

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 07/19/17;
Decision Issued: 7/20/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11012; 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: 11012

Hearing Date: July 19, 2017

Decision Issued: July 20, 2017

PROCEDURAL HISTORY

On March 3, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions.

On March 6, 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 May 9, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On July 19, 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. 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 Senior Probation and Parole Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On October 21, 2016, the Agency's Deputy Director sent employees including Grievant an email stating, in part:

Please see the attached letter directed to Director [name] from the Office of the Attorney General. It directs the Department not to destroy or delete any documents, information or material. This is all encompassing. We recognize the potential issues and inconvenience created by this guidance, such as cluttering your offices and clogging your email accounts.¹

On March 1, 2017 at 11:49 a.m.,² the Office Services Supervisor sent employees including Grievant an email stating:

As a reminder, you cannot shred or destroy any documents until further notice as instructed by the DOJ/[Deputy Director]/CPO.³

¹ Agency Exhibit 4.

² The Chief Probation and Parole Officer concluded Grievant threw away the document in the afternoon because of where it was placed in the trash cans.

³ Agency Exhibit 6.

Prior to the restriction, employees at the Facility would take documents containing offender personal information and have the documents shredded by a company specializing in shredding documents. Once the restriction arose, the Facility established a procedure where employees could remove documents from their files and placed them in a closed record room. The documents were to remain there instead of being shredded. Only if the restriction was removed later would the Facility staff begin shredding documents.

On March 1, 2017, Grievant took a duplicate Felony Registration Form and ripped it into several pieces. He placed half of the paper in a trash can in the break room and the other half in the urine specimen lab room. The form contained personal information about an offender such as his social security number. The document was of the type that the Deputy Director instructed should not be destroyed.

The Chief Probation and Parole Officer noticed the document parts in the two trash cans. He looked at the document and identified the offender's name. He then identified the probation and parole officer assigned to that offender. That probation and parole officer reported to Grievant. The Chief Probation and Parole Officer asked Grievant about the document. Grievant admitted he tore the document and put the pieces in the trash cans.

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."⁴ 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."⁵ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁶

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.⁷ Grievant was instructed by the Deputy Chief not to destroy any documents. He was reminded of that instruction at 11:49 a.m. on March 1, 2017. On March 1, 2017, Grievant ripped a Felony Registration Form into pieces and threw them into two trash cans. If the Chief had not noticed the document pieces, the document would have been disposed of by the cleaning crew who emptied trash cans every night. Grievant's action was contrary

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

⁵ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁶ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁷ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

to the Deputy Director's instruction thereby justifying the issuance of a Group II Written Notice.

Grievant argued that the document he destroyed was not an Agency document because it was submitted to the Agency by an external law enforcement agency. Grievant's argument is not persuasive. Once the document was received by the Agency, it became an Agency document and fell within the Agency's restrictions on its destruction.

Grievant argued that the Chief Probation and Parole Officer violated the Deputy Director's instruction because he allowed employees to remove documents from their files and place them in boxes in a closed room. This argument fails. The documents placed in the closed storage room were purged from employee files but they were not purged from the Agency. In addition, the documents were not shredded – they remained in their original form but held in a specific part of the Facility.

Grievant argued that the disciplinary action was too harsh. Although this matter could have been handled with a lesser level of disciplinary action, the Agency's discipline is consistent with Agency's Standards of Conduct governing Group II offenses. There is no basis to reduce the disciplinary action because it may be too harsh.

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"⁸ 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 II Written Notice of disciplinary action is **upheld**.

⁸ Va. Code § 2.2-3005.

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.