

Issue: Group II Written Notice with Suspension (failure to follow instructions and policy);  
Hearing Date: 09/08/17; Decision Issued: 12/28/17; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 11040; Outcome: Partial Relief; **Administrative  
Review: Ruling Request received 01/16/18; EDR Ruling No. 2018-4669 issued  
02/14/18; Outcome: AHO's decision affirmed.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11040**

Hearing Date:	September 8, 2017
Decision Issued:	December 28, 2017

#### **PROCEDURAL HISTORY**

On January 6, 2017, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for failure to follow instructions and policy.

On February 2, 2017, 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 June 19, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On September 8, 2017, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's 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 a Probation Officer at one of its locations. He began working for the Agency in 2006. Grievant's position was non-exempt under the Fair Labor Standards Act. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for providing daily supervision of offenders who required both intensive and regular probation, parole, and post-release supervision. Grievant was responsible for assessing the risk of crime and treatment needs for offenders under his supervision. He was responsible for preparing reports including pre-sentence, sentencing guideline, and major violation.

When a case was removed from one employee and assigned to another employee, the employee receiving the case was supposed to review the case file and take appropriate action as needed. This would include meeting with the probationer.

An offender arrested for committing a felony has committed a "major violation" of his parole. The probation officer supervising an offender who has committed a major violation must file a major violation report. A major violation report is a "document

completed by a P&P Officer outlining the alleged violations of supervision conditions.”<sup>1</sup> Agency policy does not establish a deadline for submitting a major violation report.

On April 13, 2016, the Offender was arrested for Grand Larceny. The arrest was a major violation of the Offender’s probation. The Offender was assigned to Grievant’s case load on April 14, 2016. Grievant called and spoke with the Offender on May 6, 2016.

On August 19, 2016, the Offender was convicted of Grand Larceny.

There was no deadline for writing a major violation report, but if Grievant had contacted the Supervisor about the Offender’s Grand Larceny, the Supervisor would have instructed Grievant to complete a major violation report. When Grievant was asked later by the Supervisor why he did not immediately file a major violation report regarding the Grand Larceny, Grievant told the Supervisor he thought Officer D had completed the major violation report. If Officer D had completed a major violation report, however, that action would have been visible to Grievant when he reviewed VACORIS.

On December 18, 2016, the Offender was arrested for First Degree Murder and Use of a Firearm in a Felony.

On December 18, 2016, the Supervisor sent Grievant a text and left a telephone message for Grievant to contact her immediately about the Offender. Grievant called the Supervisor on December 19, 2016. The Supervisor told Grievant that a serious incident report would need to be completed for the Offender. Grievant told the Supervisor he would not return to the office until December 27, 2016 after completion of his approved leave.

Some of Grievant’s family visited him for the Christmas holiday. They all agreed not to use their cell phones during the visit in order to encourage family communication and avoid distractions.

On December 19, 2016, the Chief sent Grievant a text message to Grievant and left telephone messages for Grievant on Grievant’s home telephone and cell phone asking him to contact the Chief. The Chief wanted to speak with Grievant to obtain information about the Offender so that the Supervisor could write a serious incident report.<sup>2</sup> Grievant did not reply to the Chief’s messages.

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<sup>1</sup> DOC Operating Procedure 920.6.

<sup>2</sup> It is unclear why the Supervisor did not ask Grievant for the needed information on December 18, 2016 when she spoke with him.

One of Grievant's children played the message the Chief left on Grievant's home phone and told Grievant about receiving a message from the Chief. Grievant did not listen to the Chief's message. Grievant did not take action because he was on vacation.

Grievant drafted a letter dated December 27, 2016 to the local Circuit Court Judge requesting a Probation Violation Hearing and that a Circuit Court Capias be issued regarding the Offender. Grievant attached a copy of a major violation report dated December 28, 2016 for the Offender. The major violation report mentioned the Offender's August 19, 2016 conviction and December 18, 2016 arrest.

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

"[I]nadequate or unsatisfactory job performance" is a Group I offense.<sup>6</sup> In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

When the facts of this case are considered as a whole, Grievant's behavior is best described as unsatisfactory performance – a Group I offense. It appears that Grievant looked at VACORIS regarding the Offender when the case was assigned to him in April 2016 but failed to notice that Officer D had not filed a major violation report for the Offender. Grievant should have written a major violation report for the Offender sooner than in December 2016. Grievant should have responded to the Chief's messages. His desire to focus on his family is understandable but when a supervisor contacts an employee at home, it is reasonable for an agency to expect an employee to respond immediately.

The Agency argued that Grievant violated policy because he did not timely complete a major violation report for the Offender. Operating Procedure 920.6 governs Violation of Supervision Conditions. Section D.1 provides:

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

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

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

1. Violations of probation will be documented in the offender's case file and processed per P&P Office practice. Actions involving any new law violation must be approved by a supervisor and documented in the Case Notes.

2. When a revocation hearing is recommended, the P&P Office shall submit to the sentencing Court a Major Violation Report \*\*\*.

This policy does not set a deadline for the filing of major violation reports. Grievant established that his practice was to complete a major violation report after an offender was convicted and not always immediately after an arrest. Grievant presented evidence showing other Probation Officers completed major violation reports several months after conviction. Grievant completed a major violation report for the Offender on December 28, 2016.

Operating Procedure 920.1 governs Community Case Opening, Supervision and Transfer. Section IV.B.2 provides:

Prior to the initial interview, the P&P Officer should review background material such as the Presentence Report and VACORIS information relevant to social history, re-entry plan, Case Plan, risk/needs assessment, and previous adjustment to incarceration and/or community supervision.

The policy does not specify a deadline for looking at VACORIS. It appears that Grievant reviewed VACORIS information relating to the Offender and, thus, complied with the policy.

The Agency alleged that Grievant was obligated to contact his supervisor within ten days after the Offender committed a Major Violation. The Agency could not identify a written policy creating this requirement.

The Agency alleged Grievant failed to follow a supervisor's instructions because he did not reply to the Chief's text and voice messages. The evidence showed that Grievant did not receive those messages but he was aware of being contacted by the Chief. This evidence is not sufficient to support a Group II Written Notice.

*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 officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the

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<sup>7</sup> Va. Code § 2.2-3005.

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 further 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 **reduced** to a Group I Written Notice. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

## 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.