

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 12/13/10;  
Decision Issued: 12/15/10; Agency: DCJS; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9453; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9453**

Hearing Date: December 13, 2010  
Decision Issued: December 15, 2010

**PROCEDURAL HISTORY**

On August 24, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions and insubordination.

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 November 9, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 13, 2010, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's 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 Criminal Justice Services employs Grievant as the Director, Office of Programs. She oversees an Agency division with approximately 20 employees. The purpose of her position is:

Provide oversight, management and direction to the manager's in the Program Development and Program Administration units and serve as the integral member of the agency's management team. The Program Development Unit provides programmatic management for new programs. The Program Administration Unit provides programmatic management for ongoing programs.<sup>1</sup>

Grievant is a part of the Agency's senior executive management team. She reports to the Chief Deputy who reports to the Agency Head. She has been employed by the Agency for approximately 20 years. With the exception of the facts giving rise to this grievance, Grievant's work performance was satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The General Assembly mandated that the Agency reduce its budget by approximately \$535,000 and reduce its full-time employment by five positions.

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

The Agency Head joined the Agency on April 12, 2010. He spoke with the Agency's Fiscal Director regarding staff reductions. The Fiscal Director recommended that the Agency Head eliminate positions after considering the Agency's core responsibilities and without first considering how particular positions were funded. Many of the Agency's positions were partially or fully funded with federal dollars. The Fiscal Director reasoned that it would be a better approach to eliminate positions based on the Agency's business needs and then re-align federal funding to the remaining positions.

In order to comply with the General Assembly's mandate, the Agency Head sought recommendations from Division Directors regarding which positions should be eliminated. The Agency Head asked Grievant to provide him with a recommendation for the elimination of three positions. On April 23, 2010, Grievant sent the Agency Head an email regarding the subject of "Staff Reduction Recommendations" and stated:

You asked, at our staff meeting on Wednesday, for recommendations of the reduction of three positions in each Division. Please find below my recommendations in priority order for the Division of Programs.

As I have indicated to you previously, I do not take the elimination of any position in the agency lightly. I am in receipt of two letters from key staff in my Division, indicating their plans to retire in July and August which will leave additional critical vacancies in Community Corrections and Victim Services that I hope to fill. With an increased emphasis in the application for federal funds and other new initiatives in the areas of gangs and offender reentry, I am anticipating a greater workload than we've had previously.

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1. Policy analyst - [Ms.G] (General fund FTE)
2. Administrative Assistant – [Ms. M] (General fund P-14)
3. Victim's Services Analyst – [Ms. A] (Federal fund FTE)

The Chief Deputy joined the Agency in May 2010 and became aware of the Agency's obligation under the mandate of the General Assembly. She had to rely on the recommendations for layoffs made by division directors because of her short tenure with the Agency.

On June 21, 2010, the Agency Head's Executive Assistance sent division directors including Grievant an email stating:

With regards to the presentations you will be giving on Thursday, the Director would also like you to answer the following questions:

In light of the possible reduction of staff, what 2 -- 3 positions are expendable in your respective divisions? Please state the positions and your rationale.

Along with your presentations, please include a list of the working titles and duties being performed by all staff in your divisions.

On June 24, 2010, Grievant attended a meeting of the Senior Management Team.<sup>2</sup> During that meeting, Grievant identified two positions that could be eliminated. The first position was the Policy and Planning Specialist that Grievant had listed in her April 23, 2010 email to the Agency Head as the first position to eliminate. The second position was the Coordinator for the Grant to Encouraged Arrests (GEAP) that Grievant had listed in her April 23, 2010 email to the Agency Head as the third position to eliminate.<sup>3</sup>

Following the June 24, 2010 meeting, the Chief Deputy made a list of the positions recommended for possible elimination by the division directors. Since she had been given only the position names, she sought assistance from a human resource employee to identify the names and salaries of the two employees Grievant had recommended for layoff. She wished to confirm the names and asked the Human Resource Manager to confirm the information with Grievant. On July 23, 2010, the Human Resource Manager sent Grievant an email stating:

[Chief Deputy] asked me to confirm with you this morning the names of the employees that were your two recommendations for layoff within your division.<sup>4</sup>

Grievant received the email while she was on vacation but did not respond when she returned to work.

The Agency Head had discussions with employees of the Office of the Attorney General, Department of Planning and Budget, Department of Human Resource Management, and Secretary of Public Safety regarding the Agency's decision to lay off employees including to the two positions provided by Grievant. The Agency Head and the Chief Deputy expected they would lay off employees including the two positions provided by Grievant.

On August 12, 2010, Grievant was concerned about her ability to replace an employee who was retiring. She expressed her concern to the Agency Head. Grievant and the Agency Head went to the Chief Deputy's office to discuss the matter. Grievant

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<sup>2</sup> The number of possible positions to be eliminated changed from three to two positions. Grievant was asked only to identify two positions for layoff.

<sup>3</sup> The GEAP position was also referred to as the Victim Services Analyst and held by the same person.

<sup>4</sup> Agency Exhibit 6.

proposed that Ms. A, the employee holding the GEAP position, be moved into the position that would soon become vacant. The Chief Deputy mentioned that Grievant's division would be losing two positions. This surprised Grievant. Grievant responded that she was not aware of the second position. The Chief Deputy looked at her handwritten notes from the June 24, 2010 staff meeting and said that Grievant had identified the GEAP position for layoff. Grievant then said that the position was given as a "bogus" position just to meet the directive given by the Agency Head to give up two positions. The Chief Deputies said "but you gave up this position?" Grievant said "yes, but I can't afford to give up the position and it won't save you any money." The Chief Deputy asked Grievant if she had informed the Human Resource Manager about the GEAP position when he sent her an email to confirm her identification of abolishment of the position. Grievant said she did not respond to his email. Grievant said that abolishing the GEAP position would not be a cost savings to the Agency which was the purpose of the directed given. Both the Agency Head and the Chief Deputy were astonished at Grievant's comments and believed they have been deceived by Grievant. The Agency Head was so upset that he had to leave the meeting. When the Agency Head returned to the Chief Deputy's office and Grievant had left, the Agency Head told the Chief Deputy that "we've been duped."

Later that evening, after the Chief Deputy had returned home, she retrieved her dictionary to look up the word "bogus". She did so because she was dumbfounded by Grievant's comments earlier in the day and wanted to make sure that she understood what Grievant was saying. Her dictionary showed that the meaning of "bogus" included "fraudulent, fake, sham, and phony."<sup>5</sup>

## **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."

Failure to follow a supervisor's instructions is a Group II offense.<sup>7</sup> The Agency Head instructed Grievant to provide him with the names of two positions that could be eliminated within her division to comply with the mandate of the General Assembly. Implicit in that instruction was an expectation by the Agency Head and an obligation by Grievant that she evaluate the approximately 20 positions within her division and offer

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<sup>5</sup> Agency Exhibit 7.

<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> See, Attachment A, DHRM Policy 1.60.

two positions whose elimination would be the least burdensome on the Agency. Grievant was aware of the General Assembly's mandate and understood why the Agency Head was asking for positions that could be eliminated. Instead of complying with the Agency Head's instruction, Grievant offered the GEAP as a "bogus" position that she did not believe the Agency would actually eliminate because it was federally funded. Grievant failed to comply with the Agency Head's instruction because she offered only one position instead of two positions that could be eliminated to satisfy the General Assembly's mandate. In addition, Grievant's behavior amounted to insubordination. She attempted to deceive the Agency Head and the Chief Deputy by offering a "bogus" position for their consideration. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant asserts that she did not use the word "bogus" during her meeting with the Agency Head and the Chief Deputy. She argues that the word "bogus" was "not part of her lexicon". She contends that it was the Chief Deputy who used the word "bogus" in response to Grievant's comments. She contends that the Agency Head and the Chief Deputy misinterpreted her comments because they were new employees who arrived with a perception that some of the existing Agency employees had been untruthful in the past.

There are several reasons to conclude that Grievant used the term "bogus" during her meeting with the Agency Head and the Chief Deputy. First, the Agency Head testified that Grievant used the term "bogus". His testimony was credible. Second, the Chief Deputy testified that Grievant used the term "bogus". Her testimony was credible. Third, the Agency's assertion that Grievant used the term "bogus" is bolstered by the fact that the Chief Deputy looked up the word "bogus" in her dictionary later in the evening following the meeting. She did so because she wanted to be certain of her understanding of the word used by Grievant. Had the Chief Deputy used the word as Grievant alleged, it would have been unnecessary for the Chief Deputy to look up the definition. It would not be logical for the Chief Deputy to use a word in conversation for which she did not already know the definition.

*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 consistently applied disciplinary action among similarly situated employees, and (3) the

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<sup>8</sup> *Va. Code § 2.2-3005.*

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**.

## 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  
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>9</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>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.