

Issues: Group II Written Notice (failure to follow policy – relationship with subordinate), Group II Written Notice (failure to follow policy – computer/internet misuse), and Termination; Hearing Date: 10/18/16; Decision Issued: 11/07/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No.10873; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10873

Hearing Date: October 18, 2016
Decision Issued: November 7, 2016

PROCEDURAL HISTORY

On July 11, 2016, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy, disruptive behavior, and having an inappropriate relationship with a subordinate. On July 11, 2016, Grievant was issued a second Group II Written Notice for failure to follow policy, unauthorized use of State property or records, and Computer/internet misuse. He was demoted to a Corrections Officer Senior with a 20 percent disciplinary pay reduction and transfer to another facility.

On August 8, 2016, 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 September 20, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 18, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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 a Corrections Captain at the Facility. He was demoted to the position of Corrections Officer effective July 12, 2016 and transferred to another facility. He received a 20 percent disciplinary pay reduction. He began working for the Agency in 1998. No evidence of prior active disciplinary action was introduced during the hearing.

On December 18, 2015, Ms. C sent Mr. B an email regarding, "Today we had something really odd happen." The email discussed the reason a law enforcement officer came to the Facility. The email was sent to various Agency managers, some of whom commented on the event. The email chain was forwarded to Grievant. On December 19, 2015, Grievant forwarded the email chain to Corrections Officer S at her personal email address.

The Agency received an allegation that Grievant was having a sexual relationship with Corrections Officer S. The Agency conducted a polygraph examination of Grievant. The Hearing Officer will not consider the results of the polygraph based on Va. Code § 8.01-418.2:

The analysis of any polygraph test charts produced during any polygraph examination administered to a party or witness shall not be admissible in any proceeding conducted pursuant to § 2.2-1202.1 or conducted by any county, city or town over the objection of any party except as to disciplinary or other actions taken against a polygrapher.

Grievant admitted to having kissed Corrections Officer S. He denied having sexual intercourse with the Corrections Officer S. Grievant had known Corrections Officer S for approximately two years.

Many of the employees working at the Facility had close relationships with each other. When employees reported to work at employee shift changes, several employees would embrace and kiss each other on the cheeks.

Corrections Officer A provided Grievant with her cell phone number so he could contact her when his shift was short. In December 2015, Grievant sent Corrections Officer A a text message stating, "I would love to see you in some lingerie" along with an eye emoji. Officer A responded, "Sorry, I don't mix business with pleasure." Grievant sent her another eye emoji text. Officer A stopped texting Grievant. The Agency's Written Notice does not address this behavior.

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

Group II Written Notice - Email

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.⁴

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

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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

DOC Operating Procedure 310.2 governs Information Technology Security. Section 11(i) of this policy prohibits, "Conducting DOC business with a personally owned external email address (e.g. Gmail, Yahoo)."

On December 19, 2015, Grievant sent an email chain containing several communications between DOC employees using their DOC email addresses to Corrections Officer S. Grievant used his DOC email address to send the email. He sent the email to Corrections Officer S's personal email account thereby acting contrary to DOC policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Group II Written Notice - Inappropriate Relationship

DOC Operating Procedure 135.3 governs Standards of Ethics and Conflict of Interest. Section (F)(2) provides:

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, and Group III offense depending on its effect on the work environment.⁵

The Agency alleged that Grievant engaged in an inappropriate relationship with Corrections Officer S. The evidence is not sufficient to support this conclusion even though some of Grievant's behavior towards Corrections Officer S appears unusual.

The Agency relied on the results of the polygraph to support its conclusion. These results are not admissible as evidence and the Hearing Officer will not consider them.

The Agency relied on Grievant's admission that he kissed Corrections Officer S to support its conclusion. The Agency did not establish whether Grievant gave Corrections Officer S a romantic kiss to the lips or a kiss on the cheek as part of a greeting. The culture in which Grievant worked is significant. Employees at the Facility sometimes greeted each other with hugs and kisses on the cheek. Superiors and subordinates also displayed this behavior. Facility managers knew of and tolerated this behavior. Although this behavior likely is unusual in many other Agency facilities and in State government, it is the standard or measure of behavior upon which to judge Grievant's behavior. If Grievant's admission is viewed in the context of the culture in which he worked, it cannot be construed necessarily as inappropriate. Grievant may have kissed Corrections Officer S on the cheek as a customary greeting – an acceptable practice at the Facility.

⁵ Agency Exhibit 6.

The Agency also showed that Grievant failed to discipline Corrections Officer S when she stated an obscenity at another employee while in his presence. This evidence certainly raises questions about his relationship with Corrections Officer S but it does not show an inappropriate dating or romantic relationship.

Although the Agency referred to Grievant's sending inappropriate text messages to Corrections Officer A, it did not take disciplinary action because of his behavior.

There is no basis to support the Group II Written Notice for engaging in an inappropriate relationship with a subordinate.⁶ Grievant's demotion, transfer, and disciplinary pay reduction was based on the accumulation of disciplinary action. Because Grievant only has one Group II to be upheld, there is no basis to demote, transfer and reduce Grievant's pay.

Mitigation

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 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 II Written Notice of disciplinary action regarding an email is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action regarding an inappropriate relationship with a subordinate is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to demotion, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the

⁶ The Agency also alleged that Grievant was not forthcoming regarding his relationship with Corrections Officer S. This assertion presupposes the existence of a relationship with Corrections Officer S. The Agency has not established such a relationship existed.

⁷ Va. Code § 2.2-3005.

employee received during the period of demotion 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.⁸

⁸ 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