

Issues: Group II Written Notice with Suspension (failure to follow instructions), and Management Actions (assignment of duties); Hearing Date: 12/06/12; Decision Issued: 12/11/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9963, 9964; 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: 9963 / 9964**

Hearing Date: December 6, 2012  
Decision Issued: December 11, 2012

### **PROCEDURAL HISTORY**

On September 18, 2012, Grievant filed a grievance alleging his workload was excessive. On September 18, 2012, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow a supervisor's instructions.

On September 24, 2012, 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 October 18, 2012, EDR issued Ruling No. 2013-3460 and 2013-3461 consolidating the September 18<sup>th</sup> and September 24<sup>th</sup> grievances for a single hearing. On November 13, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 6, 2012, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
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 Grievant's workload was excessive?

### **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 Probation and Parole employs Grievant as a Probation and Parole Officer at one of its facilities. He began working for the Agency in December 2008. The purpose of his position is:

Provides day to day supervision of offenders who require both intensive and regular probation/parole/post-release supervision. Assesses the criminogenic and treatment needs of the offender. Actively applies evidence based practices, including but not limited to effective communication skills, principles, and techniques to promote internal change within the offender. Collaborates with offender, district, and community resources to develop and manage individualized treatment plans. Makes home and community contacts in accordance with case needs and supervision plans. Prepares presentence investigations, sentencing guidelines, and other investigations and assigned in a timely

manner. Testifies and provides sentencing recommendations to the sentencing authority.<sup>1</sup>

No evidence of prior active disciplinary action was introduced during the hearing.

Grievant is one of approximately 18 probation and parole officers at the Facility. New cases are assigned to officers on a rotating basis. The caseload of officers depends in part on how quickly they process their cases. Officers can reduce their case load by closing out cases when an offender becomes incarcerated or reducing offenders to a lower level when appropriate.

Grievant reported to a Team Leader who was authorized by the Agency to review Grievant's cases and instruct him regarding how to perform his work duties. Each offender had a case file. The Team Leader would review the case file and determine if Grievant had completed all of the actions necessary to be taken. If the Team Leader noticed a task that remained undone, the Team Leader would enter that information into the Agency's database which would send Grievant an alert notifying of the task to perform. Grievant also reported to the Deputy Chief.

On August 20, 2010, the Former Team Leader reviewed the case regarding Ms. SH and observed that Grievant had not initiated a major violation report. The Former Team Leader instructed Grievant to initiate a major violation report. Grievant failed to do so. On August 24, 2012, the Deputy Chief reviewed the case file for Ms. SH and noticed that the major violation report had not been initiated and instructed Grievant to initiate a major violation report. As of September 18, 2012, Grievant had not initiated a major violation report.

On September 12, 2011, the Team Leader reviewed the case file for Ms. ML and indicated that a home contact was needed as soon as possible. On May 15, 2012, the Deputy Chief reviewed the case file and observed that a home contact had not been initiated by Grievant. The Deputy Chief instructed Grievant to initiate a home contact immediately. As of September 18, 2012, Grievant had not initiated a home contact for Ms. ML.

On June 3, 2012, the Team Leader asked Grievant to follow up on the charges of breaking and entering, grand larceny, and contributing to the delinquency of a minor which offender Mr. DR incurred on May 25, 2012. Grievant did not follow up on the charges. He had not seen the offender since April 20, 2012.

Offender PD was being held on a detainer issued by the U.S. Immigration and Customs Enforcement (ICE). The Chief Deputy conducted a case review on May 18, 2012 and instructed Grievant to determine the status of the detainer and whether or not the offender had been released. On August 24, 2012, the Deputy Chief conducted a

---

<sup>1</sup> Grievant Exhibit 1.

case review and observed that Grievant had not checked on the status of the detainer and whether or not the offender had been released.

Offender GD was being held on a detainer issued by ICE. The Chief Deputy conducted a case review on August 27, 2012 and determined that Grievant had not contacted ICE regarding the offender's status and instructed Grievant to do so. As of September 18, 2012, Grievant had not done so.

## 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>

"[F]ailure to follow a supervisor's instructions" is a Group II offense.<sup>5</sup> Grievant was instructed by a supervisor to initiate a major violation report for Ms. SH but he failed to do so. Grievant was instructed by a supervisor to make a home contact for Ms. ML but he failed to do so. Grievant was instructed by a supervisor to follow up regarding charges against Mr. DR but Grievant failed to do so. Grievant was instructed by a supervisor to determine the status of a detainer against Mr. PD but Grievant failed to do so. Grievant was instructed by a supervisor to determine the status of Mr. GD but Grievant failed to do so. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, Grievant's five workday suspension must be upheld.

Grievant filed a grievance alleging that his workload was excessive and he was unable to comply with all of the instructions of his supervisor's. Grievant established that the Agency was "short" one or two probation and parole officers and that his workload was increased because of the reduced staffing. Grievant is a non-exempt employee under the Fair Labor Standards Act and, thus, must be paid for overtime work which the Agency discouraged.

---

<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 has not met his burden of proof to establish that his workload was excessive. The Agency established that the workload among the approximately 18 officers was assigned on a rotating basis and that none of the other officers were in arrears in managing their case loads to the same extent Grievant was in arrears. It appears that Grievant's case load appeared excessive to him because he was less efficient than the other officers in processing his workload. Grievant's request for relief must be denied.

*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 Human Resource Management ...."<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.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a five workday suspension is **upheld**. Grievant's request for relief from an excessive workload is **denied**.

## 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 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

---

<sup>6</sup> Va. Code § 2.2-3005.

Richmond, VA 23219

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

2. 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 email 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>7</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.