

Issue: Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 03/27/14; Decision Issued: 04/07/14; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10301; 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: 10301**

Hearing Date: March 27, 2014  
Decision Issued: April 7, 2014

**PROCEDURAL HISTORY**

On February 4, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. Grievant was removed from employment based on the accumulation of disciplinary action.

On February 11, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 6, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 27, 2014, 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 Social Services employed Grievant as a Support Enforcement Specialist. The purpose of her position was:

Serves as program agent for assigned child support cases. Duties may include, but not limited to locating non-custodial parents; establishing paternity; determining and assessing child support obligations, and health care coverage; and ensuring compliance of child and/or medical support orders through a number of administrative and judicial enforcement actions. Manages cases using administrative processes when possible, provides testimony in court proceedings when required.<sup>1</sup>

Grievant had prior active disciplinary action. On May 20, 2011, Grievant received a Group II Written Notice with suspension for unauthorized and inappropriate use of email on personal business during work hours; conflict of interest.

Ms. H was a client of the Agency. She was the Custodial Parent who had left the Other State to escape the conflict caused by the Wife of the Non-Custodial Parent. She faced numerous legal disputes with the Non-Custodial Parent over child support. When she approached the Agency four or five years ago, she believed she had been unfairly and poorly treated in the Other State. Grievant became her case worker. Grievant provided numerous, consistent, and competent services to Ms. H. Ms. H spent many

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<sup>1</sup> Agency Exhibit 3.

hours working with Grievant to pursue her dispute in court. This enabled Ms. H to win several legal disputes in the Other State and in Virginia. Ms. H was grateful for the quality of service she received from Grievant.

The Agency routinely reassigned cases. The Agency reassigned Ms. H's case from Grievant to another case worker, Mr. R. For several years, Ms. H did not need services from the Agency.

At some point in the Fall of 2013, Ms. H called the Agency asking for assistance from Grievant. Grievant spoke with Ms. H and told Ms. H that Grievant was no longer her assigned worker and that Ms. R was now her case worker. Ms. H updated Grievant regarding how Ms. H's children were doing. Ms. H said that one of her children was driving and that Grievant could look at the pictures of Ms. H's children that were on a Social Media website. Ms. H was disappointed that Grievant was no longer her case worker. Ms. H invited Grievant to lunch but Grievant declined. Ms. H owned horses and rented a stable. Ms. H told Grievant that people stop by the "barn" all the time and that Grievant was welcome to go there.

Grievant had a Social Media web page that she kept private. She sent Ms. H a "friend" invitation<sup>2</sup> Ms. H accepted the invitation and each appeared in the other's list of friends. Grievant did not refer to her employer on her Social Media web page.

Grievant took her child to the Ms. H's stable and had a picture taken with a horse at the stable. Grievant posted the picture to her Social Media web page and shared it with Ms. H.

On October 31, 2013, the Agency reassigned Ms. H's case to Grievant. Ms. H learned that Grievant was once again her case worker on December 18, 2013 when she called the Agency for services.

Ms. H believed that access to her Social Media page was restricted and that the Wife could not view its content. The Wife, however, was able to gain access to the information on Ms. H's Social Media page. The Wife looked at Ms. H's Social Media page and observed a picture of a little girl and a horse. The picture referenced Grievant's name. The Wife recognized Grievant's name from the court documents she reviewed as the Non-Custodial Parent litigated child support issues with Ms. H. The Wife blamed Grievant for Ms. H's success and looked favorably on the opportunity to harm Grievant's career.

On January 23, 2014, Grievant received a telephone call from, Ms. H, the Custodial Parent. Ms. H said that she had received a text from the Wife of the Non-Custodial Parent saying that the Wife was going to get Grievant fired for having a

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<sup>2</sup> It may have been the case that Ms. H sent the first friendship request. Who sent the first request is not significant. What is significant is that Grievant's accepted Ms. H's request.

conflict of interest and for being friends with Ms. H on a social media website.<sup>3</sup> Grievant asked Ms. H for her telephone number. Grievant contacted the Supervisor and told the Supervisor about her conversation with Ms. H.

On January 23, 2014, the Agency removed Ms. H from Grievant's case load. Grievant removed Ms. H from her friend's list.

## **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."

Chapter 14 of the Agency's Child Support Enforcement Manual addresses conflicts of interest. Section I provides:

A conflict of interest is defined as a situation that has the potential to undermine the impartiality of a person because of the possibility of a clash between the person's self-interest and professional interest or public interest. Having a conflict of interest does not imply that illegal or unethical behavior has occurred. A conflict of interest is a set of circumstances that creates a risk that a person's professional judgment or action regarding professional duties will be compromised due to a personal relationship.

DCSE is an organization that operates to serve the public interest and the conflict of interest policy is designed to prevent any DCSE employee from breaching the public trust. DCSE employees must obey the letter and the spirit of the conflict of interest policy. Employees must be on guard against real or potential conflicts as they perform their job duties. \*\*\*

When a reasonable person would conclude that an employee's personal relationship with a principal (CP, NCP or child) could overcome his or her impartiality, there is an appearance of impropriety. The potential conflict of interest cases could include those of DCSE employee's aunt, uncle, cousin, niece, nephew, step-parent, step-child, parent-in-law, close friend,

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<sup>3</sup> Ms. H notified Grievant because Ms. H thought the Wife was "insane" and Ms. H was concerned for Grievant's safety.

<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.

or any other relationship that could be seen as compromising a DCSE employee's integrity in performing official duties. \*\*\*

Maintaining confidentiality of records and obeying the conflict of interest avoidance requirements are important parts of each DCSE employee's responsibilities. Any action that breaches this responsibility, including non-compliance with these procedures, is grounds for disciplinary action under the Commonwealth of Virginia's Standards of Conduct and Performance. Should the fact and circumstances warrant it, discipline for a first-time violation may result in termination of employment and potential criminal prosecution.<sup>5</sup>

Failure to comply with policy is a Group II offense.<sup>6</sup> Grievant developed a friendship with Ms. H. Grievant sent an invitation to become "friends" with Ms. H so that they could share access to each other's personal Social Media web pages. Grievant viewed pictures of Ms. H's children. Grievant accepted Ms. H's invitation to visit her stable. Grievant took a picture of her child with a horse at the stable and posted it on her Social Media web page for Ms. H to see. All of these activities are consistent with a personal friendship. None of the activities could be construed as part of Grievant's job duties.

By developing a friendship with Ms. H, Grievant created the "appearance of impropriety" because a reasonable person would conclude Grievant's personal relationship with Ms. H could overcome her impartiality. Indeed, the Wife observed the online interaction between Ms. H and Grievant and concluded Grievant was not impartial in her interaction with Ms. H. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with policy.

Grievant had a prior active Group II Written Notice. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that she did not have a friendship with Ms. H. The evidence showed that Grievant and Ms. H had a non-professional relationship that included actions consistent with individuals in a friendship. The evidence is sufficient for the Hearing Officer to conclude that Grievant engaged in an impermissible friendship with Ms. H.

*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

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<sup>5</sup> Agency Exhibit 4.

<sup>6</sup> See, Attachment A, DHRM Policy 1.60.

Management ....<sup>7</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 is **upheld**. Grievant's removal based on the accumulation 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., 1<sup>st</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

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<sup>7</sup> Va. Code § 2.2-3005.

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].

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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.