

Issue: Group II Written Notice (unauthorized use or misuse of State property or records); Hearing Date: 02/11/03; Decision Issued: 03/27/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5618; **Administrative Review: EDR Administrative Review requested 04/08/03; Outcome: HO neither abused his discretion nor exceeded his authority (EDR Ruling No. 2003-076). EDR Ruling dated 04/23/03)**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5618**

Hearing Date: February 11, 2003  
Decision Issued: March 27, 2003

**PROCEDURAL HISTORY**

On September 24, 2002, Grievant was issued a Group II Written Notice of disciplinary action for:

“Unauthorized use or misuse of state property or records”, a violation under the Standards of Conduct 5-10.16.B.5. By your own admittance, you used [the Institution’s] letterhead on which to type unauthorized contents which is a misuse of state property. This charge was founded per Internal Affairs Investigation.

On October 21, 2002, 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 she requested a hearing. On January 8, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 11, 2003, a hearing was held at the Agency’s regional office.

**APPEARANCES**

Grievant  
Grievant’s Counsel

Warden  
Agency Representative  
Lieutenant  
Special Agent  
Officer B  
Officer S

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action.

## **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 Corrections Officer at one of its Institutions. The purpose of her position is to "provide security and supervision of adult offenders."<sup>1</sup> She meets or exceeds the Agency's expectations of her work performance. No evidence of prior disciplinary action against Grievant was presented.

In June 2002, Officer T wanted to go to the beach with some of his co-workers. He knew his wife would not approve of the trip so he wanted some way to deceive her into thinking he was away from his home because of his work duties. Grievant, Officer T, Officer B, and Officer S discussed what to do. They decided it would be best to send a letter to Officer T's wife stating that Officer T was required to attend training at the Academy on the days of the planned trip.

Officer B drafted the text of a letter from Captain Sullivan to Officer T instructing Officer T to attend training at the Academy. Officer B decided the author of the letter should be someone named Captain Sullivan. No Captain Sullivan worked at the Institution. Officer B gave the letter text to Grievant for Grievant to type. Officer S called Grievant several times to see if the letter had been typed. Grievant typed the

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<sup>1</sup> Grievant Exhibit 3.

letter on the stationary of the Correctional Institution using the Agency's equipment. The letterhead shows the name of the Warden. After Grievant typed the letter, she gave it to Officer T. Officer T signed the letter as Captain Sullivan and later presented it to his wife.

Grievant, Officer T, Officer B, Officer S, and Officer R went to the beach. Officer T's wife became concerned that she had not heard from her husband. She contacted the Institution and asked to speak with Captain Sullivan. She informed Agency staff that she had a letter from him. Agency staff obtained a copy of the letter and began an investigation.

In order to determine the level of disciplinary action to take, the Warden spoke several times with the employees who went to the beach. Officer B misstated his role in the planned trip. He convinced the Warden that he did not have any advanced knowledge that the letter would be written on the Institution's letterhead. Officer B told the Warden that he only presented Grievant with general notes and not the text of the letter from Captain Sullivan.

After considering the various levels of involvement, the Warden issued Grievant a Group II Written Notice. He issued Officer B and Officer S a Group I Written Notice. Officer T resigned from the Institution before disciplinary action could be taken against him.<sup>2</sup>

## **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

"Unauthorized use or misuse of state property or records" is a Group II offense.<sup>3</sup> Grievant misused state property when she typed a letter on the Institution's letterhead containing false statements by a manager who did not exist. The letter gave the impression to Officer T's wife that the Institution had taken action that it had not taken.

Based on the level of responsibility, the Hearing Officer finds that Officer B and Grievant were of the same level. Grievant planned the deception and typed the text of

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<sup>2</sup> Officer T resigned on July 10, 2002.

<sup>3</sup> DOCPM § 5-10.16(B).

the letter on Institution letterhead. Likewise, Officer B planned the deception, wrote the text for the letter, and knew the letter would be written on Institution letterhead. Officer S had a lower level of responsibility because she only planned in the scheme but did not actually carry it out.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance.<sup>4</sup> Grievant argues her disciplinary action should be reduced to a Group I Written Notice in order to be consistent with the disciplinary action take against Officer B and Officer S who Grievant contends were equally responsible for what occurred.

The Rules for Conducting Grievance Hearings give examples of mitigating circumstances Hearing Officers may consider:

Consistent application. Has the supervisor been consistent? The *Standards of Conduct* states that “[m]anagement should apply corrective actions consistently, while taking into consideration the specifics of each individual case.”

The Hearing Officer interprets this provision to permit agencies to give different levels of discipline to employees based on the Agency's understanding of the specifics of each individual case. In other words, before the inconsistent application of discipline creates mitigating circumstances, the Agency knew or should have known it was disciplining its employees inconsistently.

Although the Agency disciplined Officer B and Grievant differently when they should have received the same discipline, there are not mitigating circumstances justifying a reduction of Grievant's discipline.<sup>5</sup> The reason the Agency gave Officer B a Group I instead of a Group II was because Officer B effectively mislead the Warden regarding Officer B's knowledge of events and his level of participation.<sup>6</sup> Officer B convinced the Warden that Officer B did not have any advance knowledge that the letter would be written on Institution stationary and that he did not come up with the name, Captain Sullivan.

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<sup>4</sup> DOCPM § 5-10.13(B).

<sup>5</sup> Grievant contends other employees (not involved in Grievant's case) have been inconsistently disciplined. Insufficient evidence was presented of those disciplinary actions for the Hearing Officer to conclude that the Agency inconsistently disciplined its employees.

<sup>6</sup> Significant portions of Officer B's testimony were not credible. Several portions of his testimony that were not credible represent the statements he made to the Warden. A Hearing Officer has sufficient experience to assess when an individual is being untruthful. Most Agency managers do not have similar experience.



## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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>7</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

