



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11773**

Hearing Date: April 4, 2022  
Decision Issued: April 25, 2022

**PROCEDURAL HISTORY**

On October 26, 2021, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. Grievant was also issued a Group III Written Notice with removal for breach of confidentiality.

On November 22, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 13, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 4, 2022, 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 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 Social Services employed Grievant as a Program Administrative Specialist I at one of its locations. She had been employed by the Agency for approximately nine years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received annual training regarding the importance of maintaining confidentiality. She received the Conflict of Interest Guidelines specifying, "DCSE employees are strictly prohibited from disclosing confidential information on Division cases to unauthorized individuals."<sup>1</sup> Grievant's Employee Work Profile specified that Grievant was not to disclose confidential information.

Grievant was responsible for administering a support case involving the 17 year-old Child. The Agency received payments from the Non-Custodial Parent (NCP) and sent payments to the Custodial Parent (CP).

On September 30, 2021, the NCP contacted the Agency and told Grievant that the Child no longer lived with the CP. The Child had an adult girlfriend, Ms. S. The Child was living with Ms. S. Ms. S was not a party to the Child's case before the Agency. The NCP told Grievant that the Child had been removed from the CP's home by a local social service agency in prior years. The NCP requested the Agency investigate that information quickly because he had a pending case in a local Juvenile and Domestic Relations Court

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<sup>1</sup> Agency Exhibit p. 34.

because he was in arrears for his support payments. That case could result in jail time for the NCP.

On October 1, 2021, Grievant called Ms. S and the local Department of Social Services. Grievant told Ms. S she worked for the Agency, disclosed the purpose of her contact with Ms. S, and asked Ms. S about the Child's living arrangements. Ms. S told Grievant the Child had been living with Ms. S since August 2020 and they had been dating for several years. Grievant learned from the local DSS that the Child had been removed from the CP's home from March 16, 2016 to April 5, 2017. Grievant placed a "hold" on the case until the October 2021 current support charge extension could be closed and the arrears adjusted by the Fiscal Unit to reflect the correct arrears balance.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>2</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

#### Group II

Policy Manual Chapter 4.1, Section (C)(7) states, "If the Division is enforcing a case and learns that the payee no longer has physical custody of the child, attempt to contact the formal custodial parent by using all means available. Send the custodial parent a Notice of Action Taken requesting that contact be made with the Division immediately."

On September 30, 2021, Grievant received a telephone call from the NCP who indicated the Child had not been living with the CP for at least two years and was not attending school. Grievant did not attempt to contact the CP. Grievant did not send a Notice of Action Taken to the CP. Grievant failed to comply with the Policy Manual Chapter 4, Section (C)(7) thereby justifying the issuance of a Group II Written Notice.

#### Group III

Policy Manual 2.3(B)(5), Interviewing and Communications, provides, "Division staff may speak with a third party via telephone without written authorization, only if the Division case participant (CP or NCP) is present during the conversation and provides verbal authorization.

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<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

On October 1, 2021, Grievant called Ms. S to discuss the location of the Child's residence. Grievant did not have written authorization from a parent. She did not have the NCP present during her conversation with Ms. S. Grievant acted contrary to Policy Manual 2.3(B)(5). Acting contrary to policy is usually a Group II offense but in certain unusual circumstances a Group II offense can be elevated to a Group III offense.

The Agency has presented sufficient evidence to elevate the Group II offense to a Group III offense because her behavior resulted in a prohibited breach of confidentiality. By contacting Ms. S, Grievant disclosed to Ms. S that the Agency had a support case involving the Child. Grievant discussed the custody and living arrangements of the Child without having authority to do so from either parent. Grievant's actions constituted a breach of confidentiality. Grievant's actions were contrary to the spirit of Va. Code 63.2-104 which provides:

A. The records, information and statistical registries of the Department, local departments and of all child-welfare agencies concerning social services to or on behalf of individuals shall be confidential information, provided that the Commissioner, the Board and their agents shall have access to such records, information and statistical registries, and that such records, information and statistical registries may be disclosed to any person having a legitimate interest in accordance with state and federal law and regulation.

It shall be unlawful for any officer, agent or employee of any child-welfare agency; for the Commissioner, the State Board or their agents or employees; for any person who has held any such position; and for any other person to whom any such record or information is disclosed to disclose, directly or indirectly, any such confidential record or information, except as herein provided or pursuant to § 63.2-105. Every violation of this section shall constitute a Class 1 misdemeanor.

### Grievant's Defenses

Grievant argued that her actions were in line with the Policy Manual and established practice among Agency employees. Grievant argued that her contact with Ms. S was authorized by the NCP.

Grievant cited Policy Manual 1.1(D), Release of Information to Customers to support her argument. This section addresses release of information to comply with the Government Data Collection and Dissemination Practices Act. The policy allows the Agency to release information about a "data subject" when requested by the data subject. If the information the Agency provides is by telephone, "the data subject can give verbal permission for release of information to the representative."<sup>3</sup> This policy does not apply in Grievant's case because Grievant released information to Ms. S about the Child. The

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<sup>3</sup> Agency Exhibit 18.

Child was not the data subject giving permission to release information. Ms. S was not the representative of the data subject.

Grievant presented examples of employees contacting third parties to obtain information about the Child without first obtaining permission from a parent. Those examples, however, were not similar to Grievant's behavior in this case.

### 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 ...."<sup>4</sup> 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.

Grievant was passionate about her job and attempting to perform her work duties on October 1, 2021. The Agency could have corrected Grievant's behavior with lesser disciplinary action. The Agency chose to remove Grievant from employment and its decision was consistent with the Standards of Conduct. In light of the standard set forth in the Rules, 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 II Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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.

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<sup>4</sup> Va. Code § 2.2-3005.

Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.