

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

WAYNE SMITH,
Petitioner,

Docket No.: OSAH-SPB-G-1439989-56-Teate

v.

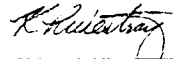
GEORGIA BUREAU OF INVESTIGATION,
Respondent.



APR 24 2014

INITIAL DECISION

I. Introduction


Kevin Westray, Legal Assistant

Petitioner, Mr. Smith, as a classified employee, requested review by the Office of State Administrative Hearings (OSAH) of a grievance determination issued by the Georgia Bureau of Investigation (“GBI”) on February 26, 2014.

The following documents are admitted as ALJ Exhibits:

- ALJ Exhibit 1: GBI’s written reprimand to Petitioner dated February 5, 2014;
- ALJ Exhibit 2: GBI’s written reprimand to Petitioner dated February 26, 2014;
- ALJ Exhibit 3: Petitioner’s grievance dated February 20, 2014;
- ALJ Exhibit 4: GBI’s grievance determination;
- ALJ Exhibit 5: Petitioner’s request for review by OSAH dated March 7, 2014 and filed on March 11, 2014;
- ALJ Exhibit 6: GBI’s submission in response to Petitioner’s request for OSAH review that includes Respondent’s Exhibits A, B, C, D, E, F, G, and H.

Having duly considered the initial referral and all subsequent submissions, GBI’s grievance determination is upheld.

II. Findings of Fact

Issuance of the Written Reprimand

1. GBI’s Investigative Division is the division responsible for conducting all criminal investigations for GBI. The Investigative Division is comprised of regional offices, which have a Special Agent in Charge (SAC) and Assistant Special Agent in Charge (ASAC). The SAC is

responsible for all activities of the personnel assigned to the regional offices. During the period relevant to this Decision, Mr. Smith was the Special Agent in Charge for the Region 2 office of GBI's Investigative Division, with Trebor Randle serving as ASAC. Mr. Smith reported to Inspector Chris Hosey, who in turn reported to Deputy Director (DD) Russell Andrews. (ALJ Exhibit 6; Respondent Exhibits A and B).

2. On September 30, 2013, an agent assigned to the Region 2 office met with Mr. Smith and ASAC Randle and informed them of a possible incident of sexual assault or battery committed against her at a doctor's visit earlier that morning. At the close of that meeting, ASAC Randle instructed the agent to submit a memorandum regarding the incident. The agent submitted this memorandum in an e-mail to ASAC Randle on October 10, 2013. Mr. Smith took no further action regarding the matter. (ALJ Exhibit 6; Respondent Exhibits A, B, C, and E).

3. On or about January 15, 2014, the agent contacted DD Andrews and requested to meet with him. At a meeting on January 16, 2014, the agent reported to DD Andrews what had occurred during the September 30, 2013 doctor visit. After listening to the agent's account, DD Andrews formed the reasonable belief that the agent had been the victim of the crime of sexual assault or battery. The agent also conveyed her concerns that nothing had been done after she had reported the incident to Mr. Smith and ASAC Randle. Deputy Director Andrews assured the agent that immediate action would be taken. (ALJ Exhibit 6; Respondent Exhibit B).

4. DD Andrews immediately sought authorization for a GBI investigation into alleged incident of sexual assault or battery. After meeting with GBI Director Vernon Keenan and Assistant Director Dan Kirk, Deputy Director Andrews contacted Inspector Chris Hosey and ordered him to contact the district attorney regarding a criminal investigation. GBI Region 3 office would handle the investigation. Inspector Hosey received authorization from the Chattahoochee Judicial Circuit District Attorney's Office to open a case regarding "Sex Offenses" shortly thereafter. During the criminal investigation, the Region 3 case agent interviewed Mr. Smith, ASAC Randle, and the agent, with Inspector Hosey present. (ALJ Exhibit 6; Respondent Exhibit B).

5. On January 21, 2013, DD Andrews asked Inspector Hosey to brief Assistant Director Dan Kirk, Director of Office of Professional Standards Fred Mays, Director of the Office of Privacy and Compliance (hereinafter "OPC") Dawn Diedrich, Inspectors Sandra Putnam and Chris Tobert, and himself regarding the matter. At the conclusion of that briefing, DD Andrews advised those present of his determination to issue a written reprimand to Mr. Smith. (ALJ Exhibit 6; Respondent Exhibit B).

6. DD Andrews issued a written reprimand to Mr. Smith on February 5, 2014 (hereinafter "February 5 Reprimand") pursuant to GBI Policy Statement No. 2014. GBI Policy and Procedures provide that a formal written reprimand may be issued to employees for

“unacceptable job performance or problem behavior” and included in the employee’s personnel file. (ALJ Exhibits 1, 6; Respondent Exhibit D).

7. The February 5 Reprimand provided that Mr. Smith’s “failure to notify the chain of command and/or ensure that a criminal action was commenced” showed a lack of good judgment and constituted a violation of Policy 1006, which requires that GBI employees “conduct themselves in a professional and ethical manner at all times.” (ALJ Exhibits 1, 6; Respondent Exhibit B).

8. The February 5, 2014 reprimand further advised Mr. Smith of his right to appeal the reprimand to the GBI Assistant Director pursuant to GBI Policy Statement No. 2009, which prescribes that:

Upon request of the affected employee, the GBI Assistant Director will consider written reprimands or written confirmation of oral reprimands. The Assistant Director will have the authority to order such documents modified or removed from the employee’s official personnel file. The Assistant Director will provide a written response to the employee within five (5) workdays of receipt by the Assistant Director.

(ALJ Exhibits 1, 6; Respondent Exhibits B and G).

Grievance and Review Request

9. Mr. Smith filed a Standardized Grievance Form with the GBI Office of Human Resources on February 21, 2014, listing “the erroneous, arbitrary, or capricious interpretation or application of personnel policies, procedures, rules, regulations, ordinances, and statutes” as the issue of grievance and requesting that the February 5 Reprimand be rescinded. Mr. Smith attached to his grievance a narrative in which he disputed the facts giving rise to the written reprimand and insisted that his conduct was not violative of GBI Policy Statement No. 1006. In accordance with GBI Grievance Policy, Human Resources Director Deborah Moore forwarded Mr. Smith’s Grievance Form to Assistant Director Kirk. (ALJ Exhibits 3, 6; Respondent Exhibit E).

10. Assistant Director Kirk reviewed Mr. Smith’s grievance and attached narrative and interviewed DD Andrews, Inspector Hosey, Mr. Smith, and the agent. In his interview with Assistant Director Kirk, Mr. Smith acknowledged that, had he the situation to do over again, he would have responded to the agent’s report of the September 30, 2013 by notifying the chain of command, making certain to follow up with the agent thereafter. (ALJ Exhibit 6, Respondent Exhibit H).

11. Based upon his review, Assistant Director Kirk determined that, although Mr. Smith had not violated Policy Statement No. 1006, a written reprimand was still warranted. He directed that reference to Policy Statement No. 1006 be removed and that the February 5 Reprimand be

modified to focus on the two shortcomings Mr. Smith acknowledged regarding his conduct: (1) failure to notify the chain of command and (2) lack of follow-up with the agent. (ALJ Exhibit 6, Respondent Exhibit H).

12. On February 26, 2014, Deputy Director Andrews submitted a revised reprimand (hereinafter "February 26 Reprimand") to Mr. Smith. The February 26 Reprimand provided that Mr. Smith's failure to notify the chain of command about the agent's report of suspicious activity or to follow up with the agent "did not violate a specific GBI policy, rule or standard" but nonetheless constituted "a lack of good judgment." (ALJ Exhibit 6, Respondent Exhibit H).

13. Assistant Director Kirk notified Mr. Smith of the revised reprimand in a letter dated February 26, 2014. He further explained in this letter that the February 5 Reprimand would be removed from Mr. Smith's personnel file. In an e-mail dated February 26, 2014, Mr. Smith asked Assistant Director Kirk to reconsider his decision to issue the revised reprimand. Assistant Director denied Mr. Smith's request. (ALJ Exhibit 6; Respondent Exhibits F and H).

14. HR Director Moore also wrote a letter to Mr. Smith regarding his grievance. In this letter, HR Director Moore advised Petitioner that, based on her conclusion that there had been no erroneous, arbitrary, or capricious interpretation or application of personnel policies related to the issuance of the reprimand, she had determined his grievance expressed in his February 21 Grievance Form and attached documents to be non-grievable. She advised Mr. Smith of his right to appeal this determination to the Office of State Administrative Hearings. (ALJ Exhibits 4, 6; Respondent Exhibits G,

15. On February 28, 2014, Mr. Smith sent an e-mail with the subject heading "Conflict of Interest" to Assistant Director Kirk, Director Keenan, and OPC Director Dawn Dietrich. In this e-mail, Mr. Smith requested that Director Keenan review the determination to issue the written reprimand because of an alleged conflict of interest on the part of Assistant Director Kirk. Petitioner claimed that Assistant Director Kirk's presence at the meeting where Deputy Director Andrews decided to issue the written reprimand created a conflict of interest. (ALJ Exhibit 6; Respondent Exhibits F, G, and H).

16. Director Keenan honored Mr. Smith's request and reviewed all the documentation pertaining to the reprimand. On March 7, 2014, Director Keenan notified Mr. Smith of his findings in an e-mail. Director Keenan wrote that he believed that the revised reprimand was appropriate and declined to take further action in the matter. Director Keenan would also deny Mr. Smith's subsequent request that the written reprimand be commuted to an informal "memorandum of caution." Later that same day, Mr. Smith submitted a written request for a hearing to the Office of State Administrative Hearings. (ALJ Exhibits 5, 6; Respondent Exhibit F).

III. Conclusions of Law

1. "Grievance" denotes a claim by an eligible employee that the employee's personal employment has been affected by unfavorable employment decisions or conditions due to unfair treatment. GA. COMP. R. & REGS. 478-1-.24(5)(a)(1). State Personnel Board Rules identify the following issues as grievable:

- (i) Allegations of unlawful discrimination because of race, color, sex, national origin, disability, age or religious or political opinions or affiliations;
- (ii) Allegations of sexual harassment;
- (iii) Harassment, retaliation or intimidation for exercising any right provided under the Rules of the State Personnel Board or policies of the appointing authority;
- (iv) Retaliation for using the grievance procedure;
- (v) Erroneous, arbitrary or capricious interpretation or application of personnel policies, procedures, rules, regulations, ordinances and statutes;
- (vi) Unsafe or unhealthful working conditions; and
- (vii) Any matter specifically included as grievable by departmental policy or procedure.

GA. COMP. R. & REGS. 478-1-.24(5)(f)1.(i)-(vii) (2013). GBI's Grievance Procedure provides that, upon receipt of a grievance form, the GBI Personnel Office will review the form to determine whether the grievant has alleged a grievable issue. GA. COMP. R. & REGS. 478-1-.24(5)(s)4. If the Personnel Office determines the issue to be non-grievable, GBI will terminate the grievance process and notify the grievant of the specific reasons for its determination. *Id.* The grievant may thereafter appeal to the Office of State Administrative Hearings.


2. Although a written reprimand is not an adverse action, it may be a grievable issue under State Personnel Rules if a departmental policy or procedure specifically includes a written reprimand as a grievable issue. GA. COMP. R. & REGS. 478-1-.24(5)(f)(1)(vii). Written reprimands are not specifically included in GBI's policy or procedures as a grievable issue. GEORGIA BUREAU OF INVESTIGATION, POLICY STATEMENT No. 2009, IV.A. (2011) (Grievance Issues). Accordingly, Petitioner's written reprimand is non-grievable.

3. Mr. Smith alleged in his grievance that the written reprimand constituted an "[e]rroneous, arbitrary, or capricious interpretation or application of personnel policies, procedures, rules, regulations, ordinances, and statutes." *Id.*; GA. COMP. R. & REGS. 478-1-.24(5)(f)1.(i)-(vii) (2013). Even accepting Mr. Smith's argument that a written reprimand, while not specifically included as a grievable issue, may nonetheless be considered a grievable issue because it was issued arbitrarily, capriciously, or erroneously, GBI introduced sufficient evidence to demonstrate that its issuance of the written reprimand was in accord with its personnel policies. GBI Policy Statement No. 2014 specifies that "[f]ormal written reprimands may be issued to employees for unacceptable job performance or problem behavior." The employee's violation of a specific rule or policy is not a prerequisite for issuance of a written reprimand. Moreover, GBI adhered to the procedure prescribed in State Personnel Board Rules for reviewing employee objections to written reprimands.

IV. Decision

Having read and considered the entire record, this matter is non-grievable and GBI's resolution of the grievance is upheld.

SO ORDERED, this 23rd day of April 2014.



Steven W. Teate
Administrative Law Judge