

Issues: Group II Written Notice (failure to follow instructions), and Termination due to accumulation; Hearing Date: 01/11/18; Decision Issued: 04/06/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11124; Outcome: No Relief – Agency Upheld.



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

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11124**

Hearing Date: January 11, 2018  
Decision Issued: April 6, 2018

**PROCEDURAL HISTORY**

On October 3, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. Grievant was removed based on the accumulation of disciplinary action.

On November 3, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 20, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 11, 2018, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency 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. 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 a Probation and Parole Officer at one of its facilities. She had been employed by the Agency for approximately nine years. She was responsible for daily supervision of offenders requiring intensive and regular probation, parole, and post-release supervision.

Grievant had prior active disciplinary action. On December 12, 2016, Grievant received a Group II Written Notice with a three workday suspension for unsatisfactory performance.

On January 3, 2017, Grievant received a Notice of Improvement Needed/Substandard Performance identifying performance deficiencies and improvements needed. These included:

- Completing MVRs in a timely manner, especially when convicted of a new felony. \*\*\*
- Meeting with all probationers in compliance with their current supervision level, per policy.<sup>1</sup>

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<sup>1</sup> Agency Exhibit 2.

A Major Violation Report is a document completed by a Probation and Parole Officer outlining the alleged violations of supervision conditions. A Probation Officer's Arrest Authority (PB 15) is a document issued by a Probation and Parole Officer for the arrest and detention of a delinquent parolee, and in some cases, a delinquent probationer.

Grievant was assigned responsibility for supervising offenders on probation or parole. Her case load was reasonable when compared to her work duties and the case loads of other probation and parole officers in her office.

Grievant was responsible for supervising Offender AB. Offender AB was arrested on April 23, 2017 for two new felonies. SPO W instructed Grievant to write a Major Violation Report. On April 26, 2017, Grievant wrote a log note indicating the MVR would be forthcoming. Grievant did not file an MVR as of September 12, 2017.

Grievant was responsible for supervising Offender TB. Offender TB was convicted on May 10, 2017 of possession of a controlled substance, misdemeanor possession of drug paraphernalia and misdemeanor possession of marijuana. Grievant did not notify a supervisor of the new charges and did not write a MVR as of September 12, 2017. In addition, Grievant did not meet with Offender TB after May 16, 2017.

Grievant was responsible for supervising Offender LW. On July 18, 2017, Offender LW was issued a PB-15 warrant with the approval of SPO W. Grievant did not notify the Probation Sentencing Court of the warrant. Grievant did not submit a Major Violation Report to the Court as of September 12, 2017.

Grievant was responsible for supervising Offender DL. On June 1, 2017, Grievant was assigned responsibility for a Major Violation Investigation from another Probation and Parole office. Grievant sent a letter to the Court along with the Major Violation Report submitted by the other Probation and Parole office. Grievant failed to complete the investigation that was due on June 9, 2017. PO B emailed Grievant several times but did not get a response. On August 16, 2017, PO B called the Commonwealth's Attorney and confirmed they had not received the report. Grievant had not submitted the report as of September 12, 2017.

Grievant was responsible for supervising Offender MH. On August 21, 2017, SPO P instructed Grievant to issue a PB-15 warrant in a district. Grievant was instructed to submit a MVR to be forwarded to the Court. The warrant was issued on August 21, 2017, but Grievant did not submit the MVR. On August 31, 2017, the other district contacted DCPO M because they had not received the MVR and the offender's court date was set for September 1, 2017. Grievant completed the MVR on September 1, 2017 but because the report was late, the court hearing had to be moved to another day.

## **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>2</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>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</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>5</sup>

On January 3, 2017, Grievant was instructed to complete MVRs in a timely manner. Grievant was assigned to write MVRs for several offenders yet she failed to write them after several months had passed. Grievant was assigned responsibility to write PB-15s, but did not write the PB-15s in five days as required by policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions and policy. Upon the issuance of a second Group II Written Notice, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency’s decision to remove Grievant.

Under the Agency’s policy, “Notification must be sent to the sentencing court advising of the issue of the PB-15 within 5 working days.”<sup>6</sup>

Grievant argued that she was absent from work due to a medical condition and that the Agency treated her unfairly due to her medical condition. Grievant did not testify. Insufficient evidence was presented for the Hearing Officer to determine Grievant’s length of absence and how her absence and medical condition affected her ability to perform her work duties. It does not appear that the Agency took action against Grievant because of her medical condition.

*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>7</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

<sup>6</sup> Agency Exhibit 2.

<sup>7</sup> Va. Code § 2.2-3005.

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. In light of this standard, 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 with removal is **upheld**.

## 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.