

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing
Date: 06/01/11; Decision Issued: 06/11/11; Agency: DJJ; AHO: Jane E.
Schroeder, Esq.; Case No. 9581; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Case Number 9581

Hearing Date: June 1, 2011

Decision Issued: June 11, 2011

PROCEDURAL HISTORY

The Grievant is employed as Chief of Security in a correctional center by the Department of Juvenile Justice ("agency"). On January 26, 2011, the agency issued a Group II Written Notice to the Grievant for failure to follow instructions and/or policy. The Grievant initiated the Employee Grievance Procedure on February 10, 2011 to dispute the Group II Written Notice. The grievance was not resolved during the management resolution steps and the grievance was subsequently qualified for hearing on March 29, 2011. On May 10, 2011, the hearing officer was assigned to hear the case.

A telephonic pre-hearing conference was held on May 10, 2011. The hearing was set for June 1, 2011 and the hearing took place on that date. Four witnesses, including the grievant, testified. The agency's and grievant's entire exhibit notebooks were entered into evidence without objection. The Agency's exhibits are identified as Exhibits A1-11. The Grievant's exhibits are identified as Exhibits G1-3. The two-hour hearing was recorded on a digital recorder and stored on two compact disks ("CD 1 and CD 2")

APPEARANCES

Grievant

Agency Representative

Witnesses for Agency and the Grievant:

Superintendent of Correctional Center

Human Resources Manager

Office of the Inspector General Special Agent

Witness for Grievant:

Grievant

ISSUES

Whether the Group II Written Notice issued on January 26, 2011, for failure to follow instructions and/or policy should be affirmed or rescinded. According to the Written Notice, on September 16, 2010 the Office of the Inspector General ("OIG") initiated an investigation into

allegations that the Grievant had sexually harassed another employee of the agency. On September 17, 2010, the Superintendent issued to the Grievant a written memorandum instructing the Grievant to have no further contact with the complainant until the investigation concluded. The agency alleges that the OIG investigation revealed that the grievant failed to follow these instructions by communicating with the complainant on multiple occasions during the time period of the investigation. The agency further alleges that the Grievant's actions violated the Staff Code of Conduct policy which requires that employees fully cooperate with agency investigations.

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. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual)

FINDINGS OF FACT

1. The Grievant and a female agency employee ("X") at the correctional center had a romantic relationship beginning in February, 2010. X left employment at the correctional center in March 2010 to work at another site of the agency. The two had an on-again off-again relationship, which, at one point, included another female agency employee ("Y") in a three way relationship. At one point in June, 2010, the two female took pictures of themselves which displayed nudity and sent them to the Grievant who was away at the time.(Exhibit A-1, p. 9,17)
2. In September, 2010, the Grievant and X broke up. On September 12, X came to the Grievant's apartment to retrieve items belonging to her. At some point, the Grievant left for several hours. According to the Grievant, X stayed in the apartment where she had access to the Grievant's computer. (Exhibit A-1, p. 27)
3. On September 12, 2010, someone created an internet account in the name of X. The account included the name and phone numbers for X and a number of inappropriate photographs which included nudity of X. This information was accessible by internet users. (Exhibit A-1, p.1)
4. On September 15, 2010, X contacted the Agency's Central Office Human Resources Manager to report that she had been subjected to inappropriate sexual contact by the Grievant. She was referred to the OIG because the allegations included actions which could constitute unlawful conduct. (Exhibit A-1, p.1)
5. On September 16, X was interviewed by personnel from OIG. She accused the Grievant of creating the internet account, using the pictures she had sent to him. (Exhibit A-1, p.1)
6. On September 17, 2010, the Superintendent of the Correctional Center called the Grievant into her office. Also present was the Human Resource Manager. The Superintendent read a letter aloud to the Grievant and gave him a copy of it. The letter

(Exhibit A-3) from the Superintendent notified the Grievant that he was under official investigation by the agency's Office of the Inspector General ("OIG") regarding allegations of misconduct from X.

7. The first sentence of the second paragraph of the letter is as follows: "Until the conclusion of this investigation, you are instructed to have no further contact, directly or indirectly, with [X]."
8. The Superintendent testified that X was given a similar letter on the same day instructing her to have no contact with the Grievant (Exhibit A-4).
9. On October 4, 2010, the Grievant was interviewed by a Special Agent from OIG. He was advised of the allegation that he had created the internet account including posting of nude pictures of X. The Grievant denied creating the internet account.(Exhibit A-1, p. 27)
10. On November 17, the Grievant was interview again by two Special Agents from OIG. The Grievant reported to the agents that on October 30, 2010, X began sending him text messages. Despite the instructions given to the Grievant and to X to not contact each other during the investigation, there were numerous text messages between them from October 30, 2010 until November 17, 2010. The vast majority of these calls were initiated by X. The Grievant admitted to responding to some of the text messages sent to him by X. (Exhibit A-1, p. 31,39).
11. The Special Agent from OIG continued his investigation until January, 2011. He submitted his report in a Memorandum to File dated January 18, 2011. The Special Agent testified that the Commonwealth Attorney declined to prosecute the Grievant or anyone else regarding the internet account postings.
12. On November 30, 2010, X was notified that she would be terminated from employment from the agency if she did not resign. She resigned. The notification cited her failure to follow a written directive by having contact with the Grievant via text messages between October 30 and November 8, 2010. (Exhibit A-4)
13. The Grievant was on leave from work under the Virginia Sickness and Disability Program ("VSDP") from October 17, 2010 until January 4, 2011. (Testimony of Grievant, CD 2). Since he was not at work during this time, none of the text messages between X and the Grievant from October 30 to November 17, 2010 took place at work.
14. On January 26, 2011, the Grievant was given a Group II Written Notice for failure to follow instructions and/or policy. (Exhibit A-9). Under Section II, the Nature of Offense and Evidence, the following was written:

On September 16, 2010 the Office of the Inspector General initiated an investigation into allegations that you had sexually harassed another [agency] employee. On September 17, 2010, I issued you a written memorandum instructing you to have no further contact with the complainant until the investigation concluded. The OIG investigation revealed that you failed to follow these instructions by communicating with her on multiple occasions during the above time period.. Your

actions also violate the Staff Code of Conduct policy which requires that employees fully cooperate with agency investigations.

The Grievant was suspended for ten days.

15. The Superintendent, who issued the Written Notice, testified that she could cite no policy that gives her the power to direct an employee's off-duty activities. She further testified that the intent of the September 17th memorandum was that the Grievant and X would have no contact, even during non-work hours. (CD 1 at 37 min.)
16. The Staff Code of Conduct policy that the Superintendent cited as being violated by the Grievant is Part D.3. Bullet 5: "Refusal to cooperate with or provide requested information during an investigation or providing false or misleading information to investigators."
17. The Special Agent testified that the Grievant fully cooperated with the investigation, including taking a polygraph, giving his cell phone to extract calling history, and participating in several interviews with the OIG and the police.(CD 2 at 32 min.)
18. The Special Agent further testified that the texting communication between the Grievant and X did not hinder his ability to conduct a thorough investigation. (CD 2 at 27 min.)

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653,656 (1989).

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct.

Policy 1.60 provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and

objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Offenses are grouped by levels, from Group I to Group II. Group I Offenses generally includes offenses that have a relatively minor impact on agency business operations but still require management intervention. Group II Offenses include acts of misconduct of a more serious nature that significantly impact agency operations. Group III Offenses generally include acts of misconduct of a most serious nature that severely impact agency operations.

The agency in this case has an Employee Handbook. (Exhibit G-1). Chapter 2 of the handbook has a section, Staff Code of Conduct. This section has been supplemented by Administrative Directive Number 05-009.2. (Exhibit A-10). In this directive is section D. Prohibited Conduct. Number 3 under Prohibited Conduct states as follows: “The following actions relating to unprofessional conduct of employees of [agency] may result in disciplinary action: . . . [bullet 5] Refusal to cooperate or provide requested information during an investigation or providing false or misleading information to investigators.” (Exhibit A-10, p. 3)

The superintendent issued the Group II Written Notice to the Grievant for failure to follow instructions and/or policy. The agency alleges that the Grievant had communicated with X after being instructed not to do so. The Grievant admitted that he did respond to text messages from X. All contact was by text messages between the Grievant and X while the Grievant was on VSDP leave. The real question is whether the Agency can direct an employee who is in his home on VSDP leave to have no contact with someone during an investigation for sexual misconduct.

In a Court of Appeals of Virginia case, Virginia Department of Transportation v. Jerry Stevens, a state employee was fired for cursing a crew leader and a co-worker. In an issue pertinent to this case, the Court of Appeals found that the state employee can be held accountable for conduct off the worksite if the behavior is job related. ((53Va.App. 654, 674 SE2d 563)

In the present case, the Grievant had been directed to have no contact with X during the investigation by IOG. By answering her text messages, even though this was on his own time, the Grievant disobeyed that directive. The Grievant can be held accountable for the contact, even though it was not during work time, because it is job related. This conduct did not show cooperation with the investigation, as required in the Employee Handbook Code of Conduct.

DECISION

I find that the Grievant engaged in the conduct described in the Written Notice, in that he did have contact with X after being instructed by his superintendent in writing that he was to have no further contact with her during the investigation. I find that the behavior constituted misconduct, and the agency’s discipline was consisted with law and policy. The agency’s

discipline of a Group II Written Notice did not exceed the limits of reasonableness. The agency took into consideration the mitigating circumstances of the Grievant's work longevity to support the discipline imposed. I find that consideration reasonable under the circumstances.

The Agency has sustained its burden of proof for the Group II Written Notice given to the Grievant on January 26, 2011. This Group II Written Notice is hereby sustained.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing office to revise the decision to conform it to written policy. Requests should be made to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, 600 East Main, Suite 301, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided, and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

June 11, 2011

Jane E. Schroeder, Hearing Officer