

Issue: Group III Written Notice with Termination (inappropriate conversation with inmate of sexual nature); Hearing Date: 05/13/13; Decision Issued: 05/28/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10059; Outcome: Partial Relief; **Administrative Review: DHRM Ruling Request received 06/11/13; DHRM Ruling issued 06/18/13; Outcome: AHO's decision affirmed; Addendum issued 06/20/13: Attorney's fees awarded in the amount of \$553.00**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10059

Hearing Date: May 13, 2013

Decision Issued: May 28, 2013

PROCEDURAL HISTORY

On March 8, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for engaging and a verbal conversation with an offender that included language of a sexual nature.

On March 14, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 1, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 13, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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. 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 Corrections Officer at one of its facilities. He began working for the Agency in March 2005. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's shift began at 5:45 p.m. and ended at 5:45 a.m. Grievant made rounds throughout the Facility by walking past each inmate's cell and observing the inmate's behavior.

On February 13, 2013 at 2:50 a.m., Grievant observed the Inmate masturbating in his cell. The Inmate was facing away from Grievant and towards the wall. Grievant did not say anything to the Inmate regarding his behavior.

At 3:45 a.m., Grievant observed the Inmate masturbating while standing and facing the wall. Grievant did not say anything to the Inmate regarding his behavior.

At 4:40 a.m., Grievant observed the Inmate fully dressed and seated on his bed. The Inmate was not masturbating at that time. Grievant asked the Inmate, "Are you through now? You really had a hard one." Grievant was referring to the Inmate's penis as being erect.

At 5:20 a.m., Grievant observed the Inmate masturbating. The Inmate was nude while he stood facing Grievant. Grievant told the Inmate to stop masturbating and cover

his body. Grievant said if he were a woman corrections officer, he would have written up the Inmate. The Inmate did not comply and continued masturbating.

Under the Agency's policy governing inmate behavior, inmates are not permitted to masturbate and may receive disciplinary action if they do so. Because the Inmate faced Grievant and refused to cover up, Grievant perceived the Inmate's behavior as aggressive. Grievant was concerned that women correctional officer making rounds might see the Inmate's behavior. Grievant wrote a charge against the Inmate.

The Agency presented a written statement from the Inmate in which he claimed he was "sexually violated" by Grievant's comment. The Inmate did not testify. The Hearing Officer cannot rely solely on written hearsay statements of inmates because inmates (1) are typically convicted felons unworthy of trust, (2) have substantial free time to develop and coordinate rumors, and (3) often have reason to harm those who control them. The Hearing Officer is not persuaded that an individual who stood naked facing Grievant and masturbated is the type of person who would be offended by Grievant's comments.

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

"[I]nadequate or unsatisfactory job performance" is a Group I offense.⁴ 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.

During the Agency's fact finding process, Grievant admitted his comment about the Inmate's erect penis was inappropriate and he was not justified in making that comment. Based on Grievant's admission, there exists a basis to uphold disciplinary action of at least a Group I Written Notice.

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

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

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

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

The Agency contends that Grievant's behavior is not merely a Group I offense but rises to the level of a Group III offense. Once an agency has established misbehavior, an agency has established at least a Group I offense. In order to elevate that offense to a Group II or a Group III offense, an agency must present evidence to show that the disciplinary action is more appropriately classified as a higher offense. In this case, the Agency contends Grievant engaged in a Group III offense because he engaged in sexual misconduct.

Under the Agency's Standards of Conduct, Operating Procedure 135.1, "Sexual misconduct with offenders" is a Group III offense. Sexual misconduct with offenders is defined as:

Any behavior of a sexual nature between employees and offenders under the Department of Corrections supervision is prohibited. This includes behavior of a sexual nature such as, but not limited to, sexual abuse, sexual assault, sexual harassment, physical conduct of a sexual nature, sexual obscenity, and conversations or correspondence of an emotional, romantic, or intimate nature.

Sexual abuse. The Agency alleged Grievant engaged in sexual abuse. Sexual abuse is not defined in Operating Procedure 135.1 but it is defined in Operating Procedure 038.3, Sexually Abusive Behavior Prevention and Intervention, as "[t]he improper use or treatment of an individual that directly or indirectly affects an individual negatively. Any intentional act that causes physical, mental, or emotional injury to an individual." The Agency presented evidence of a statement made by the Inmate that after Grievant referred to the Inmate's penis, "[a]t that point I felt sexually violated."⁵ The Inmate did not testify during the hearing. The Hearing Officer does not believe that a man who is willing to stand naked in front of the Grievant and masturbate is so sensitive that he would suffer mental or emotion injury from Grievant's comment. Grievant did not sexually abuse the Inmate.

Sexual assault. Grievant did not engage in sexual assault. Grievant did not touch the Inmate.

Sexual harassment. The Agency alleged that Grievant engaged in sexual harassment. Sexual harassment is not defined by Operating Procedure 135.1. Sexual harassment is a term of art in employment law. If sexual harassment is viewed within the context of employment law as possibly creating a hostile work environment, Grievant did not engage in sexual harassment because his behavior was not severe, pervasive, or repeated.⁶

⁵ Agency Exhibit H.

⁶ See, DHRM Policy 2.30, Workplace Harassment.

Sexual harassment is defined in Operating Procedure 038.3 which governs Sexually Abusive Behavior Prevention and Intervention. Operating Procedure 038.3 defines sexual harassment as:

Unwelcome sexual advances; sexually offensive language, comments or gestures; influencing, promising or threatening an offender's safety, custody, privacy, housing, privileges, work or program status, in exchange for personal gain or favor of a sexual nature; creating or encouraging an atmosphere of intimidation, hostility or offensiveness as perceived by any individual who observes that sexually offensive behavior or language.

Grievant did not make a sexual advance towards the Inmate. Although Grievant's comment was inappropriate by his own admission, there is no credible evidence to show that the Inmate was offended by Grievant's comment. Within the context of a correctional institution, Grievant's comment was not sufficiently offensive to justify disciplinary action. Grievant's comment was not intended to influence, promise, or threaten the Inmate. Grievant's comment was not intended to create or encourage an atmosphere of intimidation, hostility or offensiveness. Grievant inartfully described the Inmate's behavior. Grievant did not engage in sexual harassment.

Physical conduct of a sexual nature. Grievant did not engage in physical conduct of a sexual nature. He did not touch the Inmate.

Conversations. Grievant did not engage in conversations or correspondence of an emotional, romantic, or intimate nature. Grievant did not attempt to share intimate feelings with the Inmate or have the Inmate express intimate feelings.

Grievant did not engage in sexual misconduct with the Inmate. Insufficient evidence exists to support the issuance of a Group III Written Notice.

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"⁷ 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

⁷ Va. Code § 2.2-3005.

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 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 with removal is **reduced** to a Group I Written Notice. The Agency is ordered to **reinstate** Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent position. 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 credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. 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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 10059-A

Addendum Issued: June 20, 2013

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁹ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.¹⁰

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Attorney devoted 3.5 hours to representing Grievant as part of the grievance hearing. The hourly rate allowed by EDR is \$158.¹¹ Accordingly, Grievant should be paid \$553.00 by the Agency as Attorney's fees.

⁹ Va. Code § 2.2-3005.1(A).

¹⁰ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

¹¹ Grievants will be allowed to recover at their attorneys' customary hourly rate not to exceed \$131 per hour (\$158 per hour if the attorney's practice is located in Northern Virginia).

AWARD

Grievant is awarded attorneys' fees in the amount of \$553.00.

APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer