

DECISION OF HEARING OFFICER  
IN RE: ██████████ v VIRGINIA DEPARTMENT OF CORRECTIONS,  
POCAHONTAS STATE CORRECTIONAL CENTER  
CASE NO.: 11419  
HEARING DATE: October 24, 2019  
DECISION ISSUED: November 27, 2019

PROCEDURAL HISTORY

The initial conversation stating a relationship between two employees and failure to report same occurred on or about March 22, 2019. On June 18, 2019 Grievant was interviewed by a State Investigator.<sup>1</sup> After investigated, a report was sent to the Warden dated July 3, 2019<sup>2</sup>. On July 16, 2019 Grievant was put on pre-disciplinary leave after a meeting with the Warden.<sup>3</sup> On July 29, 2019 Grievant was given due process notification (referred to as “Step One”).<sup>4</sup> On August 7, 2019 Grievant’s rebuttal was submitted (referred to as “Step Two”).<sup>5</sup> On August 12, 2019 a Written Notice was issued and Grievant and Warden had a discussion (referred to as “Step Three”).<sup>6</sup> On August 19, 2019 Grievant filed a Grievance Request Form.<sup>7</sup> A Hearing Officer was appointed on September 5, 2019. A pre-hearing conference occurred on September 17, 2019 at which time the hearing was set for October 24, 2019.

APPEARANCES

Agency Advocate  
Agency Representative  
Additional 4 (Four) Witnesses for Agency

Grievant’s Advocate  
Grievant

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 the law and policy cited.
- 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.

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<sup>1</sup> Agency Exhibit 2

<sup>2</sup> Agency Exhibit 3

<sup>3</sup> Agency Exhibit 9 and Agency Exhibit 4

<sup>4</sup> Agency Exhibit 5 and Agency Exhibit 10

<sup>5</sup> Agency Exhibit 11 and Agency Exhibit 6

<sup>6</sup> Agency Exhibit 5 and Agency Exhibit 8

<sup>7</sup> Agency Exhibit 12

5) Whether Grievant received appropriate opportunity to exercise his due process rights.

### BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.<sup>8</sup>

### APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq the Rules for Conducting Grievances effective July 1, 2012 and the Grievance Procedure Manual (GPM) effective July 1, 2017

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “includes acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” More than one (1) active Group II offense may be combined to warrant termination.<sup>9</sup>

Agency relies on:

Operating Procedure 145.3 Equal Employment Opportunity<sup>10</sup>  
Operating Procedure 135.1 Standards of Conduct<sup>11</sup>  
Operating Procedure 135.3 Standards of Ethics and Conflict of Interest<sup>12</sup>  
Offense Codes 13, 33, and 39<sup>13</sup>

Grievant relies on:

Code of Virginia §9.1-508 et seq (COPGA)

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<sup>8</sup> *Grievance Procedure Manual* §5.8

<sup>9</sup> OP 135.1

<sup>10</sup> Agency Exhibit 15

<sup>11</sup> Agency Exhibit 13

<sup>12</sup> Agency Exhibit 14

<sup>13</sup> Agency Exhibit 8

## FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness the Hearing Officer makes the following findings of fact:

Grievant was a ranking Major with 23 years of service.

Briefly the facts of this case are that supervisor, Mr. A, was possibly having a relationship with his subordinate, Ms. B. Grievant, a Major, who was third in command to the Warden, was told by Grievant's secretary that she, the secretary, believed something was going on with Mr. A and Ms. B. The Human Relations person suspected Mr. A and Ms. B were involved and questioned a facility case worker. The case worker stated that he heard from his girlfriend that Ms. B told his girlfriend she (Ms. B) was involved with Mr. A. The Human Resource Officer and the Case Worker went to the Warden with their suspicions and the matter was investigated. Grievant was questioned during the investigation wherein he admitted he had heard one person's opinion about a relationship of Mr. A & Ms. B and did nothing further with the information.

Specifically, in March of 2019, Grievant and his secretary were discussing that Ms. B had been promoted to a job and "everyone was talking about her and that she acts entitled". Grievant's secretary stated she walked into Grievant's office and closed the door and said to him:

Secretary: "She does feel entitled."

Grievant: "Why would that be?"

Secretary: "Because of her (Ms. B) and Mr. A."

Grievant: "What?"

Secretary: "They are having a relationship. She (Ms. B) told me they were having a relationship, but it wasn't sexual in nature."

Grievant: "What does that even mean?"

Secretary then stated within a week of the first conversation there was a second conversation that occurred in the conference meeting room either before or after a meeting where only she and Grievant were then present. She stated Grievant said to her "If you (secretary) and I (Grievant) were to have a relationship, we would be fired and if Mr. A and Ms. B were to have a relationship, they would be fire." Secretary then stated she didn't want to be in the middle of this matter.<sup>14</sup>

A third incident reported by Secretary was a text conversation between Secretary and Grievant which text can be seen as an exhibit.<sup>15</sup> The texts were cryptic. No specific mention was made about any employee relationship. Secretary believed the conversation was about Grievant having talked to Mr. A about Mr. A's conduct. Secretary was angry that she believed Grievant had told Mr. A that she (Secretary) had given Grievant information about the relationship and Secretary didn't want to be "in the middle". At a

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<sup>14</sup> Secretary Testimony

<sup>15</sup> Agency Exhibit 1

later time, Secretary stated she told Grievant that she knew what “didn’t have sex” meant. “It meant blow jobs”.<sup>16</sup>

Grievant stated in his testimony that the first conversation was essentially correct except there was never a closed door and Secretary had never told him of Ms. B actually telling Secretary of a relationship. Grievant adamantly denied there were any other conversations that related to the A/B relationship.<sup>17</sup>

Secretary admitted that she quit working for Grievant in May 2019 believing that Grievant had heard an employee speak badly of her. Secretary felt Grievant did not stick up for her. She admitted she left abruptly and used several “colorful” words and she threw her keys on Grievant’s desk.<sup>18</sup>

The State Investigator, who gave testimony, stated Secretary was questioned by him and Secretary only related the first conversation. Nothing about text messages or other conversations were mentioned.

The State Investigator called Grievant and questioned him. He had Grievant sign a notice<sup>19</sup> which stated if Grievant was a suspect in a matter he was to be informed. The State Investigator stated he interviewed Grievant only as a witness, not as a suspect. However, the letter the investigator sent to the Warden with his finding clearly show the Investigator was investigating a complaint about Grievant.<sup>20</sup> Grievant did tell the Investigator that his Secretary had told him of her opinion that Mr. A and Ms. B were involved. Grievant stated he did not pass information on to anyone.

The Human Resource Officer testified that she suspected something was going on with Mr. A and Ms. B. She had occasion to talk with a case worker about another matter and in the course of their conversation asked him what he thought about Mr. A and Ms. B. The Case Worker stated his girlfriend said Ms. B confided to his girlfriend that Mr. A and Ms. B had a relationship.<sup>21</sup>

Although Secretary, Human Resource Officer and Case Worker had information or beliefs about the Mr. A and Ms. B relationship, none reported their suspicions. When Human Resource Officer and Case Worker exchanged info, they then decided to go to the Warden with their information. Similar to the Grievant, Secretary, Human Resource Officer, and Case Worker never took any action until a chance conversation between Human Resource Officer and Case Worker occurred.

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<sup>16</sup> Secretary Testimony

<sup>17</sup> Grievant Testimony

<sup>18</sup> Secretary Testimony

<sup>19</sup> Agency Exhibit 2

<sup>20</sup> Agency Exhibit 3

<sup>21</sup> Secretary Testimony

The Warden testified that he had followed all proper steps before issuing a Written Notice. He referred to them as “Step One<sup>22</sup>, Step Two<sup>23</sup>, and Step Three<sup>24</sup>”. (See procedural history supra.)

The Warden described Grievant’s actions (or inaction) by referring to policies that defined behavior the Warden believed necessary for Grievant to report. Although no evidence was ever given that either Mr. A or Ms. B felt sexually harassed, the Warden proceeded with his opinion that harassment must be reported and dealt with. Harassment and Hostile Workplace are defined as:

Workplace Harassment – Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person.

Sexual Harassment – Any unwelcome sexual advance, request for favors, or verbal, written or physical conduct of a sexual nature by a manger, supervisor, co-workers, or non-employee.

Hostile Work Environment – A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.<sup>25</sup>

The Warden testified that Grievant was tasked with teaching classes to officers on a regular basis. Grievant stipulated he taught the classes as found in the exhibits.

The Warden testified Grievant was given notice that he could proceed with his grievance either under the COPGA, Correctional Officers Procedural Guarantee Act, Code of Virginia § 9.1-508 et seq or the Standards of Conduct.<sup>26</sup> In his testimony, the Grievant denied he was given the options. The warden stated Grievant had a previous Group II within 3 years of the current matter.<sup>27</sup> He further stated the action for which Grievant was previously disciplined was similar to the present matter.

The Warden stated the Agency’s consideration of the severity of the offense was Standard of Ethics and Conflict of Interest OP 135.3 IV H2 which states:

2. Dating and intimate romantic relationships between supervisors and subordinates undermine the respect for supervisors with the other staff, undermine the supervisor’s ability to make objective decisions, may result

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<sup>22</sup> Agency Exhibit 5, Agency Exhibit 10

<sup>23</sup> Agency Exhibit 11, Agency Exhibit 6

<sup>24</sup> Agency Exhibit 5, Agency Exhibit 8

<sup>25</sup> Internal Policy 101.2 A EX 19, 20, 21

<sup>26</sup> Agency Exhibit 8

<sup>27</sup> Agency Exhibit 17

in favoritism or perceived favoritism, may lower morale among co-workers, or open supervisors to future (emphasis added) charges of harassment or retaliation claims. Additionally, supervisory/subordinate relationships may bring about complaints from co-workers and create a liability for the DOC.<sup>28</sup>

The Warden stated he did consider Grievant's 23 years of exceeds contributor<sup>29</sup> as well as a previous Group II discipline of December 2017.<sup>30</sup>

Grievant was called by the Agency as their witness.

Grievant stated he made no report because he just heard "gossip" and no facts about a relationship. It was just Secretary's "feeling".

Most telling was Grievant's answer to a hypothetical Agency's Advocate presented to Grievant:

Advocate: "What if someone told you 'I feel that there is an officer bringing drugs into this prison', what would you do?"

Grievant: "I'd turn it over to an investigator."<sup>31</sup>

Grievant stated he was told by Richmond Human Resources that he shouldn't report "gossip" he heard as he could then have been charge with bringing a false claim. He presented no evidence to support this conversation.

Grievant argued adamantly he had not been given due process under Virginia Code §9.1-508 et seq which was an optional avenue he could have pursued. While he may not have understood what was given to him, he should have known COGPA was not necessary to follow when pursuing the grievance process under EDR rules.<sup>32</sup> Further Virginia EDR holds that any due process deficits are cured by the grievance process and the full hearing before a State Hearing Officer.<sup>33</sup>

Grievant, as previously reported, was very adamant that he had only one short conversation with Secretary regarding Mr. A and Ms. B. Indeed, the subsequent conversations and text messages seem rather incredible.

Grievant presented evidence that he was qualified for Unemployment as he was "not discharged due to misconduct".<sup>34</sup> However, this ruling is a consideration of the Hearing Officer but not a requirement of the outcome of the Hearing Officer's decision.

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<sup>28</sup> Agency Exhibit 14

<sup>29</sup> Agency Exhibit 8

<sup>30</sup> Agency Exhibit 17

<sup>31</sup> Agency Advocate question in testimony

<sup>32</sup> Standards of Conduct OP IV C 7d pg. 3 of 20; Agency Exhibit 13

<sup>33</sup> See April 8, 2013 EDR Ruling No. 2013-3572 "Pre-Disciplinary Due Process" pg. 4 & 5

<sup>34</sup> Grievant Exhibit 3

Grievant brought up concerns about an employee he had reported where a knife and box cutter were involved and in Grievant's opinion, the employee received disparate treatment. These incidents, however, did not resemble the reason for Grievant's dismissal. Grievant gave much testimony as to why his previous Group II was unfair, yet the time to have addressed that was well past. Grievant stated the previous Warden didn't like him and vowed to get even. That testimony was not collaborated and, further, the previous Warden had nothing to do with the present discipline.<sup>35</sup>

### MITIGATING CIRCUMSTANCES

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..."<sup>36</sup> 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.

More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the discipline exceeds the limits of reasonableness.<sup>37</sup>

While Grievant was given notice, he had failed to follow a policy to report, the Agency focused on Harassment policies which harassment was never proven.

At least 3 other witnesses testified they had at least as much information as Grievant about the A/B relationship and, like Grievant, failed to report it.

No improper motive was proven. Grievant did engage in the behavior of not reporting a policy infraction which did constitute misconduct. For the reasons stated below the Agency finding of a Group III discipline was too harsh, considering Grievant's 23 years of exceeding contributor service to the facility.

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<sup>35</sup> Grievant Testimony

<sup>36</sup> Va. Code §2.2-3005

<sup>37</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1)

Testimony would indicate there were at least 4 persons at the facility who had knowledge or suspicions that Mr. A and Ms. B were doing something, by policy, they should not have been doing. Yet none of these parties came forward until the Human Resource Officer and Case Worker discussed the matter.

Grievant was an employee of 23 years and had risen in rank to that of Major. Grievant had a previous Group II discipline within the last 3 years. Grievant had received exceeding contributor ratings.

The Warden had only very recently been stationed at the facility. He had no real opportunity to evaluate Grievant as to his character, loyalty and benefit to the facility. The Warden also appeared to be of the mistaken opinion Grievant's previous Group II was a similar issue to the present issue, which it was not. The first discipline was for using foul language and the present discipline for failure to report a policy violation. There were no similarity of facts.<sup>38</sup>

The policies relied on by the Agency related to workplace violence or harassment. No actions of violence or harassment were ever presented in the Hearing.<sup>39</sup>

While there was no improper motive of the Warden, the above defects in arriving at a Group III discipline are valid mitigating facts.

#### OPINION

The Agency quoted many policies that did not directly apply to Grievant's behavior. Agency did not advise Grievant he was responsible to report a "Consensual Personal Relationship. Agency, rather, insisted Grievant failed to report "Sexual Harassment in the Workplace". There was absolutely no evidence presented in the entire hearing that Ms. B had been harassed by her supervisor, Mr. A. Nor did Grievant's secretary report harassment. She made a statement about a "relationship", which was the same misconduct suspected by the Human Resource Officer and Case Worker.

Fortunately for the Agency it was presented and confirmed by Grievant that he was aware of, and even taught classes in, all the facility's policies. Unfortunately, Grievant was never given notice that he was being investigating under appropriate policy references. None the less, Grievant knew, or should have known, his duties.

Grievant did not violate Offense Code 33 DHRM Policy 2.05. Grievant did not violate Offense Code 39 DHRM Police 2.35. Grievant did violate Offense Code 13 "Failure to follow policy." Grievant did not fail to report Workplace Harassment as none was proven or even presented as evidence. Regardless of what, how, or where the statement was made to Grievant regarding the A/B relationship, all evidence, as well as Grievant's testimony, state that Grievant had knowledge, however minimal, that

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<sup>38</sup> Agency Exhibit 8 & 17

<sup>39</sup> Agency Exhibit 18



implicated Mr. A and Ms. B in a relationship. The relationship, as stated in policy, was prohibited.

Standards of Conduct OP 135.1 VA3 states:

3. Employees have a duty to promptly report to their supervisors, other management officials, or Human Resource Officer any inappropriate conduct or behavior they are subject to, become aware of (emphasis added), or observe. If an employee's supervisor is the person engaging in the inappropriate behavior or conduct, the employee should report them to any member of management above the supervisor in the chain of command, or directly to Human Resources.<sup>40</sup>

Standards of Ethics & Conflict of Interest OP 135.3IV H2a states:

a. Supervisors are prohibited from dating or engaging in personal romantic or sexual relationships with subordinates.<sup>41</sup>

### DECISION

Considering the matter and all evidence presented, the Group III discipline with termination is reduced to a Group II discipline. With a previous Group II within the last three years, the discipline is cumulative, and the action of termination is **UPHELD**.

### APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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<sup>40</sup> Agency Exhibit 13

<sup>41</sup> Agency Exhibit 14

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.<sup>42</sup>

[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].

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Sondra K. Alan, Hearing Officer

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<sup>42</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.