

Issue: Group II Written Notice (failure to follow instructions/policy); Hearing Date: 05/26/16; Decision Issued: 05/31/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10791; 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: 10791**

Hearing Date: May 26, 2016

Decision Issued: May 31, 2016

#### **PROCEDURAL HISTORY**

On October 5, 2015, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On November 2, 2015, 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 April 4, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 26, 2016, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
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 Corrections employs Grievant as a Business Manager. She has been employed by the Agency for approximately 18 years. One of Grievant's duties included "management of surplus property."<sup>1</sup> No evidence of prior active disciplinary action was introduced during the hearing.

The Facility owned a finger print scanning machine and scanned the fingerprints of inmates at the Facility. The machine appeared as a cabinet with a table area on top. In the front of the cabinet was a door that could be opened. Inside the cabinet door was a computer tower with installed software and a hard drive memory. The computer contained inmate personal identifying information. The machine was placed in the Facility's warehouse.

Grievant was instructed to "surplus" the finger print scanning machine. She did not open the cabinet of the machine. Had she done so, she would have observed the computer tower. Grievant advertised the machine for sale on a website. On March 24, 2015, Mr. B purchased the machine for \$40.35. Mr. B received the machine on March 25, 2015 and examined the contents of the computer. He observed approximately 120 inmate charges, finger prints, social security numbers, and addresses still on the computer. He reported his findings to the Agency and an investigation began.

---

<sup>1</sup> Agency Exhibit 9.

## 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>

“Failure 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>

DOC Operating Procedure 310.1(IV)(8) required that organizational units were required to notify the Corrections Technology Surplus Unit (CTSU) in order to surplus information technology equipment.<sup>6</sup> The CTSU would ensure that computer equipment had been “scrubbed” of agency related data. Grievant was delegated responsibility to act on behalf of the organizational unit. Grievant failed to open the cabinet to the finger printing scanner to observe the computer tower inside. Grievant placed the machine which included information technology equipment on a website for sale. She did not contact the CTSU prior to doing so. Because Grievant failed to contact the CTSU, the CTSU did not have the opportunity to delete inmate information from the computer tower before it was released a Mr. B. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that she did not realize the machine contained information technology equipment. She did not know how the equipment worked. The evidence showed that Grievant should have opened the cabinet door to determine the contents inside. Had she done so, she would have observed the computer tower and realized the Agency’s information technology policies should have followed.

*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>7</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

---

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

<sup>6</sup> DOC Operating Procedure 260.2 (V)(F)(2)(a) defines information technology equipment to include “PC’s ... and any assets that contain memory capability.”

<sup>7</sup> Va. Code § 2.2-3005.

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 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 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.

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 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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>8</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.