

Issues: Group II Written Notice (failure to follow policy), and Termination due to accumulation; Hearing Date: 06/10/15; Decision Issued: 06/16/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10607; 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: 10607

Hearing Date: June 10, 2015

Decision Issued: June 16, 2015

PROCEDURAL HISTORY

On March 25, 2015, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. He was removed from employment effective March 25, 2015 based on the accumulation of disciplinary action.

On April 21, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 13, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 10, 2015, 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?

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 employed Grievant as a Probation and Parole Officer at one of its facilities. The purpose of Grievant's position was:

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 as assigned in a timely manner. Testifies and provides sentencing recommendations to the sentencing authority.¹

Grievant had prior active disciplinary action. On September 18, 2012, Grievant received a Group II Written Notice with a five workday suspension for failure to follow policy.

Agency supervisors regularly review the cases of probation officers. When they review a case and observe that some task should be completed, the supervisors

¹ Agency Exhibit 3.

instruct the probation officer to complete the task by entering the instruction into the VACORIS database. Probation officers are notified of a supervisor's instruction when they access the database.

Grievant was one of approximately 20 probation officers. He began reporting to the Supervisor in October 2014. His caseload was approximately 60 to 70 offenders.

Grievant was responsible for supervising Offender NJ. Grievant had not seen Offender NJ since August 20, 2014.

Grievant was responsible for supervising Offender RW. Grievant saw this offender on August 20, 2014. The Former Supervisor reviewed Grievant's case file on September 22, 2014 and observed that Offender RW had tested positive for opiates but Grievant had never confronted the offender regarding the drug test. The Former Supervisor informed Grievant that he needed to follow up on the case. Grievant took no action until March 17, 2015. Since the case was in a medium level of supervision, a case plan should have been submitted within 60 days of supervision. No case plan was submitted by Grievant for the offender.

Grievant was responsible for supervising Offender MC. Grievant met with the offender on September 15, 2014. The Former Supervisor conducted a case review on September 22, 2014 and recognized that the offender had submitted several urine screens that tested positive for opiates and that the subject had admitted to using heroin. The Former Supervisor informed Grievant that the subject needed to be referred to treatment as soon as possible and the case was in need of immediate attention. The DCPO conducted a case review on February 24, 2015 and found that Grievant had not had any contact with the Offender. The DCPO instructed Grievant to have the subject report to the district office immediately. As of March 17, 2015, there had been no contact with the Offender. Offender MC required a medium level of supervision and, thus, Grievant should have developed a case plan for Offender MC. Grievant did not develop a case plan for this offender.

Grievant was responsible for supervising Offender EV. Grievant saw the offender on September 29, 2014. The case was a medium level supervision case which required a case plan. Grievant did not develop a case plan for Offender EV. Offender EV had a charge of assault pending in the local Juvenile and Domestic Relations Court. Grievant did not follow up on that charge. Offender EV's whereabouts were unknown.

Grievant was responsible for supervising Offender TI. Grievant last saw the offender on October 24, 2014. The case plan for the offender stated that Grievant would see the Offender at least every 90 days. The DCPO conducted a record check on March 11, 2015 and learned that the Offender had two outstanding warrants for trespassing in the local jurisdiction.

Grievant was responsible for supervising Offender CP. The Offender was in a local Circuit Court on January 6, 2015 concerning a probation violation hearing. The

matter was taken under advisement by the Court until July 21, 2015. Log notes show that the local Commonwealth's Attorney had requested that the Probation Officer have monthly face-to-face contact with the Offender and monthly urine screens. The Offender was last seen by Grievant on January 29, 2015. The Offender tested positive for opiates on February 4, 2014 and March 3, 2015. Grievant did not confront the Offender about the positive screens or notify the court of his positive drug screens.

The Agency typically assigned responsibility for offenders on a rotating basis. Grievant's caseload was not excessive when compared to the caseloads of other employees who were meeting their performance standards.

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

DOC Operating Procedure 920.2 governs Supervision of Offenders in the Community. Under this policy, offenders are to be contacted by the probation officer based on their level of supervision. For Level Medium offenders, Section IV(C)(3) provides:

a. Contacts

- I. An initial interview will be conducted within 10 working days upon receiving notification that the offender has been placed on community supervision.
- II. A home visit will be conducted within the first 90 days of case assignment; can be satisfied by a home visit to the same residence for a Home Plan or Transfer Investigation within 90 days prior to case assignment.
- III. The frequency and type of follow-up contacts, including personal and community contacts and home and field visits, should be established and driven by the Case Plan.
- IV. All contact shall be documented in VACORIS Case Notes.

² Virginia Department of Corrections Operating Procedure 135.1(V)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

- d. Case Plan – drives the course of supervision.
 - I. Shall be developed and revised in VACORIS.
 - II. Identifies offenders’ goals during the period of supervision, outlines tasks necessary to achieve those goals, and establishes proportionate incentives for compliance and sanctions for non-compliance.
 - III. Should be based on offenders’ input, the identification and prioritization of criminogenic needs, and appropriate community resources to meet those needs.
 - IV. Offender goals and tasks should be reviewed at each contact and revised as needed to address offenders’ progress or delinquency in completing the outlined goals and tasks. The statuses of goals and tasks should be updated in VACORIS Case Plan when they are completed either successfully or unsuccessfully. ***

Section (W)(3)(b) provides:

Arrest Referrals – Any offender on Level Medium or Level Low supervision, who is arrested on new charges and makes bond, should be considered for placement in Level Elevated supervision.

DOC Operating Procedure 920.1 governs Initial Case Openings. Section IV(B)(t) provides:

Develop and submit a Case Plan in VACORIS for Supervision Level High, Elevated, and Medium cases within 60 calendar days. A Case Plan is not required for offenders placed in Supervision Level Low at Case Opening.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁵ Grievant failed to comply with Agency policy regarding case plans for offenders. Grievant should have submitted a Case Plan for Offender RW, Offender MC, and Offender EV within 60 days of beginning supervision. Grievant failed to do so. Grievant failed to follow the Former Supervisor’s instructions. On September 22, 2014 the Former Supervisor instructed Grievant to follow up with respect to Offender RW. Grievant took no action until March 17, 2015. On September 22, 2014, the Former Supervisor instructed Grievant to refer Offender MC for treatment. Grievant failed to do so. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant has prior active disciplinary action consisting of a Group II Written Notice. Upon the accumulation of a second Group II Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

Grievant argued that his actions were really performance issues and that did not rise to the level of a Group II offense. The evidence showed that the prior Group II Written Notice was for behavior similar to the behavior giving rise to the Group II Written Notice before the Hearing Officer. Grievant acted contrary to Agency policy thereby justifying the issuance of a Group II Written Notice with removal.

Grievant argued that he was denied procedural due process by the Agency. The adequacy of due process is measured by the actions of a State agency as well as the hearing process. In this case, Grievant was given a detailed Written Notice specifying the allegations against him. He had the opportunity to obtain documents from the Agency by requesting an order for the production of documents. He had the opportunity to present documents and testimony at the hearing to establish his defenses. He was able to confront the Agency's witnesses. Grievant received adequate procedural due process.

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"⁶ 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.

Grievant argued that the Supervisor gave Grievant "the silent treatment" by refusing to speak to him thereby creating an unpleasant workplace that affected his work performance. Grievant argued that when he brought his concerns to the attention of Agency Managers, his concerns went un-addressed. The evidence showed that after the Regional Manager learned of Grievant's concerns, she reported his complaint to the Regional Administrator. She coached Grievant regarding available resources within the Agency and referred him to the employee advocate. The Regional Administrator investigated Grievant's complaint and concluded it was unfounded. The Regional Administrator concluded that the Supervisor was "not a talkative guy" and that the Supervisor provided feedback to Grievant after reviewing Grievant's cases through the VACORIS system. The Supervisor testified that he did not need to have regular meetings with Grievant but he met with Grievant at least three times between October 2014 and March 2015. The Supervisor denied giving Grievant "the silent treatment." Grievant did not testify to prove his perception of his interaction with the Supervisor. Grievant's assertion is not supported by the evidence.

⁶ *Va. Code § 2.2-3005.*

Grievant argued that he sought to be transferred to another of the Agency's offices but was denied the opportunity to do so. The evidence showed that the Agency's practice was to permit the Chief of each office to determine whether he or she would accept an employee requesting a transfer to that office. In this case, Grievant was not transferred because he was not needed at another office. Grievant's transfer was not denied for any improper purpose.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁷ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁸

Grievant argued that he engaged in protected activities including making numerous complaints of discrimination, and hostile and abusive work conditions. Grievant suffered an adverse employment action because he received disciplinary action. Grievant has not established a connection between his protected activities and the disciplinary action. The Agency took disciplinary action because it believed Grievant engaged in behavior giving rise to disciplinary action. The Agency did not take disciplinary action against Grievant as a pretext for discrimination or retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

⁷ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁸ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.⁹

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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