



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11645 / 11646

Hearing Date: July 22, 2021
Decision Issued: August 11, 2021

PROCEDURAL HISTORY

On October 13, 2020, Grievant was issued a Group III Written Notice of disciplinary action with disciplinary transfer for numerous offenses including lack of workplace civility and workplace harassment. On December 7, 2020, Grievant was issued a Group III Written Notice with removal for engaging in a prohibited relationship with a subordinate and failure to notify his supervisors of that relationship. On December 7, 2020, Grievant was issued a third Group III Written Notice with removal for making false statements and failing to fully cooperate during an administrative investigation.

Grievant timely filed grievances to challenge the Agency's actions. On January 6, 2021, the Office of Employment Dispute Resolution consolidated the grievances for hearing. On January 19, 2021 the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 22, 2021, a hearing was held by remote conference. Grievant was notified of the date and time of the hearing but did not participate.

APPEARANCES

Agency Party Designee
Agency 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. 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 Warden at one of its facilities. He had been employed by the Agency for approximately 40 years. No evidence of prior active disciplinary action was introduced during the hearing.

Over the course of a year, the Agency received numerous complaints about Grievant. The Agency conducted two Equal Employment Opportunity investigations involving interviews with 26 employees and contractors.

Grievant supervised employees of different races. He sometimes had "favorites" of one race who received additional attention and preferential treatment from Grievant.

Grievant regularly conducted rounds with Captain B and Captain H who were among Grievant's "favorites." He did not often conduct rounds with other members of his executive team who were of a different race.

Captain B referred to Grievant as his best friend. Grievant did not take corrective action when Captain B gave the Assistant Warden a T-shirt with offensive language written on it.

Grievant was sometimes moody. He did not speak to some staff even when they greeted him. He sometimes left meetings when questions were asked of him that he did not like. Grievant banned the Classification Supervisor from executive team meetings because she asked him questions he did not like.

Grievant sometimes micro-managed, nitpicked, and overly scrutinized some employees.

Ms. 1 worked with Grievant and was within his chain of command. In May 2020, they began a romantic relationship. Grievant and Ms. 1 stayed together overnight in hotel rooms on May 14, 2020, May 27, 2020, June 18, 2020, July 1, 2020, and July 30, 2020.

On July 24, 2020, Grievant and Ms. 1 drove Ms. 1's vehicle to a location where Grievant's vehicle was parked. Grievant and Ms. 1 exited the vehicle. Grievant placed a black bag in the back of his vehicle. Grievant and Ms. 1 stood close together. They talked and kissed several times.

On August 7, 2020, Grievant's Wife sent Ms. 1 an email indicating that the Wife intended to report Ms. 1 to DOC headquarters and have her fired. Grievant's Wife added that Ms. 1 had ruined her life and marriage.

On September 14, 2020, an HR Investigator asked Grievant questions about Ms. 1 as part of the Agency's equal employment investigation. Grievant told Agency HR Investigators he had regular contact with Ms. 1. He said she was his point of contact when there was no Assistant Warden working. The HR Investigator asked Grievant if he had a personal relationship with Ms. 1 outside of work. Grievant replied, "No, not really. I always [have] been kind of like a loner because those things can lead to other things." He added there were, "no non job-related things." At the time Grievant made these statements, he knew they were untrue.

On September 16, 2020, Ms. 1's husband called the Facility to report that Ms. 1 was involved in an inappropriate relationship with an employee at the Facility. Ms. 1's husband had received a text message from an unidentified person who was most likely a DOC employee. The Agency's Special Investigation Unit was assigned to investigate the allegation.

Grievant subsequently spoke with the Supervisor who asked him about his relationship with Ms. 1. Grievant told the Supervisor that there was nothing between him and Ms. 1.

On October 21, 2020, Grievant sent an email to Ms. 1 in which he told her he loved her.

Grievant met with an SIU Investigator on November 6, 2020 and told the Investigator that a personal relationship with Ms. 1 did not develop until the later part of May 2020 and that he had hugged and kissed Ms. 1.

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.”¹

Group III Written Notice – Civility in the Workplace

Group III offenses include violating the DHRM Policy 2.35 governing Civility in the Workplace. This policy provides:

It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, equity, and inclusion. In keeping with this commitment, workplace harassment (including sexual harassment), bullying (including cyber-bullying), and workplace violence of any kind are prohibited in state government agencies.

The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace.

Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.

Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

DHRM Policy 2.35 defines Bullying as:

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

Disrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person. The behavior may involve a real or perceived power imbalance between the aggressor and the targeted person. The behavior typically is severe or pervasive and persistent, creating a hostile work environment. Behaviors may be discriminatory if they are predicated on the targeted person's protected class (e.g., using prejudicial stereotyping or references based on the targeted person's characteristics or affiliation with a group, class, or category to which that person belongs, or targeting people because they are in a protected class).

Discriminatory Harassment is defined as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race; traits historically associated with race including hair texture, hair type, and protective hairstyles such as braids, locks, and twists; sex; color; national origin; genetic information; religion; sexual orientation; gender identity or expression; age; political affiliation; veteran status; pregnancy, childbirth or related medical conditions; or disabilities, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

Grievant held a position of authority and was expected to serve as a role model to other staff. Grievant created a hostile and toxic work environment especially for employees based on race. He demonstrated a pattern of inequitable and unfair management practices. He undermined team cohesiveness and staff morale. Grievant violated DHRM Policy 2.35 thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee or in lieu of removal impose a disciplinary demotion, transfer, and pay reduction. The Agency's issuance of a Group III Written Notice with disciplinary transfer must be upheld.

Grievant claimed the disciplinary action was initiated in order to retaliate against him for holding staff accountable for poor job performance. No evidence was presented to justify this assertion.

Group III Written Notice – Romantic Relationship

Operating Procedure 135.3 governs Standards of Ethics and Conflicts of Interest. Section VIII provides:

C. Romantic or sexual relationships between supervisors and subordinates undermine the respect for supervisors with 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 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 relation with a subordinate is a violation of Operating Procedure 135.1, Standards of Conduct, and will be treated as a Group I, Group II, or a 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. ***

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.

Grievant engaged in a romantic relationship with Ms. 1. He spend several nights in a hotel room with her and kissed her in public. Ms. 1 reported to Grievant. Grievant did not disclose his romantic relationship with Ms. 1 to any Agency supervisor. Grievant held the highest position at the Facility and was expected to set an example for other employees. Other Agency employees knew of the relationship. One employee notified Ms. 1's husband who notified the Agency resulting in an investigation. Grievant's actions rose to the level of a Group III offense. Upon the issuance of a Group III Written Notice, an agency may remove an employee. According, the Group III Written Notice with removal must be upheld.

Group III Written Notice – False Statement

Making false statements to an investigator is a Group III offense. This is consistent with Operating Procedure 135.1 which makes "Falsifying any records" a Group III offense. Operating Procedure 145.3 governs Equal Employment Opportunity. Section IV(F) requires employees to cooperate fully during the course of administrative investigations. The policy authorized demotion and discharge under the Standards of Conduct for failure to fully cooperate in an administrative investigation.

Grievant engaged in a romantic relationship with Ms. 1. When the Agency's investigators asked Grievant about that relationship he denied having a personal

relationship with Ms. 1. He knew his statements were untrue. He did not fully cooperate with the Agency's administrative investigation. The Agency has presented sufficient evidence to support the Agency's issuance to Grievant of a Group III Written Notice.

Grievant asserted the Agency's disciplinary action was inconsistent with the level of disciplinary action given to other employees. Grievant did not present any credible evidence to support this assertion.

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"² 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with transfer for lack of civility is **upheld**. The Agency issuance to the Grievant of a Group III Written Notice with removal for engaging in and failing to report an inappropriate relationship with a subordinate is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice with removal for making false statements 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:

² Va. Code § 2.2-3005.

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.