

Issue: Group III Written Notice with Termination (failure to follow policy and unauthorized use of State property); Hearing Date: 11/08/17; Decision Issued: 11/13/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11071; 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: 11071**

Hearing Date: November 8, 2017  
Decision Issued: November 13, 2017

**PROCEDURAL HISTORY**

On July 20, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policy and unauthorized use of State property or records.

On July 20, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 3, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled for September 20, 2017 but an extension was granted without objection and the matter was rescheduled for November 8, 2017. On November 8, 2017, 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 an Intensive Probation and Parole Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant supervised Probationer W. Probationer W was a sex offender who was prohibited from having sexually explicit information on his personal cell phone. On June 5, 2017, Grievant met with Probationer W and reviewed the images and text messages on Probationer W's cell phone. Grievant seized the cell phone of Probationer W. Probationer W completed a Chain of Custody Form authorizing Grievant to take his cell phone. Grievant wrote in the Agency's electronic database, VACORIS:

As result of the client having sexually explicit images within his phone and as the result of the client [not] having the Covenanting Eyes installed, this PO [has] confiscated the client's cellular device. Chain of custody form was completed and signed.<sup>1</sup>

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<sup>1</sup> Agency Exhibit 6.

Grievant did not write in the Agency's log book that he had seized the cell phone. Grievant did not place Probationer W's cell phone into a secured area at the Facility. Grievant knew he was obligated to record that he had seized a cell phone from an offender and lock it in a secured area in the Agency's office because he had done so on prior occasions.

Grievant took Probationer W's cell phone to Grievant's home.

On June 6, 2017, Grievant used Probationer W's cell phone to send Ms. W a text message, "What's good ima cu today". Ms. W did not respond. On either June 15, 2017 or June 16, 2017<sup>2</sup>, Grievant used Probationer W's cell phone to send Ms. W a text message, "Hey what's good." Ms. W responded "just got off."<sup>3</sup>

Beginning June 6, 2017, Grievant used his personal cell phone to contact Ms. W. He used software to hide his personal cell phone number and make it appear to Ms. W that she was receiving text messages from a different cell phone number. Grievant did not identify himself despite Ms. W's request that he do so. After Ms. W blocked the telephone number, Grievant created another fictitious cell phone number to contact her. He again did not identify himself. Once Ms. W stopped responding to that second cell phone number, Grievant used his actual cell phone number. He sent her his picture. Ms. W showed the picture to Probationer W and Probationer recognized Grievant.

On June 21, 2017, Ms. W went to the Agency's office to make a complaint about Grievant's behavior. She complained about receiving text messages from an unknown person and continuing to receive messages from that person after asking to be left alone. She later learned that the unknown person was Grievant.

On June 22, 2017, Ms. G accompanied Grievant to his residence and retrieved Probationer W's cell phone. Ms. G returned the cell phone to the Agency's office.

## **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>4</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

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<sup>2</sup> The exhibit is difficult to read. The weekday appears on the cell phone screen to read Thursday and the date appears to read June 16, but Thursday was June 15, 2017.

<sup>3</sup> Agency Exhibit 6.

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

warrant removal.”<sup>5</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>6</sup>

“Theft or unauthorized removal of ... property of other persons including but not limited to ... offenders” is a Group III offense. On June 5, 2017, Grievant used the authority given to him by the Agency to seize a cell phone belonging to Probationer W. Instead of placing the cell phone in a secured area of the Facility as knew he was obligated to do, he took Probationer W’s cell phone home with him. Grievant used Probationer W’s cell phone to send messages to Ms. W knowing that Ms. W would believe the messages were from Probationer W. Grievant did not have the authority or authorization to remove Probationer W’s cell phone from the Facility and use it to communicate with Ms. W. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for unauthorized removal of property of an offender. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that he began an investigation after he read a text message sent by Probationer W to his friends saying “I got me a young one.” Grievant believed Probationer W was referring to Ms. W. Grievant was concerned that Ms. W might be “under age”, according to Grievant. Grievant decided to keep Probationer W’s cell phone and impersonate Probationer W while sending text messages from that phone to Ms. W. He sent Ms. W additional messages using his own cell phone in furtherance of that investigation, according to Grievant. This argument is not persuasive. Nothing in Grievant’s position description would authorize him to conduct an independent investigation into the relationship between Probationer W and Ms. W. His actions were not consistent with the behavior of employees holding similar positions with the Agency. He complained that his work unit was short-staffed, yet he assumed unnecessary additional investigatory duties. Grievant’s behavior was not consistent with the Agency’s expectation of his work performance.

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 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

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

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

<sup>7</sup> Va. Code § 2.2-3005.

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 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>

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.

[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