

Issue: Group III Written Notice with demotion (unprofessional relationship with a subordinate); Hearing Date: 09/10/07; Decision Issued: 09/14/07; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 8681; Outcome: No Relief, Agency Upheld in Full.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 8681

Hearing Date: September 10, 2007

Decision Issued: September 14, 2007

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
3 Witnesses for Agency
5 Witnesses for Grievant

ISSUES

The parties, by counsel and representative agreed in the pre-hearing conference on August 23, 2007, that the issue for this hearing is: "Did Grievant violate Human Resources Memorandum HR-2006-1, Relationships in the Workplace, resulting in a Group III Written Notice?"

After the pre-hearing conference, Grievant's counsel requested fact files on non-parties and copies of e-mails of non-parties. A ruling was requested by the Agency if such fact files and e-mails would be required. Without a showing of the relevance of these matters and with the limitations imposed by DHRM 6.05, the e-mails and fact files were ruled not required.

Counsel for Grievant presented at the beginning of the hearing a brief entitled "Brief In Support of Employee Grievance" in which she broadened and elaborated on the issue agreed to in the pre-hearing conference call as follows:

1. Did the Administration fail to follow the process set forth in the Employee Standards of Conduct in administering grievant's written notice.
2. The second issue is whether the administration has waived its right to give grievant a Group III written notice and a demote him by its past history of condoning relationships between supervisors and their subordinates?

3. The third issue is whether the administration should be estopped from enforcing this decision upon grievant because he has reasonably and detrimentally relied on their previous decision not to punish similar incidents in the manner in which this one was dealt with.

4. The fourth issue is whether the alleged offense even rises to the level of a Group III offense?

5. The fifth issue to be considered is whether the administration has engaged in a malicious prosecution due to the publicity surrounding the case of the person that grievant was alleged to have been involved in an unprofessional relationship?

6. The sixth issue to look at is whether the alleged confession that grievant signed in his resolution step meeting was coerced by the Warden ?

7. Does this policy go against property rights protected by the First Amendment of The United States Constitution.

8. Are there mitigating factors that the administration failed to adequately consider in rendering its decision.

FINDINGS OF FACTS

On May 25, 2007, the Grievant, a Corrections Sergeant, was given a Group III Written Notice and demoted to Corrections Officer B for an unprofessional relationship with a subordinate Corrections Office. The relationship violated policy HR-2006-1, which had an effective date of March 28, 2006.

Grievant alleges that policy HR-2006-1 was waived and the Department was estopped from enforcing it on him since a Corrections Major had a "romantic" relationship with a subordinate for which no disciplinary action was taken.

Evidence was uncontroverted that the Major's relationship began in February, 2007, at which time the lady involved was the Assistant Warden's secretary and not under the supervision of the Major.

When the Assistant Warden was transferred, the Major reported the relationship and declined the Warden's request that he serve as Acting Assistant Warden.

The Major testified that he rotated in and out of the job of institution Duty Officer, but that decisions about scheduling or evaluating the job performance of the lady in question were not made by him.

The question was raised, whether the process required in the Employee Standards of Conduct was followed. Operation Procedure No. 135.1, Section 5-10

requires three actions by the Department, (1) an oral or written notice of the offense, (2) an explanation of the department's evidence in support of the charge, and (3) a reasonable opportunity to respond. The three step process was followed.

The Warden upon learning of the Grievant's alleged consensual relationship in the work place called the Grievant to his office on May 22, 2007. When asked, the Grievant told the Warden that he knew why he was there, admitted the consensual relationship with a subordinate, and when asked to do so by the Warden, put his admission in writing as to having a relationship with a subordinate Corrections Officer. The warden asked for the written statement and told the Grievant to put it in his own words, which the Grievant voluntarily did. On May 25, 2007, a second meeting with the Warden and Gievant was held with Grievant being asked if he had anything else for the Warden and given an opportunity for comments or questions. Grievant offered no explanation and said he knew the relationship was a violation of policy. The meeting ended. The Grievant went back to work. Approximately three hours later on May 25, 2007, Grievant was called back, and given the Group III Written Notice. During the three hour interim period, the Warden conferred with the Regional Director. Given an opportunity to comment on the Group III Written Notice with demotion, the Grievant replied he felt the Warden had been fair, but the action taken was not fair, based on the Major's relationship.

All parties agreed that the Grievant had an excellent record as a Corrections Sergeant and the discipline contemplated was mitigated because of this.

The Warden testified that his confidence in Grievance as a supervisor (Sergeant) was diminished by the covert act in violation of HR-2006-1.

APPLICABLE LAW, POLICY AND PROCEDURES

For state employees subject to the Virginia Personnel act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the polices and procedures promulgated by DHRM. [DHRM Policy No. 1.60, "Standards of Conduct" (effective 9/16/93)]. Section VI of DHRM Policy No. 1.60 deals with corrective action.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

The following policies and procedures were admitted and considered as exhibits:

- DOC Human Resources Memorandum: HR-2006-1, Subject: Consensual Personal Relationships in the Workplace; Effective Date: March 28, 2006.
- DOC Procedure Number 5-4: Standards of Ethics and Conflict of Interest.
- Red Onion State Prison Strategic Plan for 2007 with Values and Code of Ethics.
- VDOC Operating Procedure No. 135.1, Standards of Conduct.

CONCLUSIONS OF LAW

While Grievant's counsel broadened and elaborated on the issue agreed to in the pre-hearing conference, Counsel's BRIEF IN SUPPORT OF EMPLOYEE GRIEVANCE, which was accepted without objection, does provide a framework to insure all of Grievant's concerns are addressed. Taking the matters as numbered in the brief:

1. The Administration did not fail to follow the process set forth in the Employee Standards of Conduct in administering the Grievant's written notice.

2. The Administration has not waived its right to give Grievant a Group III Written Notice and demote him by its past history condoning relationships between supervisors and their subordinates. The evidence was uncontroverted that the relationship complained of was not covert and the Administrator involved went to great lengths, to the point of declining to be appointed the Acting Assistant Warden, so that he would not supervise a person with whom he had a relationship. Every effort was made (successfully) to not condone or violate policy.

3. The Administration is not estopped from enforcing discipline on Grievant. He had no reasonable cause to detrimentally rely on a violation which did not occur.

4. The offense does rise to the level of a Group III offense. The current violation was admitted and the Warden testified that it had a detrimental effect on his confidence in the Grievant. In the words of the procedure, it had an "... effect on the work environment."

5. From the evidence presented at the grievance hearing, the publicity surrounding the case of the person with whom Grievant had an admitted unprofessional relationship was not considered in the disciplinary action.

6. The confession signed by Grievant in his resolution step meeting was not coerced. The fact that Grievant was upset by the predicament in which he had placed himself did not make the confession coerced.

7. I do not believe this discipline rises to the level of a constitutional matter.

8. Finally, the excellent record the Grievant had as a Corrections Sergeant was considered, resulting in no suspension, the minimum reduction in pay and demotion to Corrections Officer B, rather than termination.

DECISION

By the Grievant's own admission, he violated Human Resource Memorandum HR-2006-1. Proper procedures were followed. Mitigation was considered and applied to the discipline. The Group III Written Notice with demotion from Corrections Sergeant to Corrections Officer B was proper and is sustained.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia, 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia, 23219 or faxes to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and **received** by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Thomas J. McCarthy, Jr.
Hearing Officer