

Issue: Group II Written Notice (failure to follow instructions) – [reduced to Group I during resolution steps]; Hearing Date: 05/14/07; Decision Issued: 05/17/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8514; Outcome: Agency upheld in full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8514**

Hearing Date: May 14, 2007  
Decision Issued: May 17, 2007

**PROCEDURAL HISTORY**

On November 3, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. As part of the Third Step Response, the Agency reduced the disciplinary action to a Group I Written Notice.<sup>1</sup>

On November 17, 2006, 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 April 16, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 14, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel

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<sup>1</sup> The Agency contends it reduced the disciplinary action contingent on Grievant withdrawing her grievance. The third step respondent states, "However, I will reduce the Group II to a Group I." The Third Step Respondent does not state that the reduction is contingent on Grievant withdrawing her grievance. Accordingly, the Group II Written Notice was reduced to a Group I Written Notice.

Agency Party Designee  
Agency Representative  
Witnesses

### **ISSUE**

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 Probation Officer I at one of its Facilities. She has been employed by the Agency for approximately 17 years. The Agency has consistently evaluated her work performance favorably. No evidence of prior active disciplinary action was introduced during the hearing.

The purpose of Grievant's position is, "[s]upervise adult offenders, conduct investigations, and document activities."<sup>2</sup> Some of Grievant's responsibilities include writing pre-sentencing reports, and detention and diversion evaluations. She may testify in court regarding her recommendations and must be knowledgeable about the services available to offenders.

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<sup>2</sup> Agency Exhibit 1.

On January 31, 2006, the Regional Manager sent the Chief Parole Officer an email stating:

We want to make sure that Probation Officers and Surveillance Officers have been personally exposed to Special Programs such as [Detention Center]. It is important for us to educate staff in way that they will respond to. One way to educate staff is o simply tell them about [the Detention Center] or have [Detention Center] staff to visit your districts while another way may be to provide videos of the unit but the best way is to have staff to learn about [Detention Center] by having them on-site. District officers must see both the intake and graduation exercises to get a full circle view of what [Detention Center] starts with and what they make out of the detainees through hard work, discipline, various vocational, educational and treatment programs along with community service work. \*\*\*

The goal is to have your districts complete this task (intake and graduation) prior to June 15, 2006. You may need to offer flex schedules to accommodate the needs of staff, especially those living in the [city] area. Some may need overnight accommodations for the intake day, as they take place late in the day. Some may have already visited [the Detention Center] but may not have seen an intake or graduation exercise. They need to plan on scheduling their time to include a facility tour while they are there. \*\*\*

Please add this to the list of items to be accomplished during that time. Officers who visit [Detention Center] will be good ambassadors for [Detention Center] when they testify in court and when they supervise offenders before and after special Program participation. They will be able to tell attorneys and court officials exactly what this valuable program offers offenders. They will encourage the use of the program once they see it for themselves. \*\*\*<sup>3</sup>

Agency managers subsequently modified this initial instruction from the Regional Manager. All Probation Officers were permitted to attend the Detention Center to observe an intake or a graduation. Twenty-six dates were given to observe intakes prior to the revised due date of December 31, 2006. In addition, twenty-six dates were given to observe graduation. If Probation Officers were not able to attend on any of those dates, they were permitted to visit the Detention Center on a date of their own choosing to take an individual tour.

On March 10, 2006, Grievant's Supervisor sent Grievant and other Probation Officers an email informing them that they were obligated to visit the Detention Center. The email stated that employees visiting the Detention Center would receive credit

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<sup>3</sup> Agency Exhibit 2.

towards their 40 hour per year training requirement. During a staff meeting on March 14, 2006 which Grievant attended, Grievant's Supervisor notified employees they had to visit the Detention Center.<sup>4</sup>

In order for Grievant to visit the Detention Center, she would have to travel approximately 3.5 hours away. Grievant's teenage daughter has a history of mental health concerns and is taking prescription medication to help treat those concerns. She is under the care of a medical doctor. On September 12, 2005, Grievant's daughter took certain actions to harm herself. Grievant was able to stop the daughter. Grievant took the daughter to the emergency room for help. In October 2006, Grievant's daughter took certain actions to harm herself. Grievant was able to help the daughter and get her to the emergency room for treatment. As late as a month ago, Grievant received a call from her daughter's school staff informing Grievant that her daughter had made statements expressing a desire to harm herself. Grievant does not have other family living near her who could look after her daughter if her daughter had an episode.

All Probation Officers in the District other than Grievant visited the Detention Center.

### **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>5</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>6</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>7</sup>

"[F]ailure to follow a supervisor's instructions" is a Group II offense.<sup>8</sup> Grievant failed to follow her Supervisor's instruction to visit the Detention Center thereby justifying the issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice. The Group I Written Notice must be upheld.

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<sup>4</sup> Agency exhibit 5.

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>7</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>8</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

*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 Employment Dispute Resolution....”<sup>9</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.

Grievant contends the disciplinary action should be mitigated because of her personal hardship of driving 3.5 hours away from her daughter. If Grievant’s daughter experienced an emergency and Grievant was 3.5 hours away, the emergency could be life-threatening for the daughter. Although Grievant’s concerns are real and understandable, the disciplinary action against her should not be reversed under the *Rules* for two reasons. First, the Agency mitigated the disciplinary action from a Group II to a Group I Written Notice as part of the grievance process. Thus, Grievant has received some relief from the harshness of the original discipline. Second, reversing the disciplinary action would have the same effect as changing a job duty of Grievant’s position. The Agency’s requirement to attend the Detention Center applied to all Probation Officers in Grievant’s District and was for a legitimate and important Agency business reason. By visiting the Detention Center, Grievant would be able to perform her duties better. Upon consideration of the standard set forth in the *Rules*, the Agency’s disciplinary action did not exceed the limits of reasonableness.<sup>10</sup>

Grievant contends the disciplinary action should be reversed because the Agency could have provided her with the same information through a video tour of the Detention Center. Grievant raised the issue of a video tour for the first time at the hearing. The Agency was not obligated to propose solutions to Grievant. Accordingly, the Agency’s failure to offer a video tour cannot be a mitigating circumstance.

## DECISION

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

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<sup>9</sup> *Va. Code § 2.2-3005.*

<sup>10</sup> No evidence was presented showing the Agency acted contrary to the Family Medical Leave Act or the Americans with Disabilities Act.

## APPEAL RIGHTS

You may file an administrative review request within **15 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-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>11</sup>

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<sup>11</sup> Agencies must request and receive prior approval from the Director of EDR 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 EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer