

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice (failure to follow instructions/policy), and Termination; Hearing Date: 09/19/12; Decision Issued: 10/31/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9910, 9911; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 9910 / 9911**

Hearing Date: September 19, 2012

Decision Issued: October 31, 2012

#### **PROCEDURAL HISTORY**

On May 14, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to obey instructions that could result in a weakening of security. On May 14, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow supervisor's instruction/established policy.

On June 13, 2012, Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On August 16, 2012, the Office of Employment Dispute Resolution (EDR) issued Ruling No. 2013-3411, 2013-3412 consolidating the two grievances for a single hearing. On August 28, 2012, EDR assigned this appeal to the Hearing Officer. On September 19, 2012, 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 Notices?
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 employed Grievant as a Corrections Officer at one of its Facilities. The purpose of her position was to, "provide security over inmates at the institution and while in transport; supervises their daily activities and observes and records their behavior and movement to ensure their safe and secure confinement."<sup>1</sup> Grievant received an overall rating of "Contributor" on her 2011 annual performance evaluation. Grievant had prior active disciplinary action. On February 2, 2012, she received a Group I Written Notice for excessive absenteeism or tardiness.

Grievant's shift began at 5:40 p.m. The Facility supervisors held muster daily at 5:40 p.m. Muster usually took ten minutes and the shift changed at 5:55 p.m. On May 1, 2012, Grievant did not report to work for the beginning of muster. The Lieutenant was not sure at what time Grievant reported to work.

Employees at the Facility communicate by using radios. A radio has several buttons on the front to identify which frequency the radio is using. One of the buttons is for channel one. An employee must press the button for channel one in order for the radio to transmit over channel one. One of the buttons is a "scan" button. When the

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

scan button has been pushed, the radio begins switching from frequency to frequency seeking a frequency with sound being transmitted on the frequency. If someone is speaking on a frequency, the radio stops at that frequency and the voice can be heard over the radio. For example, if someone is speaking on channel one, the radio will stop at channel one and receive the transmission even though the radio is in scan mode. A radio has a volume switch at the top. It is also the switch to turn on and off the radio. To turn on the radio, one must twist the knob so that it clicks on and then turn the knob further in order to increase the volume.

On May 4, 2012, Grievant was working in the trailer of the Facility while several inmates were involved in TABE testing. She was the only corrections officer working in the trailer. The trailer did not have a telephone or any other way for security staff to contact Grievant except for Grievant's radio. Grievant moved to an area outside of the camera's view while the inmates took their tests. The Lieutenant attempted to contact Grievant by radio but she had turned down her radio volume. He made six or eight attempts between 6:30 p.m. and 7:04 p.m. to contact Grievant but she did not respond. The Lieutenant became concerned for Grievant's safety. The Lieutenant did a radio check with another employee to make sure his radio was working and it was working. The Lieutenant told Officer M he could not contact Grievant and instructed Officer M to go to Grievant's location and determine her status. Officer M went to Grievant's location and asked her why she was not answering her radio. Grievant said there was a problem with the radio. The Lieutenant asked Officer M over the radio if Grievant was ok and he said she was. The Lieutenant told Officer M to leave his radio with Grievant and bring her radio to the Lieutenant. Officer M did so. The Lieutenant looked at Grievant's radio and observed that the volume was down and it was on channel one. He turned up the volume and made a radio check with another employee using Grievant's radio. The radio worked properly. The Lieutenant told Officer M to take Grievant's radio back to her and tell her to keep the radio on channel one and the volume up. Officer M took Grievant's radio back to her and retrieved his radio from Grievant. Officer M told Grievant of the Lieutenant's instruction.

At approximately 7:58 p.m., the Lieutenant attempted to contact Grievant by radio. Grievant did not respond. Grievant later left the trailer and was with other employees near the Lieutenant. The Lieutenant asked that Grievant's radio be handed to him. The Lieutenant looked at Grievant's radio and observed that it was in scan mode and the volume was turned down. The Lieutenant told Grievant that the radio was not working because it was in scan mode with the volume turned down. He told her that she had to have the radio on channel one with the volume turned up. He told her she should not have the radio inside her pocket but clipped on the side of her uniform.

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

### Group II Written Notice

“[F]ailure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.<sup>5</sup> The Agency contends Grievant failed to follow the Agency’s policy governing excessive tardiness. The Agency failed to present a copy of its policy defining excessive tardiness. Although some of the Agency’s witnesses attempted to define the policy, that evidence is not persuasive because there is no way for the Hearing Office to determine the accuracy of the policy interpretations made by the witnesses. The policy appears to be based on an accumulation of tardiness but how the threshold for discipline is calculated was not explained sufficiently during the hearing. The Group II Written Notice for failure to follow policy must be reversed.

### Group III Written Notice

“Refusal to obey an instruction that could result in a weakening of security” is a Group III offense. After discovering that Grievant had turned down the volume on her radio, the Lieutenant instructed Grievant to leave her radio on channel one and keep the volume up so she could hear radio communications. Grievant turned down her radio again thereby refusing to obey the Lieutenant’s instruction. She weakened security because her radio was the only means of contacting her in the event of an emergency or security threat. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an employee may be removed from employment. Accordingly, Grievant’s removal must be upheld.

Grievant argued that her radio was malfunctioning and it turned from channel one to scan mode. She argued that she kept the volume of her radio up as instructed except when another employee with a radio approached her. At that time, she turned down the volume in order to avoid creating a squelching sound because the two radios created interference for each other when next to each other. Grievant argued that her radio would malfunction by switching to scan mode without her pushing the button.

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

Grievant established that it was sometimes necessary to turn down the volume of her radio when her radio was placed next to the radio of another employee. Grievant demonstrated during the hearing how two radios will sound when placed near each other such as when two officers were speaking with one another in close conversation. Grievant also acknowledged her responsibility to restore the volume on her radio when she was not standing close to another officer with a radio. Grievant established that it was not uncommon for officers to set their radios on channel one but later discover that their radios were operating in scan mode. Grievant argued that after Officer M returned her radio with the volume up, she did not turn down the volume while in the trailer but she failed to hear the radio calls for her because her radio had inadvertently switched to scan mode. Grievant's argument fails because there was no material difference between a radio on channel one and a radio in scan mode. When a radio was in scan mode, it scanned for any radio traffic in the area. When the radio detected radio traffic, it stopped on that frequency and one could hear the communications on the radio. The Facility is located in a rural area without others using frequencies that would be detected by the radios. When radio traffic communications occurred, a radio on scan mode would detect that traffic and stop on channel one. In other words, if Grievant's radio had inadvertently switched to scan mode, scan mode would have detected radio traffic on channel one. When the Lieutenant called Grievant on the radio, Grievant would have heard the Lieutenant's call if the volume of her radio was turned up even if her radio was operating in scan mode. The most logical analysis of the evidence presented is that Grievant turned down her radio volume after being instructed to refrain from doing so.

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>6</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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.<sup>7</sup>

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<sup>6</sup> Va. Code § 2.2-3005.

<sup>7</sup> Grievant presented evidence regarding a medical condition that might have made her late for work. Since the Group II is being reversed, that evidence is no longer of significance with respect to mitigation.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice with removal 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

or, send by fax to (804) 371-7401, or e-mail.

3. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

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

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-

calendar day period has expired, or when requests for administrative 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>8</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>8</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.