

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 03/27/13; Decision Issued: 04/04/13; Agency: VEC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10037; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 04/08/13; EDR Ruling No. 2013-3579 issued 04/23/13; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 04/08/13; DHRM Ruling issued 04/30/13; Outcome: AHO's decision affirmed.



# **COMMONWEALTH of VIRGINIA**

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

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

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

In re:

**Case Number: 10037**

Hearing Date: March 27, 2013

Decision Issued: April 4, 2013

#### **PROCEDURAL HISTORY**

On January 11, 2013, Grievant was issued a Group II Written Notice of disciplinary action with a one workday suspension for violating VEC's Internal Security and Ethics Policy.

On January 14, 2013, 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 March 5, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 27, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Counsel  
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 Virginia Employment Commission employs Grievant as a Hearing Officer in one of its offices. She has been employed by the Agency for approximately 23 years. The purpose of her position is:

To render monetary and non-monetary determinations concerning claimant's eligibility or qualification for unemployment benefits based on findings of fact from claimants and employers and application of law and regulations.<sup>1</sup>

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

Grievant had a unique identification and password enabling her to access the Agency's Virginia Automated Benefits System (VABS). This database contained information regarding claims filed by individuals seeking benefits from the Agency. The computer system also identified employees assigned responsibility for individual claims. Access to VABS was governed by Agency Policy Statement No. 1-95. On May 10, 2010, Grievant signed an Acknowledgment Certificate to certify that she had read the Agency's Policy Statement No. 1-95 Internal Security and Ethics Policy and that she agreed to abide by the policy.

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

Grievant's Son applied for unemployment compensation benefits with the Agency. He called his local office approximately three times and did not receive a return telephone call even though he left voice messages seeking assistance. The Son was frustrated that he was not receiving assistance from staff at his local VEC office so he called Grievant for assistance. She did not know the name of the Hearing Officer who might be able to assist her Son so she asked her son for his social security number. She logged into VABS. Grievant used the information contained in the VABS to determine that Mr. B was the Hearing Officer working on her Son's claim.

On November 1, 2012 at 10:16 a.m., Grievant sent an email to Mr. B stating:

Is there anyway you can do this claimant's decision today. [social security number]. He is in need of his medication.

On November 1, 2012 at 12:37 p.m., Mr. B replied:

Good afternoon. I am waiting for clarification on the B14 from<sup>2</sup> the physician's office but I'll get to it when they respond or the deadline has passed.

On November 1, 2012 at 1:32 p.m. Grievant wrote:

What is wrong with the B-14? I checked it over carefully.

On November 1, 2012 at 1:37 p.m. Grievant wrote:

You can call me. [Telephone number].

On November 1, 2012 at 2:18 p.m., Mr. B wrote:

The B14 states the claimant is totally unable to work from 8/30/12 to currently. At the same time the physician indicated that he is currently able to work and listed restrictions. This is a contradiction that I have called for clarification on.

On November 1, 2012 at 2:26 p.m. Grievant wrote:

Yea, but if you looked down [to] the bottom it states his restrictions. He is able and available for work for light duty. He cannot do heavy manual labor anymore and the doctor advised him to quit. They did not know how to fill out the form. When I saw the form the first time, I took him back to the doctor's office to correct it. They apologized for confusion. [Name] is my son. He does not live with me, and I know right now he is having

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<sup>2</sup> This form is entitled "Request for Physician's Certificate of Health." Mr. B had to review this form in order to adjudicate the Son's claim.

financial problems and [is] low on his pain medication. He is been trying to call the center, and has not been able to get thru. I told him I would see what I could do to get in touch with you.

On November 1, 2012 at 2:48 p.m. Mr. B wrote:

I did see the restrictions but it also states he is currently unable to work and I can not just ignore that. Even though he is your son and you state he is able to do light duty work if the physician's statement does not clearly support that I have no choice [but] to wait for clarification. In fact, I have just received what the physician's office terms as a "corrected form" (this new B14 is attached) that states he is unable to work and it is unknown at this time when he will be able to work. I know you are acting out of concern for your child and I understand that as I have two little ones but I must make a decision as I do in each case based upon the facts on record. Thanks.

On November 1, 2012 at 2:51 p.m. Grievant wrote:

Okay, that form is not correct. I will call the doctor's office myself. They told me he could work but no heavy lifting.<sup>3</sup>

Once Mr. B learned that Grievant was inquiring on behalf of her son, he notified his supervisor and the Son's case was assigned to another Hearing Officer.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>4</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Agency Policy Statement 1-95 governs Internal Security and Ethics Policy for the Virginia Employment Commission. Under Section III(B) of this policy, "[i]t is a responsibility of all employees to enforce good security practices, use proper standards of conduct, and provide proper safe guards for agency information and assets." Section III(D) provides that it is a violation of this policy for any employee to:

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<sup>3</sup> Agency Exhibit 6.

<sup>4</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

6) Obtain information through the computer terminal or other official means for any purpose other than for official business \*\*\*

19) Knowingly participate in taking, processing, adjudicating, or accepting a claim from a spouse; child; parent; grandparent; sister; brother; aunt; uncle; niece; nephew; first cousin; in-law; step-relative; any other person related to the employee by blood, marriage, or adoption, or any individual residing in the employee's household. If only one employee is in the office, the claim may be accepted, but the completed forms, supporting documents, and note of explanation must then be forwarded to the Chief of Benefits for processing.

Failure to follow policy is a Group II offense.<sup>5</sup> Grievant acted contrary to Agency Policy Statement 1-95 because she obtained information through the VABS about the Hearing Officer assigned to her Son's claim. The Son's claim was not filed with Grievant or assigned to Grievant by the Agency. It was not part of her job responsibilities. She obtained information through VABS for a purpose other than for official business. Grievant also acted contrary to Agency Policy Statement 1-95 because she knowingly participated in the processing and attempted to influence the outcome of her Son's claim. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant's one workday suspension must be upheld.

Grievant justifies her actions by arguing that she treated her Son's claim the same way she would have treated the claim of any other person seeking assistance from the Agency. This argument fails. The Agency's Policy specifically requires employees to treat family members differently from non-family members. Grievant's claim that she treated her Son the same as any other person is consistent with the Agency's allegation that she failed to comply with policy.

*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

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<sup>5</sup> See, Attachment A, DHRM Policy 1.60.

<sup>6</sup> *Va. Code § 2.2-3005.*

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.

Grievant argued that Acting Chief of Benefits issued the written notice for an improper purpose, namely, that the Acting Chief of Benefits did not like Grievant and did not like the fact that Grievant was telecommuting. Even if the Hearing Officer were to assume those allegations a true, there is insufficient evidence to show that the Acting Chief of Benefits acted against Grievant based on these assumed facts. The most credible evidence is that the Acting Chief of Benefits issued the Written Notice because she believed Grievant engaged in conduct contrary to the Standard of Conduct.

Grievant argued that the Agency inconsistently applied disciplinary action because the Director of Unemployment participated in a claim involving a relative and he was not disciplined by the Agency. The evidence showed, however, that the Director of Unemployment complied with the Agency's policy. He did not access the VABS to find out the name of the Hearing Officer responsible for the claim. He asked another employee, Ms. S, to identify the information and continue processing the claim. Grievant also argued that another employee, Ms. W, engaged in similar behavior to Grievant's behavior but was not disciplined. The evidence showed that Ms. W was disciplined by the Agency and received a higher level of discipline than did Grievant. In light of the standard set forth in the Rules, 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 suspension 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>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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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