

Issue: Group III Written Notice with Termination (failure to follow instructions); Hearing  
Date: 05/04/18; Decision Issued: 05/24/18; Agency: Division of Capitol Police;  
AHO: Carl Wilson Schmidt, Esq.; Case No. 11184; 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: 11184**

Hearing Date: May 4, 2018  
Decision Issued: May 24, 2018

#### **PROCEDURAL HISTORY**

On February 19, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow instructions.

On March 2, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 20, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On May 4, 2018, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Counsel  
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 Division of Capitol Police employed Grievant as a Senior Police Officer. He had been employed by the Agency for approximately 12 years. Grievant had prior active disciplinary action. He received a Group II Written Notice on October 15, 2015 for failure to follow instructions. Grievant received a Group III Written Notice with a one work day suspension on October 15, 2015 for failure to follow policy.

In 2016, Grievant attended a political rally wearing his uniform after his shift ended. He had a ticket to the event and wanted to attend the rally. He was not permitted entry into the event because he was wearing his uniform and the organizers had a security protocol in place.

On April 28, 2017, the Agency Head, Major S, and Captain G met with Grievant to provide Grievant with guidance regarding Grievant's expressed interest in running for the position of State delegate. The Agency Head advised Grievant that any decision to run for office would be entirely Grievant's decision. The Agency Head told Grievant he wanted to advise Grievant of the ground rules that would be in place if Grievant decided to run for office. The Agency Head told Grievant there would be a "bright line" between what Grievant could and could not do while on duty as a DCP officer. The Agency Head told Grievant that Grievant would not be allowed to campaign or conduct any political business whatsoever while on duty. He reiterated that the separation between Grievant's duties as a DCP officer and political candidate would be black and white. The Agency Head said that this would include no campaigning in or the use of any images of Grievant in uniform. The Agency Head told Grievant that he wanted to

maintain an open dialog with Grievant regarding this matter in order to provide Grievant with clear and concise guidance.

Captain G told Grievant that in maintaining a clear separation between Grievant's role as a DCP officer and as a candidate, it would be imperative for Grievant to understand that he would not be able to discuss his campaign in person or via telephone, email, or text while working on Division time. Captain G said this would include not using his personal cell phone or other device(s) to conduct campaign business while on duty.

Grievant worked eight hour shifts. Although he was allowed to eat a meal during his shift, he remained on duty at all times during the eight hour period.

Grievant was on paid administrative leave. When he returned to work he was placed on "light-duty" and assigned to work at the Location.

On September 26, 2017, Grievant was working at the Location. He did not tell any of the employees working there that he was running for office. An employee working at the Location knew one of Grievant's co-workers who told her that Grievant was running for office. She told other employees at the Location that Grievant was running for office.

Grievant sat at reception desk next to the Docent. They were side-by-side. Grievant was not in uniform. Grievant was wearing a coat and tie. He was not carrying a weapon. The Docent knew that Grievant was running for office. Grievant spoke on his cell phone. Grievant said he wanted to be put in a situation where he could meet with a group of voters. The Docent was a former government teacher so his attention was "sparked" when Grievant mentioned wanting to meet with a group of voters. The Docent did not know to whom Grievant was speaking.

A radio broadcast Journalist was leaving the Location. Grievant recognized her. Grievant said words to the effect of, "You need to come back and interview me." or "Can you come back and interview me." The Journalist was standing approximately 25 feet away when Grievant spoke to her.

On October 5, 2017, the Director of the Location sent the Agency's Chief an email indicating that Grievant was discussing his political campaign with visitors. The Director asked if Grievant could be reassigned to another location.

When interviewed by the Investigator, Grievant denied using his cell phone to discuss his campaign. He denied shouting at the Journalist that she needed to interview him. He admitted to asking the Journalist for her business card and inquiring on who he could contact to get some coverage for his district. Grievant was running for office in his district. He admitted to speaking with the Journalist and asking her who they were, what they did, and which audience they reached.

## 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>1</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.”

Failure to follow instructions is a Group II offense.<sup>2</sup> The Agency Head instructed Grievant that he would not be allowed to campaign or conduct any political business whatsoever while on duty and the separation between his duties as a DCP officer and political candidate would be black and white. Captain G instructed Grievant that he would not be able to discuss his campaign in person or via telephone, email, or text while working on Division time. Captain G said this would include not using his personal cell phone or other device(s) to conduct campaign business while on duty.

On September 26, 2017, Grievant participated in campaign related activity while on duty. He spoke to someone on his cell phone and said he wanted to be put in a situation where he could meet with a group of voters. By referring to “voters” Grievant displayed behavior relating to his campaign. In addition, Grievant gained the attention of a Journalist at the Location and expressed an interest in having her interview him. A customary campaign practice would be for a candidate to be interviewed by a journalist to express his or her political views. By asking or suggesting the Journalist interview Grievant, Grievant was discussing a campaign activity. Grievant’s actions were contrary to the instructions he received from the Agency Head and Captain G. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Upon the accumulation of two Group II Written Notice, an agency may remove an employee. Grievant has accumulated two Group II Written Notices and one Group III Written Notice. Accordingly, the Agency’s decision to remove Grievant must be upheld.

The Agency argued Grievant should receive a Group III Written Notice because his behavior was an extreme circumstance and a repeated failure to follow instructions. Grievant’s behavior was no so extreme as to justify elevating the Group II to a Group III Written Notice. Repeated behavior constituting a Group II offense does not provide a basis to elevate a Group II offense to a Group III offense.<sup>3</sup> It is appropriate for Grievant to receive a Group II Written Notice, not a Group III Written Notice.

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

<sup>3</sup> An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays), if the employee has an active Group I Written Notice for the same offense in his/her personnel file.

Grievant did not recall speaking with anyone on his cell phone about getting in front of voters. He argued that if such a conversation occurred he may have been speaking to his wife about planning activities. If the Hearing Officer assumes for the sake of argument that Grievant was speaking with his wife instead of his campaign manager, it does not affect the outcome of this case. Organizing his family events and schedule so he could be “put in a situation where he could meet with a group of voters” remains a campaigning activity.

Grievant denied shouting at the Journalist about an interview for his campaign. None of Grievant’s duties at the Location involved speaking with the Journalist about an interview. His actions were consistent with someone seeking attention for himself as a candidate.

Grievant argued that being sent to the Location was a “set up”. Agency witnesses testified Grievant was assigned to the Location because it could accommodate an employee on light duty. The Hearing Officer is not persuaded that Grievant was set up to be disciplined.

*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. 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 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.

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<sup>4</sup> Va. Code § 2.2-3005.

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.