

Issues: Group III Written Notice (conduct unbecoming), Demotion and Pay Reduction;
Hearing Date: 08/10/12; Decision Issued: 08/15/12; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 9860; 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: 9860

Hearing Date: August 10, 2012
Decision Issued: August 15, 2012

PROCEDURAL HISTORY

On May 15, 2012, Grievant was issued a Group III Written Notice of disciplinary action with demotion to a Senior Correctional Officer and a 15% disciplinary pay reduction for engaging in a romantic intimate relationship with a corrections officer in his chain of command.

On May 17, 2012, 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 July 10, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 10, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 Captain at one of its Facilities until his demotion to a Senior Corrections Officer with a 15% disciplinary pay reduction effective May 15, 2012. Grievant had been employed by the Agency for approximately 17 years without having received prior active disciplinary action.

Grievant and the Officer lived approximately 1 hour away from the Facility. They often drove to work together. Beginning sometime in 2009, they developed a romantic intimate sexual relationship. The relationship ended in the summer of 2010. Grievant was a Lieutenant at the time of the relationship and the Officer worked within Grievant's chain of command. Grievant was promoted to the position of Captain by the Warden who was unaware of Grievant's relationship with the Officer. The Warden testified that he would not have promoted Grievant had he known of the relationship.

The Agency discovered emails between Grievant and the Officer that were sent in March 2011. The emails showed that Grievant and the Officer had a romantic sexual relationship. On March 20, 2011, Grievant revealed that he had been with the Officer when she was smoking marijuana.¹ Grievant did not report the Officer's illegal behavior to Agency managers as he was required under the Agency's policies. The emails also

¹ Grievant wrote, "Not just the obvious, but you smoking pot and me drinking on the greatest afternoon of all." See, Agency Exhibit 3.

showed that the Officer told another Corrections Officer at the Facility about her relationship with Grievant.

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 governs Standards of Ethics and Conflict of Interest for Agency employees. Section IV (E) (1) states:

All units within the Department will provide a workplace environment and reflects its values, and is equitable, fair, and free from pressure or sexually harassing conduct and intimidation. Dating or intimate romantic relationships between supervisors and subordinates undermines the respect for supervisors with other staff, undermines the supervisor’s ability to make objective decisions, may result in favoritism or perceived favoritism, may lower morale among co-workers or open supervisors to future charges of harassment or retaliation claims. Additionally, supervisory/subordinate relationships may bring about complains from co-workers and create a liability for the Department.

- a. A subordinate includes anyone in a supervisor’s direct chain of command. ***
- b. Supervisors are prohibited from dating or engaging in personal romantic or sexual relationships with subordinates. Initiation of or engagement in an intimate romantic or sexual relationship with a subordinate is a violation of the Standards of Conduct and will be treated as a Group I, Group II, or Group III offense depending on its affect on the work environment.

Grievant engaged in an intimate and romantic sexual relationship with the Officer beginning in 2009 and ending in the summer of 2010. Grievant worked as a Lieutenant

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

and the Officer was within his chain of command. The Agency has presented sufficient evidence to support the issuance of disciplinary action.

Grievant argued that the disciplinary action should not rise to a Group III offense because the impact on the Agency was limited. He argued that he did not show favoritism to the Officer. He testified that he did not give the Officer preferential post assignments. He testified that he reported the Officer to Facility managers in 2009 when he believed she was fraternizing with an inmate.

The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice based upon the effect Grievant's behavior had on the work environment. Grievant observed the Officer engaging in criminal behavior. He showed favoritism to the Officer because he did not report her to Facility managers.⁵ The Officer was not a good employee. In October 2011, the Officer resigned from her position in lieu of termination. Had Grievant reported the Officer when he observed her engaging in criminal behavior, the Facility may have been able to address the Officer's employment status sooner. Grievant placed himself at risk of being influenced by the Officer or the Corrections Officer who learned of the relationship in the event they threatened to disclose the relationship. The Warden testified that he would not have promoted Grievant from Lieutenant to Captain had he known of Grievant's behavior. The effect of Grievant's failure to disclose his inappropriate behavior was that the Agency selected him for the position of Captain instead of another qualified employee.

Upon the issuance of a Group III Written Notice, an employee may be removed from employment. In lieu of removal an agency may demote an employee with a disciplinary pay reduction. Accordingly, Grievant's demotion to Senior Correctional Officer with a 15% disciplinary pay reduction must be upheld.

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 Employment Dispute Resolution..."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.

⁵ Grievant knew that he was obligated to report the Officer's criminal behavior to Facility managers.

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 15% disciplinary pay reduction 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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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 email.

3. 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 the Office of Employment Dispute Resolution to 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 email 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 give a copy of all of your appeals to the other party and to EDR. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.