



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11602

Hearing Date: January 21, 2021

Decision Issued: January 22, 2021

PROCEDURAL HISTORY

On July 8, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow Operating Procedure 135.3, Standards of Ethics and Conflicts of Interest.

On August 3, 2020, 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 she requested a hearing. On October 19, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 21, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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. 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 employs Grievant as a Corrections Officer at one of its facilities. She began working for the Agency in May 2017. No evidence of prior active disciplinary action was introduced during the hearing.

When Grievant began working for the Agency she learned of the Agency's expectation that employees report romantic relationships.

Grievant began an inmate relationship with Officer P in 2019. Grievant told her Captain about the relationship and the Captain began assigning Grievant and Officer P to different shifts. Grievant did not know Officer P was married at that time. When she learned he was married and confronted Officer P, Officer P told her he was separated from his wife. At some point, Officer P began pursuing another employee at the Facility. Grievant learned of Officer P's behavior. Grievant and Officer P ended their relationship in December 2019. They were cordial at work, but did not see each other outside of work.

Grievant did not tell the Warden of her relationship with Officer P during or after it ended. The Agency's Special Investigations Unit conducted an investigation of another matter. On June 2, 2020, the Warden learned of Grievant's relationship with Officer P through that investigation.

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

“[I]nadequate or unsatisfactory job performance” is a Group I offense.² In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant’s admission that she acted contrary to the Agency’s expectations is sufficient to establish a basis for disciplinary action. That basis for disciplinary action begins at the Group I level. The Agency believes Grievant should receive a Group II level disciplinary action for failure to follow policy. The Agency has not established that the disciplinary action should be a Group II Written Notice.

The Agency’s Written Notice charges Grievant with a Group II Written Notice for violating Operating Procedure 135.3 which provides:

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. (Emphasis added).

Grievant did not violate this policy wording because it was not the policy in effect in December 2019. Grievant was not properly charged. The policy wording in effect in December 2019 stated:

Regardless of the supervisory/subordinate or peer/peer working relationship, staff involved in a romantic relationship with a co-worker should advise the work Unit Head of their involvement to address potential employment issues. (Emphasis added).³

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

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

³ The Agency asserted that it changed the wording from “should” to “shall” through a memorandum issued by the Deputy Director for Administration on March 8, 2017. The wording in the memo was not implemented. To the extent Grievant had notice of the Agency’s proposed wording change, she also had notice that the policy did not change. Indeed, no policy was presented including the wording “shall” as part of the operative language.

Grievant did not admit during the hearing that her intimate relationship was a romantic relationship. The policy states that an employee “should” advise - not that the employee “must” or “shall” advise. The word “should” includes a degree of discretion whereas “must” or “shall” removes any discretion and imposes a mandate. Grievant did not fail to follow an Agency mandate. The Hearing Officer cannot conclude that Grievant failed to follow policy.

The purpose of the policy was “to address potential employment issues” such as conflicts that might arise between or because of employees in a romantic relationship. In this case, Grievant notified her Captain of her relationship with Officer P and the Captain scheduled Grievant and Officer P on different shifts. Thus, the significance of Grievant failing to exercise her discretion to notify the Unit Head (Warden) of her relationship with Officer P was minimal. Grievant’s relationship with Officer P did not cause a disruption in the workplace as alleged by the Agency.

When the Hearing Officer considers the Agency’s failure to charge Grievant with the correct policy violation, the discretion permitted under the policy wording actually in effect, and Grievant’s notification of the Captain of her relationship, there is no basis to consider Grievant’s behavior to be a Group II offense instead of a Group I offense.

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”⁴ 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 is **reduced** to a Group I Written Notice.

⁴ Va. Code § 2.2-3005.

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 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.