

Issue: Group III Written Notice with suspension (seeking sensitive information for non-business related reasons and disseminating criminal information); Hearing Date: 11/09/01; Decision Issued: 11/17/09; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9216; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 12/01/10; EDR Ruling #2010-2473 issued 01/27/10; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 12/02/10; DHRM Ruling issued 12/23/09; Outcome: Declined to review.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9216**

Hearing Date: November 9, 2009  
Decision Issued: November 17, 2009

**PROCEDURAL HISTORY**

On August 6, 2009, Grievant was issued a Group III Written Notice of disciplinary action with a twenty day suspension for seeking sensitive information on another individual for other than law enforcement reason and disseminating criminal history information.

On August 14, 2009, 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 October 13, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 9, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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?
5. Whether the Agency retaliated against Grievant.

### **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 Alcoholic Beverage Control employs Grievant as a Special Agent in Charge at one of its Facilities. She has been employed by the Agency for over twenty years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency operates the LINX system which contains detailed information about individuals including their criminal history. Grievant attended LINX system training on February 28, 2008. She was instructed during the training that the system could be used only for business related requests and not for personal use. Grievant signed a user agreement stating in part that she

Acknowledge that I have read, understand and agree to comply with the HR LINX User Rules. I also understand that the HR LINX system and the equipment are subject of monitoring to ensure proper functioning and to protect against improper or other authorized use, access or dissemination of information. Unauthorized requests, use, dissemination or receipt of

LINX information could result in civil or criminal proceedings being brought against the agencies and/or individuals involved. Violations of these rules may also subject of the user to possible disciplinary action and HR LINX excess termination.<sup>1</sup>

Grievant's Daughter married Mr. G. Grievant had not met Mr. G. Mr. G had been charged with sexual battery. Mr. G had not been involved in any licensee or criminal matters involving the Agency.

Grievant was having difficulty accessing the LINX database. On August 7, 2008, Grievant went to Special Agent C<sup>2</sup> and asked if she would provide assistance. Grievant gave Special Agent C several names to check in the database. One of those names was the name of Grievant's Daughter. Special Agent C knew the Daughter's name. Grievant said "put [Daughter's] name in there." Grievant also told Special Agent C "put [in] her husband's name, whoever he is."<sup>3</sup> Special Agent C entered the names into the database and retrieved information regarding the Daughter and Mr. G. Grievant was stunned regarding the information she learned from the inquiry.

Grievant called the Daughter from her work telephone. Grievant told the Daughter, "do you know what you have gotten into?" If you can, get out of the marriage now. We're willing to help you and do anything we can for you." The Daughter asked "how do you know?" Grievant said, "I don't know what you're involved in. But I don't like it. This man must be involved with something." Grievant also said "this man has a criminal record. He probably has a record as long as I don't know what. This man probably has a record 2 miles long. Get out of it."<sup>4</sup> Grievant also told the Daughter, "whoever you're married to, you and him need to get it to the precinct. Go to the precinct and run both of [your] criminal records. And after you run your criminal records, go to [the] Retail Merchants and run your credit reports. Then you find out what kind of man you're ... married to."<sup>5</sup>

Mr. G spoke with Special Agent B on August 11, 2008 regarding his concerns about Grievant. Mr. G alleged that Grievant had accessed his criminal history and informed his wife of his background. Mr. G sent Special Agent B a letter reiterating his concerns with Grievant's behavior.

One or two days after August 26, 2008, Grievant received a letter sent by certified mail from her Daughter and Mr. G. The Daughter and Mr. G stated they did not

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<sup>1</sup> Agency Exhibit 4.

<sup>2</sup> The Agency did not call Ms. C as a witness.

<sup>3</sup> Agency Exhibit 4.

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

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

wish to receive any further contact from Grievant. The letter upset and surprised Grievant. Grievant believed sending the letter was not consistent with her Daughter's normal behavior. Grievant believed Mr. G was unduly influencing the Daughter. Grievant and her Husband went to the police office in the jurisdiction revealed by the return address on the certified letter. They inquired regarding the Daughter's location and expressed concern about Mr. G's criminal background. They were told that the daughter was no longer in that jurisdiction and that Mr. G had charges pending against him for rape and attempted rape.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>6</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

DHRM Policy 1.60 lists numerous examples of offenses. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.

In the Agency's judgment, Grievant's behavior rises to the level of a Group III offense. The Agency's judgment in this case is supported by the evidence. Grievant used the Agency's computer database to obtain sensitive information about two people, the Daughter and Mr. G, who were not seeking services from or otherwise involved in the Agency's business operations.<sup>7</sup> Grievant then used the information she obtained from the Agency's computer database to warn her Daughter about Mr. G's character and background. Grievant held a position of trust. She had received training during which he was instructed not to access the Agency's computer database for personal reasons. She signed an agreement acknowledging that improper use of the system could result in disciplinary action. The Agency's judgment is consistent with the DHRM Policy 1.60 which defines Group III offenses to include, "any misuse or unauthorized use of state records".

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<sup>6</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>7</sup> Grievant his actions were contrary to CAD General Order 10 Code of Conduct, Abuse of Position. This section provides, in part, "Bureau members shall not use their official position ... for obtaining privileges not otherwise available to them except in the performance of duty ...."

Upon the issuance of a Group III Written Notice, and agency, may, in lieu of removal, suspend an employee for up to 30 workdays. In this case, Grievant was suspended for 20 workdays. Accordingly, Grievant's suspension must be upheld.

The Agency contends Grievant's actions were contrary to Va. Code § 18.2-152.5, Computer Invasion of Privacy, and § 9.1-136, Criminal Penalty for Violation of 19.2-389. These sections do not appear to apply in Grievant's case. Section 18.2-152.5 addresses intentionally examining "without authority" identifying information. Because Grievant was a Special Agent (law enforcement officer) with the Agency and had a password to login to the computer database, she had the authority to access that database. What Grievant lacked, however, was "permission" from the Agency to access identifying information. Section 9.1-136 addresses accessing information from the Central Criminal Records Exchange. The Exchange is operated as a division of the Department of State Police and not of Grievant's Agency. Although the Agency has not established criminal behavior, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

Grievant argues that she did not access the Agency's computer database. Special Agent C was the individual who entered the names into the computer system. Grievant's argument fails. Special Agent C was acting on Grievant's behalf. Grievant asked Special Agent C to make entries into the computer database and provided the names to be entered. Grievant was responsible for obtaining sensitive information unrelated to her business needs.

Grievant argues that she did not disseminate Mr. G's criminal history. Although it may have been necessary for the Agency to show that Grievant disseminated Mr. G's detailed criminal history in order to establish that Grievant acted contrary to law, it was not necessary for the Agency to establish that degree of detail in order to uphold a Group III Written Notice. In this case, the Agency has shown that Grievant learned that Mr. G had some sort of criminal record and used that knowledge to warn her Daughter. This level of information dissemination is sufficient to support the Agency's judgment that Grievant misused sensitive information belonging to the Agency.

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>8</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>8</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.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>9</sup> (2) suffered a materially adverse action<sup>10</sup>; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.<sup>11</sup>

Grievant engaged in protected activity by filing a grievance regarding behavior by another employee. Grievant suffered a materially adverse action because she received a written notice. Grievant has not established any connection between her protected activity and the materially adverse action. No credible evidence was presented to suggest Agency staff considered her prior protected activity when issuing the written notice. The Agency did not discipline Grievant as a pretext for retaliation.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a 20 days suspension is **upheld**.

## 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:

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<sup>9</sup> See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>10</sup> On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

<sup>11</sup> This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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  
600 East Main St. STE 301  
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>12</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



December 23, 2009

RE: **Grievant v. Department of Alcoholic Beverage Control**  
**Case No. 8216**

Dear Grievant:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to 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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. While you identified DHRM Policy 1.60 as the policy with which the decision is inconsistent, your explanation as to why there is inconsistency does not support your argument. To the contrary, it appears that you are disagreeing with how the hearing officer assessed the evidence and with the resulting decision. We must therefore respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley