

Issue: Group III with termination for unauthorized use of State property and falsifying records; Hearing Date: 06/18/18; Decision Issued: 07/08/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11210; Outcome: Partial Relief.



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

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11210**

Hearing Date: June 18, 2018  
Decision Issued: July 9, 2018

**PROCEDURAL HISTORY**

On March 29, 2018, Grievant was issued a Group III Written Notice<sup>1</sup> of disciplinary action with removal for unauthorized use of State property or records and falsifying records.

On April 20, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 7, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On June 18, 2018, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

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<sup>1</sup> The Agency erroneously checked the block for a Group II Written Notice in addition to checking the box for a Group III Written Notice.

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 employed Grievant as an IT Support Specialist II. Grievant received Contributor ratings on his annual performance evaluations. Grievant had prior active disciplinary action. On December 19, 2017, Grievant received a Group II Written Notice with a three workday suspension.

Grievant began reporting to the Supervisor in March 2017. The Supervisor reported to the Manager.

Grievant was responsible for setting up hardware, software, and other technology for offenders to use at DOC facilities. Grievant had responsibility for 310 computers at seven facilities. He often travelled among those facilities using the Agency's vehicle. Grievant worked independently.

School Dude is an online ticket request system. If tasks need to be completed, a user enters information into School Dude and a ticket is generated for the task. The ticket is assigned to Grievant or a Site Tech to evaluate the request and determine the

appropriate steps to take to resolve the problem. Once the problem is corrected, the Site Tech updates the online ticket request system to indicate completion of the task.

The Agency presented evidence regarding numerous allegations of unsatisfactory work performance. Unsatisfactory work performance is a Group I offense. Several of these offenses were unsupported by the evidence or, if supported by the evidence, rose no higher than Group I offenses. For example, Grievant took longer than necessary to complete certain tasks. This would be a Group I offense. The Hearing Officer will not discuss these facts.

The Agency attempted to improve Grievant's work performance by monitoring his daily activities. On July 12, 2017, the Supervisor sent Grievant an email stating, "I wanted to summarize our call this morning. Each day before you leave the facility, you will send me an email with your plans for the following day."<sup>2</sup> Grievant began sending Daily Plans to the Supervisor and Manager. On November 29, 2017, the Supervisor sent Grievant an email stating, "[p]lease make sure you send us a daily plan each day as we agreed to."<sup>3</sup> The Manager also instructed Grievant to send the Manager a Daily Plan. Grievant was supposed to submit the Daily Plan to the Manager and Supervisor by the end of each work day. On January 9, 2018, the Manager sent Grievant an email stating:

Quick Reminder, per our discussions please send us your Daily Plan Daily. We had not received your daily plan for today.<sup>4</sup>

On January 10, 2018, the Manager sent Grievant an email stating:

We need Daily Updates from you that have the below. (Please continue to copy me and [Supervisor]).

- A. Completed/Work Done for the current day.
  - 1. Work completed/ worked on – which tickets.
  - 2. Facilities you visited and time spent at facilities.
  - 3. Individuals you worked with.
  
- B. Work Planned for the next day.
  - 1. Facilities planning to visit and planning time at facilities
  - 2. Tickets planning to work on.
  - 3. Individuals you will be working with.<sup>5</sup>

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<sup>2</sup> Agency Exhibit 55.

<sup>3</sup> Agency Exhibit 54.

<sup>4</sup> Agency Exhibit 11.

<sup>5</sup> Agency Exhibit 12.

Grievant did not submit a Daily Plan on February 1, 2018. Grievant did not submit a Daily Plan on February 22, 2018. The Manager reminded Grievant to send the Daily Plan daily. Grievant did not submit a Daily Plan on March 14, 2018. The Manager reminded Grievant to send the Daily Plan daily.

Grievant obtained a surplus desktop computer from a facility. He intended to install the equipment at another facility. Grievant placed the desktop computer in his State vehicle. On February 2, 2018, Grievant forgot to remove the desktop computer from the State vehicle when he returned the vehicle. Grievant did not report any equipment missing and did not document his receipt of the equipment in School Dude. On February 13, 2018, the Agency realized Grievant was the last person to operate the State Vehicle in which the desktop computer was found. On February 15, 2018, the Manager called Grievant into his office and asked Grievant if Grievant was missing anything. Grievant said “no.” After the Manager showed Grievant the desktop, Grievant remembered obtaining the desktop and said he intended to install it at another facility.

On February 7, 2018, Grievant attempted to send an email to Mr. S who worked for a private vendor. Mr. S’s email address ended with “.com”. Grievant wrote Mr. S’s email address with ending of “.cos”. Grievant deleted the draft email without sending it. After the Manager realized Grievant had not contacted Mr. S as requested, the Manager asked Grievant if he had contacted Mr. S. Grievant said he had contacted Mr. S, but had not gotten a response. The Manager asked Grievant to forward Grievant’s email to Mr. S. Grievant searched for the email in his electronic mailbox and sent a copy of the deleted draft to the Manager and several other employees on February 20, 2018.

## **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.”<sup>6</sup> 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.”<sup>7</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>8</sup>

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.<sup>9</sup> Grievant did

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<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>7</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>8</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>9</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

not submit Daily Plans on February 1, 2018, February 24, 2018 and March 14, 2018 thereby justifying the issuance of a Group II Written Notice for failure to follow instructions.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justify the Agency's decision to remove Grievant from employment.

The Agency alleged Grievant should receive a Group III Written Notice for falsifying records. The Agency alleges Grievant falsely claimed to have sent an email to Mr. S. The Agency has not met its burden of proof. To show Grievant falsified records, the Agency must show Grievant knew or should have known his statements about sending the email were false. The evidence showed that Grievant drafted an email to Mr. S on February 7, 2018 and mistakenly believed he had sent the email. He did not create the email after being asked for a copy of his email to Mr. S. When Grievant was asked for the email, he searched his email folder and found the deleted draft which he then sent to the Manager. When Grievant sent the Manager a copy of his email to Mr. S, Grievant did not know he had not sent the email. Grievant did not falsify records.

The Agency alleged Grievant should receive a Group III Written Notice for unauthorized removal of a desktop computer from a facility without first having received a ticket through School Dude. The evidence showed Grievant had the authority to remove the equipment and did not need to have a ticket to remove the equipment when the task he was scheduled to complete would take very little time. Grievant did not take the desktop for his personal use. The Agency's allegation is not supported by the evidence.

Grievant argued the Agency removed him simply to downsize his unit. The evidence showed that his position was open and the Agency intended to fill his position and did not intend to downsize his unit.

*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>10</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.

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<sup>10</sup> *Va. Code § 2.2-3005.*

Grievant contends the disciplinary action should be mitigated because of his reaction to medication. Grievant was diagnosed with bipolar disorder 15 years ago and began taking medication to address his illness. The Agency was aware of his disability. Grievant noticed “things had changed” in 2017 so he sought professional help. He and his doctor began changing his medication. His doctor left the medical practice and another doctor began treating Grievant. The new doctor prescribed medications that caused Grievant physical problems. Grievant suffered vision and cognitive challenges. Grievant went to a third doctor who corrected his medication.

Although grievance hearings are *de novo* in nature, EEDR has ruled that disciplinary action is measured from the facts before the Agency at the time it decided to take disciplinary action. Grievant did not notify the Agency he was having problems with his medication. He did not seek accommodation. At the time the disciplinary action was issued, the Agency did not know about Grievant’s health concerns and, thus, those health concerns cannot be considered to mitigate the disciplinary action. 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 III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant’s removal is upheld based on the accumulation of disciplinary action.

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR 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 EEDR before filing a notice of appeal.