

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice with Termination (failure to follow policy); Hearing Date: 11/19/14; Decision 11/24/14; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No.10477; 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: 10477

Hearing Date: November 19, 2014
Decision Issued: November 24, 2014

PROCEDURAL HISTORY

On August 25, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. On August 28, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policy.

On September 24, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 13, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 19, 2014, 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 Notices?
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 an Office Services Specialist at one of its facilities. She reported to the Superintendent. She had been employed by the Agency for approximately nine years. No evidence of prior active disciplinary action was introduced during the hearing.

On May 13, 2013, the Superintendent sent all employees including Grievant a memorandum stating:

Issues of any investigation cases are not to be discussed with any employee or offender. Any violations of this directive could result in disciplinary action in accordance with the employee standards of conduct and performance or more serious actions should the investigative case be related to criminal conduct. Should an offender try to discuss issues of an investigative case with you, you are to immediately report the incident to your chain of command in an effort to hold offenders accountable for maintaining confidentiality of investigative cases. Thank you.¹

The Counselor obtained information from a former offender at the Facility that she and Officer S had been communicating by text message. On or about July 31, 2014, the Counselor reported this information to her supervisor who reported the

¹ Agency Exhibit 6.

information to the Superintendent. The matter was referred to the Agency's Special Investigations Unit and an investigation began.

Two or three days before August 5, 2014, Grievant was at her home when she received a telephone call from an anonymous caller. The caller told her that Officer S was communicating with a former offender. Grievant did not report this information to her supervisor.

On August 5, 2014 at approximately 8:30 a.m., Officer S passed by Grievant's office. Grievant called Officer S into her office and told Officer S that Officer S was under an investigation. Grievant told Officer S, "I wanted you to know you are under investigation for a text you sent to ex-offender [Ms. A] about officer [B's] wedding. Don't lie, be honest when they ask you about this." Officer S replied, "I don't have nothing to lie about to anyone." At approximately 12:40 p.m., Officer S approached the Lieutenant and asked "can a person get in trouble for being in contact with an offender?" The Lieutenant asked Officer S to explain what had happened. Officer S told the Lieutenant that Grievant had informed her that she was under investigation over a text message from an offender who was no longer at the Facility. Officer S discussed with the Lieutenant her communication with Ms. A. Prior to that discussion, the Lieutenant did not know Officer S was under investigation.

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

Group III Written Notice

Under Operating Procedure 130.1, employees are prohibited from fraternizing with former offenders for up to 180 days after the former offender's release from a Facility. Sending texts to a former offender could be considered fraternization depending on the nature of the communication. On July 31, 2014, the Agency began an investigation of whether Officer S fraternized with a former offender.

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).

Operating Procedure 130.1(IV)(1) provides that:

In addition to complying with the above procedures, employees have a continuing affirmative duty to disclose to their supervisors or other management officials any conduct that violates this procedure or behavior that is inappropriate or compromises safety of staff, offenders, or the community and any staff or offender boundary violations.

“Violation of DOC Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships with Offenders” is a Group III offense.⁵ After July 31, 2014 but before August 5, 2014, Grievant received a telephone call informing her that Officer S had communicated with a former offender. Grievant recognized that such behavior would be contrary to Agency policy but she failed to report the information to a supervisor thereby acting contrary to DOC Operating Procedure 130.1. The Agency has presented sufficient evidence 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, the Agency’s decision to remove Grievant must be upheld.

Group II Written Notice

“Failure to follow a supervisor’s instructions ...” is a Group II offense.⁶ On May 13, 2013, Grievant was instructed by her supervisor that, “[i]ssues of any investigation cases are not to be discussed with any employee.” On August 5, 2014, Grievant told Officer S that she was under investigation thereby acting contrary to the Superintendent’s instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that she did not know there was an ongoing investigation of Officer S. There exists sufficient evidence to show that Grievant had the ability to learn whether the Agency was conducting an investigation of Officer S. In Grievant’s position, she served as an assistant to the Superintendent and could have viewed any incident reports and communications about the investigation between managers at the Facility and the Special Investigations Unit. In addition, Officer S’s testimony was clear and credible that Grievant told her that she was under investigation and not that there was a rumor about a possible investigation.

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”⁷ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any

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

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

⁷ *Va. Code § 2.2-3005.*

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 III Written Notice of disciplinary action with removal is **upheld**. The Agency's issuance to the Grievant of a Group II 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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.