her complaints against Officer K. Grievant did not separately report Officer D's allegations to the Agency.

At some point in time, Grievant began a romantic relationship with Officer D. He did not inform Agency managers that he had begun a romantic relationship with Officer D. The Agency received two anonymous letters indicating Grievant was in a relationship with Officer D. When the Agency investigated Officer D's allegations against Officer K, it began investigating whether Grievant and Officer D were in a relationship. On February 28, 2013, Grievant admitted to the Investigator and Warden that he was in a romantic relationship with Officer D.

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

Operating Procedure 101.3(IV)(E)(2)(a) provides that, "[s]upervisors are prohibited from dating or engaging in personal romantic or sexual relationships with subordinates." Violation of this section would justify the Agency to issue a Group I, Group II, or Group III depending on its effects on the work environment. The Agency chose not to discipline Grievant for being in a relationship with Officer D. Accordingly, the Hearing Officer will not address whether Grievant engaged in a Group I, Group II, or Group III offense for being in a romantic relationship with Officer D.

Operating Procedure 101.2(IV)(D)(4) provides that:

Managers and supervisors have a duty to promptly investigate allegations of workplace harassment that come to their attention. Complaints should be reported by the manager or supervisor to the Human Resources Office, the DOC Office of Equal Employment Opportunity (EEO), or the Human Resources Director for monitoring, advice, or assistance. If the

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

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

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

investigation determines the complaint has merit, immediate, appropriate corrective action is to be taken.

Operating Procedure 101.3(IV)(E)(2)(e) provides:

Regardless of the supervisor/subordinate or peer/peer working relationship, staff involved in a romantic relationship with a co-worker should advise the work unit head of their involvement to address potential current or future employment issues.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁵ Grievant was in a romantic relationship with Officer D. He did not report that relationship to the Agency’s managers thereby acting contrary to policy. In December 2012, Grievant learned that Officer D alleged she was sexually harassed by Officer K. Grievant did not report that allegation to Agency managers. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice an agency may suspend an employee for up to ten work days. In this case, the Agency reduced Grievant’s compensation through demotion and it is reasonable for the Hearing Officer to conclude that the Agency would have suspended Grievant had it issued a Group II instead of a Group III Written Notice.

Grievant argued that he did not report his romantic relationship with Officer D because doing so would render her complaint worthless and introduce a disparaging element into the complaint. Grievant’s argument fails. One purpose of requiring supervisor’s to report their romantic relationships with subordinates to Facility managers is to enable Facility managers to separate those employees so that they are not in a supervisory relationship while working. Grievant prevented the Agency from making an informed staffing decision. Grievant’s assertion that disclosure of his relationship would have undermined Officer D’s allegation is without merit.

Grievant suggested that he was afforded discretion to report under the policies because they read “should” instead of “shall”. To the extent Grievant had discretion under the policies, his discretion would have been to benefit the Agency for a legitimate business reason. In this case, it appears Grievant failed to report because he was interested in avoiding disclosure of his relationship with Officer D, a relationship which he knew was discouraged. He did not exercise his discretion to report to further the Agency’s needs.

Grievant argued he was not obligated to report Officer D’s allegations because she reported them to Grievant when Grievant and Officer D were away from the Facility. The policy does not distinguish between information disclosed while at work and information disclosed outside of work hours when employees are away from the Facility.

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

Grievant remained obligated to report the information he received from Officer D regardless of where he was when he learned of the complaints.

Grievant argued that the Investigator's report was flawed. The Hearing Officer relied on the testimony of witnesses and documents including the report but gave appropriate weight to the Investigator's report to disregard any errors in that report.

The Agency argued that it had discretion to elevate the offense to a Group III Written Notice because the list of itemized Group III offense is not all inclusive.

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."

The Agency has not presented evidence to show that Grievant's behavior was anything other than a failure to comply with written policy. Failure to comply with written policy is on the itemized list of Group II offenses. The "not all-inclusive" language refers to offenses that are not otherwise on an itemized list of offenses. Since Grievant's failure to report is on the itemized list of Group II offenses, it is not necessary to consider whether his behavior is a Group III offense.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁶ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction is **reduced** to a Group II Written Notice with a ten workday suspension. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to demotion, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** equaling the amount of pay he would have otherwise received had he not been demoted and credit for leave and seniority that the employee did not otherwise accrue. The Agency may account for a ten work day suspension when addressing Grievant's back pay.

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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.