

Issue: Group II Written Notice with suspension (failure to follow instructions/policy);  
Hearing Date: 11/15/13; Decision Issued: 11/26/13; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq.; Case No.10194; 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: 10194**

Hearing Date: November 15, 2013  
Decision Issued: November 26, 2013

**PROCEDURAL HISTORY**

On July 31, 2013, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow a supervisor's instructions or written policy.

On August 20, 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 October 14, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 15, 2013, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Representative  
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 Virginia Department of Corrections employs Grievant as a Probation Officer at one of its facilities. Grievant's duties include supervising offenders who have been released to live in their communities. Grievant must travel to various locations away from her office in order to meet with offenders. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant is a non-exempt employee under the Fair Labor Standards Act. She must be paid for overtime worked.

On January 17, 2013, Grievant attended a staffing meeting. During that meeting, the Chief instructed Grievant and the other staff that:

The District Manual has been updated. [Name] will send it out. Make sure you read it. Included in this manual are the following:

- A. You must receive prior approval if you are working past eight (8) hours.
- B. You must get with your supervisor if you will be working over. If they are unable to stay [then] they will have to get with another supervisor who will be working in order for you to stay.

C. Let your supervisor know if you are in the field ....<sup>1</sup>

Grievant began working at approximately 8 a.m. on Friday, July 26, 2013. She left her office to meet with offenders. At approximately 5:15 p.m., the Supervisor called the Deputy Director to report that Grievant had not returned to the office from performing field work. The Deputy Director asked the Supervisor if Grievant had left a field itinerary. The Supervisor determined that Grievant had not left a field itinerary. The Deputy Director went to the office at approximately 6 p.m. She used an office telephone to call Grievant's cell phone. Grievant did not answer the call but the Deputy Director did not leave a voice message. The Deputy Director remained in the office until 6:50 p.m. She placed a note on Grievant's door before leaving the building. Grievant did not return to the office prior to that time. Grievant later sent the Deputy Director an email saying she had returned to the office at 7:15 p.m. and had not completed a field itinerary.

### 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> On January 17, 2013, one of Grievant's supervisors, the Chief, instructed Grievant not to work more than eight hours in a day without obtaining prior approval. On July 26, 2013, Grievant worked from 8 a.m. until 7:15 p.m., a period of time exceeding eight hours. Grievant did not obtain permission to work more than eight hours thereby acting contrary to the Chief's instruction. 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 suspension of five workdays must be upheld.

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

<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).

Grievant argued that she had worked more than eight hours in the past, written that information on her time sheets, and the time sheets were signed by her supervisor without comment. This evidence is insufficient to show that the Agency waived enforcement of its rule. The Chief imposed the instruction. It is not clear the Chief was aware that Grievant was working more than eight hours without permission. The Chief Deputy testified that on several occasions Grievant had asked permission from the Chief Deputy to work more than eight hours. The evidence presented shows that Grievant was aware of her obligation to obtain permission to work in excess of eight hours in a day.

The Agency alleged Grievant should be disciplined for failing to answer the Deputy Director's telephone call. The Agency has not met its burden of proof with respect to this allegation. The Agency's policy provided that cell phones were "to be on at all times." Grievant's cell phone was on when the Deputy Director called. Grievant claimed she did not answer the call because she did not hear the telephone ring. Even if Grievant heard the telephone ring and chose to disregard the call, the policy does not say that an employee must answer the call. The employee is only expected to have the telephone on at all times.

The Agency alleged that Grievant should be disciplined for failing to complete a field itinerary. Insufficient evidence was presented to show that Grievant was given a specific instruction to complete a field itinerary.

Although the Agency has not presented sufficient evidence to support two of its three allegations, the Agency's single allegation is sufficient to support the Group II Written Notice.

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 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.

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<sup>6</sup> Va. Code § 2.2-3005.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a five workday 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.