

Issues: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 01/13/11; Decision Issued: 01/19/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9474; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9474

Hearing Date: January 13, 2011
Decision Issued: January 19, 2011

PROCEDURAL HISTORY

On July 29, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. Grievant was removed based on the accumulation of disciplinary action.

On August 27, 2010, 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 December 15, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 13, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
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 Correction employed Grievant as a Captain at one of its facilities. He had been employed by the Agency for approximately 23 years prior to his removal effective July 29, 2010. Grievant had prior active disciplinary action. On May 27, 2009, Grievant received a Group II Written Notice for failure to comply with the applicable established written policy. On May 27, 2009, Grievant received another Group II Written Notice for failure to comply with applicable established written policy.

Grievant worked on the "B" day shift. He had approximately 75 employees under his chain of command. Grievant reported to be Major. The Major's Secretary was not within Grievant's chain of command. Grievant, the Major, and the Secretary worked in adjacent offices and would see each other frequently throughout the day.

Grievant and the Secretary began a romantic relationship. Grievant and the Secretary became engaged to be married and Grievant gave the Secretary an engagement ring which she wore to work. In October 2009, the relationship soured. Their breakup was emotional and difficult for both of them. They were unable to control their emotions and displayed them frequently while at work. The Major devoted significant amounts of her time listening to each employee complain about the other. The Major made it clear that they should not let their emotions and personal relationship affect their working relationship. Although each party understood the Major's expectation, neither party complied. The Secretary complained to the Major that

Grievant sent her flowers at her home. She was concerned that he had been on her property. When the Major spoke with Grievant about the flowers, Grievant denied delivering any flowers but he did not deny sending her flowers. Grievant complained that the Secretary intentionally antagonized him by entering meetings and speaking to everyone but him. The Secretary asked the local police to serve a "no trespassing" notice on Grievant so that he would stay away from her home. This upset Grievant. A Hot Line complaint was made against the Secretary alleging that the Secretary was paying her bills using the Agency's computer system. The Secretary believed the Grievant initiated the claim. Someone sent a picture of Grievant in his uniform holding a baby to the Agency's Central Office. Grievant believed the Secretary was the one who sent the picture. In November 2009, the Major again instructed Grievant and the Secretary not to bring their personal relationship into the workplace. The Major was concerned that the Agency might be facing a harassment complaint from the Secretary and sought the assistance of other Agency managers.

On December 4, 2009, Grievant and the Secretary were called into a meeting with the Warden and the HRO to discuss the conflict between Grievant and the Secretary. Grievant admitted to sending the Secretary flowers. He claimed that she had called him at times and he felt she was sending him "mixed signals". The Secretary denied doing so and said that Grievant is the one who called her and sent her flowers and that Grievant is the one who would not leave her alone. Grievant said that all he needed to hear was her saying that she wanted absolutely no contact with him and then he would leave her alone. The Secretary stated "I do not want any contact from you whatsoever." Grievant responded "Fine. That is all I needed." The Warden told those employees that they needed to "stop this behavior" immediately. He said that although this was taking place outside of work, it was being brought into the workplace because of the emotions being displayed and the constant discussion about it with Agency supervisors and other staff. The Warden said that they were to only interact at work if it had something to do with work-related matters; other than that, they were not to talk with each other. The Warden pointed out that their conflict was taking up his time and that of others, and that it needed to stop. He said they both needed to "get a grip and to act professionally." Grievant and the Secretary said that they would abide by each other's wishes to be left alone and that they both felt that they could conduct themselves in a professional manner while at work.

On February 22, 2010, the Employee Relations Manager and the EEO Manager went to the Facility to meet with Grievant and the Secretary. They came at the request of the Warden and in response to someone sending the Agency a copy of a picture of Grievant holding a baby while in uniform. Grievant believed that the Secretary had sent the picture, but she denied doing so. The Employee Relations Manager, the EEO Manager, and the HR met with Grievant and the Secretary separately.

The Secretary told her story in great detail and recounted several incidents of Grievant contacting her even though she had made it clear he was to leave her alone. The Secretary began crying as she recounted her story and said that Grievant had recently put a letter in her mailbox without putting a stamp on it, so she knew that he

had been at her house. She also said that Grievant gave her "dirty looks" at work and she simply wanted it to stop. She said that she had made several attempts to persuade Grievant to discontinue all contact, but that he continued to do so and that she was afraid for her safety. The Secretary said that she felt safe while at work but did not feel safe in her own home. The Employee Relations Manager and the EEO Manager told the Secretary that most of these incidents took place outside of the workplace where the Agency had no jurisdiction; however, the problem obviously was being brought into the workplace. The Secretary was instructed to avoid Grievant whenever it was possible in order not to have any contact with him, and to do whatever was necessary not to make the situation worse. The Secretary was told not to discuss events with her coworkers and keep her personal life completely outside of the Facility.

Grievant was allowed to state his version of the story in great detail with the Agency's managers. Grievant stated that he had received "mixed signals" from the Secretary and he related accounts of alleged incidents when the Secretary contacted him or brought in personal mementos that reminded him of the relationship. Grievant denied dropping the letter off at her house but said that a friend of his had taken the letter for him. Grievant admitted that he had been told not to have any contact with the Secretary but he said he felt a need for closure. Grievant denied that he gave any "dirty looks" towards the Secretary. Grievant was given the same directives as was the Secretary. He was told to maintain professionalism at all times while at work. He was to keep all contact with the Secretary at an absolute minimum, and whenever possible to avoid contact at all. Any contact was to be made for business purposes only. The Employee Relations Manager and the EEO Manager admonished Grievant for bringing the conflict into the workplace and said that it was taking time and attention away from important institutional matters. Grievant responded that he had not brought the situation into the Facility but rather the Secretary was the one talking to everyone about it. The managers warned Grievant about doing anything to exacerbate the situation. Grievant said that he would act appropriately and professionally. He said he would not have any contact with the Secretary.

The Facility had an Employees Fund Committee. The purpose of the Employees Fund was to help employees at the Facility by doing such things as sending notes or flowers to employees who may be experiencing illness or difficulties in their lives. To raise money for the Employees Fund, the Employees Fund Committee asked employees at the Facility to purchase candy grams at the cost of one dollar per candy gram. If an employee wanted to send a candy gram to another employee, he or she would pay one dollar to the Employees Fund Committee. A member of the Employees Fund Committee would take a bag of candy, attach a label with a message in the name of the recipient, and send the candy gram.

On March 8, 2010, a Secretary spoke with the Major regarding candy grams. She told the Major that employees on the "B" day schedule had not purchased any candy grams for the employee fundraiser. The Secretary implied to the Major that Grievant did not want to participate in the fund-raising because the Secretary was responsible for the fund-raising. The Secretary requested permission to attend the shift

briefing to address staff under Grievant's command and encourage them to participate. The Major told the Secretary that her suggestion was not a good idea but that she would talk with the Grievant about the Secretary's concern. Later in the day, the Major asked the Grievant about the candy grams and his shift. Grievant said "I don't know why they aren't buying; it's not my fault." Grievant stated that he announced the fundraiser several times in briefings. The Major informed them that the Secretary had requested permission to attend his briefing. Grievant said "Hell no, she ain't coming to my briefing." The Major asked the Grievant to address the program with the shift. She suggested that Grievant show support for the program and let his shift employees know that he did not have a problem with the program. Grievant said he would take care of the problem.

Grievant wrote the names of 10 employees on a piece of paper. Those names were Ms. Ro, the Records Manager, Ms. Bu, the Secretary, Ms. Co, Sgt. Wh, Ms. Whi, Ms. Sm, Ms. Ra, and Ms. Ram. Grievant wrote the message "Thanks for your support" to be sent to each recipient. He took the piece of paper to the Records Manager and asked her to send candy grams to the 10 people. He paid her \$10. The Records Manager drafted the labels, attached into the candy bags and readied them to be delivered to the 10 employees.

A few hours after giving the list to the Records Manager, Grievant spoke to the Major about the candy grams. He told her that he had spoken with his shift and encouraged them to buy candy grams. He said that he bought candy grams as well. He added that he was "buying her one". The Major said "Who?" Grievant said he was buying a candy gram for the Secretary. The Major said stop it before it gets delivered. Grievant responded, "Fu-k that bitch. She can't touch me." The Major said to Grievant "you need to do this." Grievant responded "there's nothing she can do to me; I am not going to do it." Grievant did not work the following two days. When he returned to work on the third day, he approached the Records Manager and asked her to stop the candy gram to be delivered to the Secretary. The Records Manager said the candy gram had already been delivered.

On March 10, 2010 at approximately 6 p.m., the Secretary learned that Grievant has sent her a candy gram. She became upset and began using profanity. Lieutenant C heard her say "Why the fu-k would he send me a candy gram!" The Secretary wrote an incident report the following day which stated:

I, [Secretary], was in the Training Facility for the purpose of labeling and filling baggies for a fundraiser for the Employee Fund fundraiser. I, along with [Lieutenant C] and [Ms. Ro] were labeling the baggies when [Captain S] pointed out a label that read to [Secretary] from [Grievant].

This was upsetting to me, as I felt that, under the circumstances and all of the events surrounding [Grievant] and myself, that he truly understood that I wish to have him leave me alone and in no way shape or form to make any kind of contact with me, in or outside of my place of employment. I

had also hoped that, with the measures taken with him from upper management, that it would deter him from any such action.

I have not, in any way shape or form, offered any encouragement to [Grievant] to lead him to believe anything other than I wanted him to leave me alone. This has been my wish and [I] feel that I have exhausted all measures to make this point clear to him.

I did tell [the Major] that I no longer want to work with/around the [Grievant].¹

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.”² 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.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

Failure to follow a supervisor’s instruction is a Group II offense. Inadequate or unsatisfactory job performance is a Group I offense.

Supervisors often give general and specific instructions to subordinates regarding how to perform work for an agency. When an employee fails to perform work in accordance with an agency's instructions, whether an employee has committed a Group I offense or a Group II offense often depends on whether the instruction was general or specific. A general instruction is in the nature of a performance expectation and resembles the performance expectations set forth in an employee’s Employee Work Profile. An employee who fails to comply with a performance expectation may be subject to a Group I Written Notice for inadequate or unsatisfactory job performance. For example, if a supervisor tells an employee to perform all of the employee's various duties on a timely basis, that instruction is best characterized as a general instruction. If the employee fails to timely perform one of the duties, the employee's work performance is unsatisfactory thereby justifying a Group I Written Notice. A specific instruction, however, justifies issuance of a Group II Written Notice because a supervisor has directed attention to the completion of an identified task. When an employee is given a

¹ Agency Exhibit 3.

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

specific instruction, the employee's attention is directed at completing the assigned task in accordance with a supervisor's expectations. If a supervisor tells a subordinate to deliver a package to another employee on a specific date and at a specific time, that instruction is best characterized as a specific instruction. If the employee makes no effort to deliver the package, the employee has failed to comply with a supervisor's instructions thereby justifying the issuance of a Group II Written Notice.

In this case, the Agency contends that the Major and Warden instructed Grievant to keep his relationship with the Secretary on a completely professional level and do nothing that would exacerbate his conflict with the Secretary. This instruction is best characterized as a general instruction.⁵ The general instruction established a performance expectation for Grievant. He was expected to exercise his judgment in a manner designed to further his performance expectation.

Grievant knew that the Major was devoting a lot of her time listening to the Secretary's complaints about Grievant and attempting to limit the impact of the conflict between Grievant and the Secretary on the Agency's operations. Grievant knew that he was to avoid taking actions that might provoke the Secretary and interfere with her work activities. Grievant knew or should have known that sending the Secretary a candy gram would upset her. By sending the Secretary a candy gram, Grievant engaged in unsatisfactory job performance. He created a disturbance in the workplace that could have been avoided. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that he sent candy grams to the three employees administering the candy gram program as a means to show his support for the program and demonstrate his compliance with the Major's request to support the program. The Major did not tell Grievant to send candy grams to specific people or what to say; her instruction was for Grievant to advise his subordinates that they were free to participate in the candy gram fundraiser. Grievant chose to participate in the candy gram program and decided to whom he would send candy grams. He could have selected 10 of the 75 employees within his chain of command to receive candy grams. Those employees would likely be employees who had provided Grievant with support. Instead he selected the Secretary under the pretext that he would be showing support for the Employee Fund Committee. Grievant should have exercised appropriate judgment and realize that by including the Secretary among his recipients of a candy gram, his actions would have upset the Secretary and created a disruption in the workplace.

Grievant argued that the wording of his message was not improper.⁶ Grievant was not disciplined for the wording of his message; he was disciplined for sending a

⁵ An example of a specific instruction would be if the Major had instructed Grievant not to send a candy gram to the Secretary.

⁶ It is not clear that Grievant's assertion is true. The Secretary took many actions to undermine Grievant's work performance. She did little to provide support to him. It would not be logical for Grievant to send the Secretary a candy gram thanking her for her support when she had offered so little support to him.

message to the Secretary. Grievant knew or should have known that sending a message thanking the Secretary for her support would have upset the Secretary. His actions were disruptive 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....”⁷ 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.

An employee may be removed from employment if the employee has two active Group II Written Notices and receives additional disciplinary action. In this case, Grievant has two Group II Written Notices. With the addition of a Group I Written Notice Grievant may be removed from employment. Accordingly, the Agency’s decision to remove Grievant must be upheld.

DECISION

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

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.

⁷ Va. Code § 2.2-3005.

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 14th St., 12th 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.⁸

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.