

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 08/08/13;
Decision Issued: 08/20/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10139; 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: 10139

Hearing Date: August 8, 2013
Decision Issued: August 20, 2013

PROCEDURAL HISTORY

On March 26, 2013, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On April 11, 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 she requested a hearing. On July 22, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 8, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's 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 employs Grievant as a Case Management Counselor at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to the Supervisor. Counselor S reported to a different supervisor.

On February 22, 2013, Grievant and Counselor S co-facilitated a therapeutic meeting with a group of offenders. Towards the end of the session, Offender B made a comment to the group about his ex-girlfriend having an affair with another woman. Offender B said he knew that his "old lady" was a "muff diver" and that she would "mess around" with other women. Officer B complained that when he asked about her actions, she would lie. Offender B wanted to know how to prove to her that he knew what she was doing. Counselor S attempted to be humorous and said, "Just pluck the hair out of her teeth." The topic of discussion and Counselor S's comment made Grievant feel uncomfortable. She and Counselor S recognized that Counselor S's comment was inappropriate at that time.

In the afternoon of February 22, 2013, the Supervisor walked to Grievant's office and began speaking about general business matters including filing a charge against an offender. Counselor S joined the meeting. During their meeting, Grievant told the Supervisor she needed tell him something. She said that during the classroom discussions, the topic turned to something of a sexual nature and she should have

recognized it sooner. Grievant said an inappropriate comment was made in the room. The Supervisor asked if the comment was directed to an offender and Counselor S said "no." Grievant said she stopped the conversation after recognizing that Counselor S's comment was inappropriate. Counselor S said he made the inappropriate comment. The Supervisor said that it was good that they recognized when to stop the conversation. The Supervisor discussed ways for them to stop those types of conversations from happening. When the Supervisor left the meeting, he had not asked for the details about what was said and did not understand the seriousness of Counselor S's comment. The Supervisor assumed that Counselor S had used vulgar language during the class and then realized he should not have done so.

Grievant did not tell the Supervisor that she felt uncomfortable by Counselor S's comment during the class.

Under Operating Procedure 038.3, sexual misconduct is defined as:

Any behavior or act of a sexual nature directed toward an offender by an employee, volunteer, visitor, or agency representative. This includes but is not limited to acts or attempts to commit such acts of sexual assault, sexual abuse, sexual harassment, sexual conduct, conduct of a sexual nature or implication, obscenity, and unreasonable invasion of privacy. Sexual misconduct also includes but is not limited to conversations or correspondence that suggests a sexual relationship between an offender and any party mentioned above.

Counselor S received a Group III Written Notice with a 30 day suspension for sexual misconduct. The Supervisor was disciplined for failing to seek additional details about the events that occurred in the group session.

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

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

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

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁴ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On February 22, 2013, Grievant observed Counselor S make an inappropriate comment. Counselor S engaged in sexual misconduct because he made a comment of a sexual nature or implication. Grievant recognized the comment was inappropriate. Under the Facility’s practice, employees are taught to complete immediately incident reports when they observe any significant event occurs. Grievant failed to complete an incident report until she was asked to do so. Grievant knew to report the incident to the Supervisor. She failed to fully report the incident to the Supervisor to enable him to understand that Counselor S violated an Agency policy that would justify disciplinary action. Grievant should have told the Supervisor the words used by Counselor S. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that she reported the matter to the Supervisor and, thus, satisfied her obligation to report. Although Grievant properly reported her concerns, she failed to fully report the incident thereby justifying the issuance of disciplinary action.

Grievant argued that she was being disciplined for her Supervisor’s failure to ask for details about Counselor S’s comment. The Supervisor was disciplined for failing to seek additional details. Grievant could have provided those details and given the seriousness of the inappropriate comment, she should have disclosed the details regardless of the Supervisor’s failure to inquire.

Grievant argued that it was difficult for her as a woman to discuss matters of a sexual nature such as Counselor S’s comment with two males, the Supervisor and Counselor S. The Agency showed that a female manager, the Institutional Program Manager, worked in the same building with Grievant and a few offices away from Grievant. Grievant could have addressed her concerns in detail to the Institutional Program Manager.

Grievant argued that the Agency failed to engage in progressive discipline. Although the Standards of Conduct encourages the Agency to engage in progressive discipline, it does not require the Agency to do so as a precondition of taking disciplinary action.

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

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

⁵ Va. Code § 2.2-3005.

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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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.