

Issue: Group II Written Notice with suspension (failure to follow instructions/policy);
Hearing Date: 05/02/18; Decision Issued: 05/22/18; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11175; 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: 11175

Hearing Date: May 2, 2018
Decision Issued: May 22, 2018

PROCEDURAL HISTORY

On January 10, 2018, Grievant was issued a Group II Written Notice of disciplinary action with a 10 workday suspension for failure to follow policy.

On January 11, 2018, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On March 12, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On May 2, 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 employs Grievant as an Intensive Supervision Probation Officer at one of its Facilities. He has been employed by the Agency for approximately four years. Agency managers consider Grievant to be a good and accomplished employee. No evidence of prior active disciplinary action was introduced during the hearing.

A probation officer does not have the authority to make an unassisted arrest of an offender. When an offender violates his or her parole, the probation officer is supposed to obtain a PB-15 warrant to arrest the offender. A local law enforcement officer must serve the warrant on the offender to make the arrest. Once a probation officer gives the PB-15 to a local law enforcement officer to serve on an offender, the probation officer is expected to ensure that the arrest is completed.

The Offender was a sex offender. He began communicating online with a 14 year old female contrary to his probation.

The Surveillance Officer was an experienced law enforcement officer who joined the Agency several days before December 14, 2017. He did not carry a weapon.

The Investigator worked for the local Police Department. The Trooper worked for the Virginia State Police.

The Investigator had evidence that the Offender had solicited a minor online contrary to criminal law and his probation. The Investigator asked Grievant to assist the Investigator in conducting a warrantless search of the residence of the Offender. On December 13, 2017, Grievant asked the Senior Probation Officer for permission to accompany the Investigator on the search scheduled for December 14, 2017. The Senior Probation Officer approved Grievant's request. They discussed that if the Offender was going to be charged with new offenses, a PB-15 should be issued.

Grievant and the Surveillance Officer met with the Investigator and the Trooper at the Police Department to discuss the Offender's online communication with a 14 year old female. They decided to go to the Offender's residence to speak with the Offender. The Offender's residence was a short distance from the Police Department.

On December 14, 2017, Grievant and the Surveillance Officer met the Investigator and Trooper at the Offender's residence. Grievant was carrying a weapon but the Surveillance Officer was unarmed. The Offender agreed to accompany them to the Police Department.

The Investigator and Trooper spoke with the Offender about his behavior. The Offender confessed to his contact with the minor. The Investigator told the Offender he would be charged with three additional felonies and asked Grievant if the Offender would be in violation of probation. Grievant answered "yes" and said that Grievant would get a PB-15. The Offender heard Grievant's statement. At 9:17 a.m., Grievant sent the Senior Probation Officer a text message indicating his location and status.

The Offender was wearing shorts. He asked if he could go back to his residence to get long pants and a sweater. The Investigator said, "I don't see why not." The Investigator asked Grievant if he would escort the Offender back to his residence. Grievant agreed to do so.

Grievant and the Surveillance Officer escorted the Offender back to his residence. The Offender put on long pants and a sweater.

After the Offender collected his clothing, Grievant and the Surveillance Officer escorted the Offender to the Jail. As they walked, the Offender thanked them for not putting him in handcuffs. The Surveillance Officer said that they did not have any handcuffs. Grievant did not notify the Senior Probation Officer that he was transporting an offender who was aware of a pending arrest.

Grievant left the Offender in the Jail lobby and returned to his Office to print a PB-15. The Surveillance Officer went with Grievant while the Offender remained in the Jail lobby unsupervised.

Grievant returned to the Jail lobby and handed the PB-15 warrant to the dispatcher at the window and left the Jail. Grievant told the Surveillance Officer that it

would be a while before the sheriff's department staff took custody of the Offender because they were busy at the moment. Grievant indicated they should leave. The Surveillance Officer suggested he remain with the Offender until the deputy sheriffs served the Offender. Grievant declined the suggestion and said the Offender would not leave. Grievant and the Surveillance Officer left the Jail while the Offender remained in the Jail lobby by himself. A short time later, the Offender left the jail before he was served with the PB-15 by a deputy sheriff.

The Offender's whereabouts were unknown until December 25, 2017 when he was apprehended by law enforcement and taken into custody on the outstanding charges.

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

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.⁴

Under the Agency's Field Safety and Security Practices, Grievant was obligated to:

Use the VACORIS Field Contact Itinerary or other locally approved method that identifies their location(s) while conducting field work

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

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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

Section (J)(6) of Operating Procedure 910.2 provides:

Employees transporting offenders should ... for multiple destinations, make period contact with the office.”

Grievant made numerous mistakes supporting the issuance of a Group II Written Notice. Grievant should have notified the Senior Probation Officer that he was escorting the Offender from the Offender’s residence to the Police Department. Grievant should have called to have someone bring him a PB-15 while they were at the Police Department so that the Offender could be arrested at that time rather than escorting the Offender to his residence. Grievant should have notified the Senior Probation Officer that he was escorting the Offender from the Police Department to the Offender’s residence and from there to the Jail. When he was at the Jail the first time, Grievant should have asked a deputy sheriff to detain the Offender while Grievant returned to his office to obtain the PB-15. Once Grievant returned with the PB-15, he should have remained with the Offender in the Jail lobby until the deputy sheriff served the PB-15 on the Offender to complete the arrest and take custody of the Offender. By failing to do so, Grievant allowed a convicted sex offender who had violated his probation to remain in the public for 11 days. Upon the issuance of a Group II Written Notice, an agency may suspend an employee. Accordingly, Grievant’s ten workday suspension is upheld.

It is clear that the Investigator and Trooper should have placed the Offender under arrest when they had him at the Police Department rather than allowing him to return to his residence. Since the Offender was not under arrest, the Offender was not obligated to comply with the instructions of Grievant or the Surveillance Officer. The mistakes made by the Investigator and Trooper, however, did not relieve Grievant of his responsibility to comply with Agency policy. Grievant had the authority to call for a PB-15 and have it served on the Offender at the Police Department regardless of the Investigator or Trooper’s permission for the Offender to return to his residence.

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”⁵ 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.

⁵ Va. Code § 2.2-3005.

Grievant argued that he was forthcoming during the investigation and that the level of punishment with suspension as too harsh and did not benefit him or the Agency. He argued that the Agency did not consider how the loss of income from the suspension would affect him and his family as well as his morale.

The Agency could have resolved this matter with a lesser level of disciplinary action. It was not obligated to consider the financial hardship on Grievant. Typically a suspension is intended to cause a financial hardship as a form of corrective action. Once the Agency has met its burden of proof, the Hearing Officer cannot reduce the disciplinary action unless it exceeds the limits of reasonableness. The Agency's discipline was consistent with the Standards of Conduct and did not exceed the limits of reasonableness. 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 with a ten workday suspension 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 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 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.^[1]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.