



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11710

Hearing Date: October 6, 2021
Decision Issued: October 26, 2021

PROCEDURAL HISTORY

On May 3, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of ethics rules. On May 3, 2021, Grievant was issued a Group II Written Notice for failure to follow policy.

On May 28, 2021, Grievant timely filed a grievance to challenge the Agency's actions. The matter advanced to hearing. On June 15, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 6, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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. He had been employed by the Agency for approximately 15 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked as the Shift Commander at the Facility. Other employees sometimes found him abrasive, hard to read, and hard to get along with.

In March 2021, rumors began among Facility staff that Grievant and Nurse C were having a romantic relationship.

Nurse C worked at the Facility. Nurse C reported to Nurse B who was the nursing supervisor. Nurse C was not in Grievant's chain of command. Nurse B would sometimes select Nurse C as "charge nurse" which meant she had supervisory duties during her shift but was not a permanent supervisor. None of Nurse C's duties required frequent contact with Grievant.

Lieutenant B reported to Grievant. Lieutenant B and Nurse B were married.

The Facility “had lost” a charge nurse for the night shift and that position needed to be filled. Nurse B was responsible for replacing the night shift charge nurse. Nurse C knew she could be placed on night shift as the charge nurse. Nurse C did not want to be placed on the night shift and “vented” to Grievant.

Nurse C was supposed to be escorted by security staff when she walked through secured areas of the Facility and could come into contact with inmates. She conducted “pill call” which involved dispensing medication to inmates. She stood behind a secured window while dispensing medication. A corrections officer was supposed to be nearby to ensure her safety.

On March 8, 2021, Grievant asked Lieutenant B to come to his office. Grievant asked Lieutenant B for what Lieutenant B described as a “favor.” Grievant asked Lieutenant B to see if Nurse B would not place “his nurse”, Nurse C, on night shift because it would mess up his home life, causing him to take off unplanned days.¹

Lieutenant B testified he did not speak with his wife about Grievant’s request. Instead, he reported Grievant’s behavior to the Assistant Warden. Lieutenant B did not agree with Grievant’s management style and his opinions. They did not get along great, according to Lieutenant B.² Nurse B testified her husband told her about Grievant’s request not to move Nurse C to the night shift. Nurse B moved Nurse C to the night shift on some nights. Nurse B did not give Nurse C preferential treatment.

The Assistant Warden observed Nurse C in the Building and not being escorted by security staff. He called an “emergency meeting” with Grievant asking why Nurse C was not being escorted during pill call. Grievant spoke with Lieutenant B and demanded to know why “his nurse” was not being escorted through the building on Thursday March 11, 2021.

On March 11, 2021 at approximately 8 a.m., Nurse C completed “pill call” and was standing by the elevator. Officer C and Officer H began knocking “dosing cups” from the pill cart and began pouring water from the spout of the water jug attached to the cart. Nurse C told them to stop several times but they continued making a mess of the pill cart while laughing. Nurse C entered the elevator and both officers entered with her. They continued to pour water from the water jug. Nurse C told them to stop. Officer H said, “No I’m not going to quit” as he laughed. Nurse C exited the elevator and left the Building.

On March 11, 2021 at approximately 3 p.m., Nurse C was in the Building completing the evening pill call. Officer H was escorting Nurse C. Officer H said, “I heard [Officer C] made you squirt.” Nurse C said, “What are you talking about?” Officer H then flipped on the water spout and said, “Look, now I made you squirt.” Officer H used his

¹ It is unclear how placing Nurse C on night shift would affect Grievant’s home life or cause him to take unplanned days.”

² Grievant considered Lieutenant B to be a friend. He was surprised to learn Lieutenant B did not consider him to be a friend.

radio to call Officer C and told Officer C to go to “the maintenance.”³ Officer H said to Officer C, “I heard you made [Nurse C] squirt five time.” Officer C responded, “Yeah, I made her squirt and it was messy.” Officer H said, “I just made her squirt again.” Nurse C became upset. Nurse C told Officer H to stop making these comments and putting them over the radio for all to hear. Officer H said, “No one is on this channel and won’t hear it.” Officer H then held up the radio to show her.

Nurse C reported her interaction with Officer C and Officer H to Grievant on March 11, 2021.⁴ She told him she did not want to get the officers in trouble by reporting them to human resources.⁵ Grievant told her to think about what she wanted to do. Nurse C was going to be away from work the next week. On March 12, 2021, she called Grievant and said she intended to report the matter to human resources.

Grievant met with Officer C and asked him if she escorted Nurse C on March 11, 2021 and Officer C said, “Yes.” Grievant asked Officer C if he made any inappropriate comments to Nurse C and Officer C asked, “Are you talking about squirting?” Grievant said, “Yes.” Grievant said right now the matter is not with human resources and that Nurse C reported it to Grievant. Grievant said Nurse C still had the option to report the matter to human resources.

When Officer C was later questioned about his interaction with Nurse C, he denied the allegations and said his interaction with her was “strictly professional.”

On March 19, 2021, Officer S was talking to Sergeant C and asked Sergeant C where Grievant was. Sergeant C said Grievant was in his office. Officer S went to Grievant’s office and “peeked” in the Captain’s office. Grievant saw Officer S at the door and said, “What the f—k do you want.” Officer S replied, “I was checking to see if you were in your office.” Approximately five minutes later, Grievant told Officer S to step into Grievant’s office. Grievant said, “Why is it, every time I see you, you always have a slick ass remark. I’m going to see to it that I will not be disrespected. I’ve already gotten one staff member fired. I’m not afraid to add one more to it.”⁶

The Agency submitted hundreds of pages of emails between Grievant and Nurse C. Most of the pages showed duplicate emails. The volume of pages gives the appearance of lengthy excessive contact between Grievant and Nurse C even though there may be only one brief series of emails on a particular day. With one exception, both

³ Maintenance is a radio channel.

⁴ The Agency claimed Grievant did not timely report the matter to a supervisor. Grievant asserted he learned from Nurse C on March 12, 2021 that she wanted the matter addressed by human resources. Grievant said he reported it to management on his first opportunity upon returning to the Facility. The Agency did not discipline Grievant for failing to timely report Nurse C’s complaint.

⁵ Nurse C was concerned that if she reported two corrections officers the rest of the shift would gang up on her. She wanted time to make sure she made the right decision about whether to report the officers.

⁶ Agency Exhibit p. 372.

employees were at work when they sent the email. The emails were not directly work related.

The Warden testified that he did not have a problem with Grievant referring to Nurse C as “my nurse.” Building supervisors sometimes referred to officers working in the building as “my officer.”

The Agency counseled Nurse C for sending too many personal emails to Grievant. It did not counsel her for being in a romantic 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.” 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.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁷

Group III Written Notice

The Agency argued Grievant should receive a Group III Written Notice for, “Hiding the truth/lying for not disclosing the relationship when asked” When Grievant was asked by the Assistant Warden if he was in a relationship with Nurse C, Grievant said he was in a “Friendship relationship.” Grievant’s answer was truthful. The Agency did not establish that Grievant was hiding the truth or lying about his relationship with Nurse C.

Operating Procedure 135.3, Standards of Ethics and Conflicts of Interest provides:

Romantic or sexual relationships between supervisors and subordinates undermines the respect for supervisors with the other employees, 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 complaints from co-workers and create a liability for the DOC.

1. Supervisors are prohibited from dating or engaging in personal romantic or sexual relationships with subordinates. A subordinate includes anyone in a supervisor’s direct chain-of-command.

a. Initiation of, or engagement in an intimate romantic or sexual relationship with a subordinate is a violation of Operating Procedure 135.1, Standards

⁷ See, Virginia Department of Corrections Operating Procedure 135.1.

of Conduct, and will be treated as a Group I, Group II, or Group III offense depending on the impact on the work environment.

b. The evidence to substantiate the adverse effect on the work environment to support the issuance of a written notice must be documented.

2. If the Organizational Unit Head determines the work environment is adversely affected by the romantic, or sexual relationship of a supervisor and subordinate who is in an indirect line of supervision (i.e. corrections officer and sergeant on different shifts and breaks), such relationships may be deemed inappropriate for the workplace and may be grounds for discipline under Operating Procedure 135.1, Standards of Conduct.

3. All employees are responsible for compliance with this operating procedure regarding consensual personal relationships in the workplace. The Organizational Unit Head will determine the appropriate disciplinary action to be taken and the reassignment or transfer of the supervisor or employee to alleviate the supervisor/subordinate work problems the relationship may create.

D. Personal relationships, even between peers, within the same work unit may create similar problems as romantic or sexual relationships and reassignment of one or both parties should be considered if such a relationship influences or affects the work environment or the work performance of any of the parties involved.

E. Regardless of the supervisory/subordinate or peer/peer working relationship, employees involved in a romantic or sexual relationship with a co-worker must advise the Organizational Unit Head of their involvement to allow the Organizational Unit Head to address potential employment issues preemptively.

The Merriam-Webster dictionary defines “romantic” as “of, relating to, or involving love between two people.” A romantic relationship involves more than just being friends. The Agency has not established that Grievant expressed love for Nurse C. Grievant did not go on dates or talk about going on dates with Nurse C. They did not hug or hold hands at work. None of Grievant’s emails to Nurse C expressed love for Nurse C. Grievant and Nurse C were friends. They sometimes confided in each other, however, such behavior would be consistent with a friendship. They sometimes talked on the phone after work. They met outside of work so that Grievant could repair the air conditioning in Nurse C’s vehicle.⁸ Grievant made repairs to vehicles for other staff as well. On one occasion, they ate together at a fast food restaurant. The evidence is not sufficient to establish a romantic relationship between Grievant and Nurse C. This conclusion is confirmed by the Agency’s failure to take corrective action against Nurse C for allegedly failing to report a romantic relationship with Grievant.

The Agency argued Grievant should receive a Group III Written Notice for “threatening or coercing” Lieutenant B. Grievant did not threaten or coerce Lieutenant B.

⁸ It was common knowledge that Grievant worked on cars and all-terrain vehicles. He had worked on vehicles belonging to other staff at the Facility.

Lieutenant B described the request as asking for a “favor.” Grievant perceived Lieutenant B as a friend. Grievant did not attach any consequences if Lieutenant B failed to grant his favor. Lieutenant B testified he did not tell Nurse B about Grievant’s request.

Grievant should not have asked Lieutenant B for a favor. Because of Grievant’s rank, his request could have been perceived⁹ as something more than a “favor.” Grievant’s behavior was unsatisfactory performance, a Group I offense. Because Grievant held a supervisory position the offense could be elevated to a Group II offense with a ten workday suspension. Grievant’s behavior did not rise to the level of a Group III offense. Requesting a favor of someone perceived as a friend was not threatening or coercing behavior.

The Agency asserted Grievant threatened Officer C by saying, “man to man, it’s not going to happen, leave her alone.” Grievant allegedly said, “It won’t do you any good to tell on me, I’m untouchable; the last person to snitch on me is sitting at the house right now.” Grievant also allegedly told Officer C that if Officer C did tell, Grievant would have Nurse C “push sexual harassment in HR.”

Grievant denied threatening Officer C. If Grievant told Officer C to leave Nurse C alone, it would be consistent with Grievant wanting to prevent further harassment of Nurse C. It is unclear what Officer C would “snitch on” about Grievant. In addition, Officer C’s testimony contained additional statements beyond what he wrote in his report to the Assistant Warden. This undermines his credibility. Officer C denied making offensive statements to Nurse C. Nurse C’s account of Officer C’s behavior, however, was credible. Based on the evidence presented, the Hearing Officer cannot conclude that Grievant threatened or coerced Officer C.

The Agency alleged Grievant threatened Officer S. Grievant was in a position to tell subordinates they were at risk of disciplinary action. Doing so would not be an impermissible threat. Officer S “peeked” into Grievant’s office to determine Grievant’s location. No explanation was given as to why Officer S would need to peek into Grievant’s office to determine Grievant’s location. Unnecessarily tracking the location of another employee could form a basis for corrective action. Grievant’s tone may have been unnecessarily harsh which would constitute unsatisfactory performance, a Group I offense. He should not have cursed while speaking to Officer S. Given Grievant’s position of authority, the Group I could be elevated to a Group II offense. Nevertheless, the Written Notice does not mention Grievant’s interaction with Officer S as a basis for disciplinary action.

The evidence presented is sufficient to establish a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. A ten workday suspension would be appropriate in this case.

⁹ The evidence showed that Lieutenant B did not perceive Grievant’s request as a threat or coercion. Lieutenant B perceived Grievant’s request as a request for a favor.

Group II Written Notice

The Agency alleged Grievant failed to follow Operating Procedure 135.3, Standards of Ethics and Conflicts of Interest, because he did not report his romantic relationship with Nurse C to the Agency. The evidence showed Grievant did not have a romantic relationship with Nurse C. Thus, he was not obligated to report a relationship that did not exist.

The Agency alleged Grievant violated Operating Procedure 310.2, Information Technology Security, because he sent “almost 300 personal emails in a 6-8 week period” to Nurse C. The evidence showed Grievant did not send Nurse C “almost 300 personal emails” in a six to eight week period to Nurse C. During the hearing, the Agency alleged Grievant sent approximately 100 emails to Nurse C.

Operating Procedure 310.2(III)(B)(4) provides:

Personal use of the computer and the Internet - Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth’s electronic communications tools, including the Internet is permitted during work hours, but not to interfere with the performance of the employee’s duties or the accomplishment of the unit’s responsibilities. Personal use is prohibited if it:

- a. Adversely affects the efficient operation of the computer system; or
- b. Violates any provision of this operating procedure, any supplemental procedure adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law, or guideline as set forth by Federal, State or Local, law, see COV §2.2-2827, Restrictions on state employee access to information infrastructure.

Grievant sent Nurse C a series of emails on February 1, 2021, February 15, 2021, February 16, 2021, February 28, 2021, March 1, 2021, March 5, 2021, March 11, 2021, March 20, 2021, and March 21, 2021. Grievant’s emails did not affect the efficient operation of the computer system and did not otherwise violate Operating Procedure 310.2. Grievant sent emails on nine days over a six to eight week period. Grievant’s use was incidental and occasional and did not exceed the limits permitted by Operating Procedure 310.2.

The Group II Written Notice is not supported by the evidence.

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

....”¹⁰ 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.

Attorney’s Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys’ fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney’s fees unjust. Accordingly, Grievant’s attorney is advised to submit an attorneys’ fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director’s *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice with a ten workday suspension. The Group II Written Notice is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant’s same position at the same facility prior to removal, 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 employee received during the period of removal and after accounting for his suspension. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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.

¹⁰ Va. Code § 2.2-3005.

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 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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.