

Issue: Group III Written Notice with Suspension (workplace harassment); Hearing Date: 09/17/14; Decision Issued: 09/24/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10439; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10439

Hearing Date: September 17, 2014
Decision Issued: September 24, 2014

PROCEDURAL HISTORY

On June 11, 2014, Grievant was issued a Group III Written Notice of disciplinary action with a one day suspension for violation of Policy 2.30, Workplace Harassment.

On July 1, 2014, 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 August 19, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 17, 2014, 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 employs Grievant as a Unit Manager at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant supervised Ms. J and Ms. D. Grievant observed Ms. J acting inappropriately with an inmate in the building. He believed it would be best to move Ms. J out of the building and into another building to reduce her interaction with the inmate. Ms. D was aware of the rumors that Ms. J was fraternizing with an inmate in the building.

On May 27, 2014, Grievant walked into the office where Ms. J and Ms. D worked. Grievant said that it would be necessary to move one of the two employees. He did not indicate that he intended to move Ms. J but Ms. D suspected it would be Ms. J who would be moved because of Ms. J's interaction with the inmate. Ms. J became upset and started crying. Ms. J told Grievant he could not separate them because of their friendship. Grievant restated that one of them would have to be moved.

During their conversation, an offender outside of the office created a disturbance that agitated Grievant. Grievant slammed his radio down onto Ms. J's desk and exited the office to address the offender. Ms. J and Ms. D were startled by Grievant's action of slamming the radio on Ms. J's desk.

After addressing the inmate's concerns, Grievant returned to the office where Ms. J and Ms. D worked. Grievant apologized for slamming the radio on the table. Ms. D was at her desk with her back to Grievant and Ms. J who were speaking. Grievant said "I want to have a threesome with you two."¹ Ms. J asked Grievant if he was serious and Grievant said, "This is not a joke [Ms. J] I am serious. I want to have a threesome with you two." Grievant left the office. As Grievant was leaving, Ms. D turned and looked at Grievant's face. He was making the same facial expression he typically made when he was joking and not intending his words to be taken seriously. Ms. J heard Grievant's comment but it did not mean anything to her and she was not offended by his comment.

The Former Warden interviewed Ms. J and Ms. D separately and together. Ms. J complained to the Former Warden about Grievant's behavior. Ms. D also complained to the Former Warden about Grievant's behavior. Neither woman perceived Grievant's behavior as a joke or as being made in jest. The Former Warden believed that each woman was upset and disturbed that "something like this" could occur in the workplace. Although neither woman perceived Grievant's comment to be a request for sex, neither woman perceived Grievant to be joking or intending to be entertaining or humorous, according to the Former Warden.

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

"Inadequate or unsatisfactory job performance" and "[d]isruptive behavior" are Group I offenses.⁵ On May 27, 2014, Grievant told two subordinates that he wanted to have a threesome with them. His language implied having a sexual relationship with them. His comments were inappropriate for the workplace. His comments resulted in a complaint being filed by Ms. J which the Agency had to devote time and attention to resolving. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

¹ Grievant used the phrase "threesome" as a euphemism for sexual relations."

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).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

Grievant denied making the offensive statement to the two women. His denial was not credible. The evidence showed that Grievant told the two women he wanted to have a threesome with them. Although Grievant intended his comments to be humorous, his comments were inappropriate in the workplace.

The Agency argued that Grievant engaged in workplace harassment by creating a hostile work environment contrary to policy 2.30. The evidence is not sufficient to support this conclusion. There were two witnesses to Grievant's behavior. Ms. J did not testify at the hearing. She had been removed by the Agency prior to the hearing because the Agency believed she fraternized with an inmate. The Hearing Officer could not assess Ms. J's credibility. She had a motive to overstate her concern about Grievant's comments because Grievant had told her he would be separating her from Ms. D. Ms. D testified at the hearing. Her testimony was materially different from what she told the Former Warden when he asked her about the incident. Her testimony during the hearing showed that she did not take Grievant's comments seriously and believed he was joking about having a threesome with his two subordinates. She indicated that employees often made jokes of a sexual nature and Grievant's comment did not mean anything to her. Based on this evidence, the Agency has not established that Grievant actually made a request for sexual favors or that his behavior amounted to severe or pervasive repeated sexual comments.

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 further 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 suspension is reduced to a Group I Written Notice. The Agency is directed to provide the Grievant with **back pay** less any interim

⁶ *Va. Code § 2.2-3005.*

earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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

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

[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