Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 02/04/13; Decision Issued: 02/21/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10004; 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: 10004

Hearing Date: February 4, 2013
Decision Issued: February 21, 2013

PROCEDURAL HISTORY

On October 18, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On November 15, 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 she requested a hearing. On January 3, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 4, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Corrections employs Grievant as a Time Computation Auditor. The purpose of her position is:

Approves state inmate sentence computations that are accurate and in accordance with Virginia Statutes, case law, Attorney General opinions and Court & Legal policies and procedures. Conducts complete audits of inmate time computation records and authorizes the release of state inmates from custody based on the accurate interpretation all documents contained in the time computation record to include such documents as sentencing court orders, jail credits, etc., as well as the appropriate interpretation and application of Virginia Statutes related to sentence calculations, case law, Attorney General opinions, VDOC policies and Court & Legal policies and procedures.

Grievant had prior active disciplinary action. On June 11, 2010, she received a Group I Written Notice for unsatisfactory performance for an oversight that led to an inaccurate time computation for the offender.

On December 2, 2009, Grievant was counseled regarding an offender time computation error. The memorandum directed her to:

> Ensure that sentence and time computation memos accurately reflect the intent of the Court Order, when and where clarifications are necessary.

*** Provide additional research whenever concurrency is present in a time computation record.[1]

On March 31, 2010, Grievant was counseled regarding an offender time computation error that lead to the release of an offender past his correct release date. Grievant was advised that as, "Time Computation Auditor, it is your responsibility to provide over site and ensure that every time computation record that comes under your review is thoroughly checked for completeness and accuracy. Your actions caused this offender to be deprived of his liberty for 9 months. *** Any instances of inaccurate verifications in the future will result [in action] under the Standards of Conduct."[2]

On April 2, 2009, a local Circuit Court found an Offender guilty of Burglary and Grand Larceny. On June 23, 2009, the Court sentenced the Offender as follows:

> The Court SENTENCES the defendant to Incarceration with the Virginia Department of Corrections for the term of ten (10) years on the burglary charge and five (5) years on the grand larceny charge, concurrent, for a total sentence of ten (10) years.
>
> The Court SUSPENDS three (3) years of the ten (10) year sentence, leaving seven (7) years to serve.
>
> ***
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> SENTENCING SUMMARY:
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> TOTAL SENTENCE IMPOSED: Ten (10) years
> TOTAL SENTENCE TO SERVE: Seven (7) years
> TOTAL SUPERVSED PROBATION TERM: Balance of ten (10) years sentence.[3]

When Grievant reviewed the Court's June 23, 2009 order, she had questions about the Court's sentencing. She asked the Time Clerk to contact the Court. As a result of that contact, the Court realized it had made a mistake. On July 30, 2009, the Court entered an order:

> CORRECTION OF RECORD DUE TO CLERICAL ERROR
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> Pursuant to Va. Code Ann. § 8.01-428(B) (Rep. Vol. 2000), it appearing to the Court that the order previously entered in this matter on June 23, 2009, is in error in that it erroneously stated that "the Court suspends

[1] Agency Exhibit 5.

[2] Agency Exhibit 5.

[3] Hearing Officer Exhibit 1.

> three (3) years of the ten (10) year sentence, leaving seven (7) years to serve", and should have stated "the Court suspends seven (7) years of the ten (10) year sentence, leaving three (3) years to serve" and it appearing to the Court that the errors were clerical mistakes on the part of the person drafting the Order, and errors arising from oversight and inadvertence on the part of the Court;
>
> It is therefore ORDERED, that such order is hereby corrected to provide as stated above. All other terms and conditions of the aforesaid order shall remain in full force and effect.

On September 16, 2009, Grievant reviewed the Offender's record and approved the Offender's record with a total sentence of 5 years. She concluded that the Corrected Order's language of "the ten (10) year sentence" modified only the Burglary conviction and not the Grand Larceny conviction. Under Grievant's interpretation, the Offender had to serve three years under the Burglary conviction and five years under the Grand Larceny conviction. Since the convictions were to run concurrently, the Offender's total sentence was five years. In other words, Grievant interpreted the Corrected Order to reduce the Burglary conviction but not reduce the total sentence.

On October 12, 2012, the Agency received a letter from the Offender's sister questioning why he was being held in prison longer than his sentence. Grievant wrote a note to and asked the Time Clerk to call the court to obtain additional information. Her note stated, in part:

> Contact the court for clarification of the **total sentence**. It is 5 yrs to serve or 3 yrs (Emphasis added).

The Court confirmed that the total sentence was three years. This meant that the Offender had been imprisoned longer than the Court had ordered.

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."[4] 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."[5] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[6]

[4] Virginia Department of Corrections Operating Procedure 135.1(X)(A).

[5] Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

[6] Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

"[I]nadequate or unsatisfactory job performance" is a Group I offense.[7] In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant received training and had experience regarding how to determine total sentences for offenders. She failed to correctly interpret the Corrected Order thereby causing the Agency to retain in custody an offender who should have been released sooner. Grievant had been counseled to perform her job duties more carefully. Grievant's work performance was unsatisfactory to the Agency. The Agency has presented sufficient evidence to show that Grievant should receive a Group I Written Notice.[8] An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant has prior disciplinary action for unsatisfactory performance. Accordingly, the Group II Written Notice issued to Grievant must be upheld.

Grievant argued that she correctly calculated the sentence based on the Corrected Order. She argued that the Time Clerk who contacted the Court also interpreted the Corrected Order as affecting only the Burglary offense. This is argument fails. After the Agency received a letter from the Offender's sister, Grievant obtained information from the Court which confirmed that the Offender's total sentence was three years. The Offender should have been released after those three years passed. At a minimum, after receiving the Corrected Order, Grievant should have recognized that the Corrected Order could be constructed several ways and contacted the Court for clarification.

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 …."[9] 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

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[7] Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

[8] The Agency described Grievant's behavior as a failure to follow a supervisor's instruction. That instruction, however, was a general instruction to perform better her job duties. Such an instruction is too general to support a Group II offense standing alone. The Hearing Officer interprets the Written Notice to include an assertion that Grievant's work performance was unsatisfactory. Implicit in any allegation that an employee has acted contrary to the Standards of Conduct is an allegation that the employee's work performance was unsatisfactory. Every employee's work performance should include compliance with the Standards of Conduct.

[9] Va. Code § 2.2-3005.

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 14th St., 12th 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 14th St., 12th Floor
   Richmond, VA 23219

   or, send by e-mail to 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.[10]

[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

[10] Agencies must request and receive prior approval from EDR before filing a notice of appeal.