Issue: Group II with suspension (failure to follow instructions); Hearing Date: 06/13/12; Decision Issued: 07/6/12; Agency: DFS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9835; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9835

Hearing Date: June 13, 2012
Decision Issued: July 6, 2012

PROCEDURAL HISTORY

On March 13, 2012, Grievant was issued a Group II Written Notice of disciplinary action with a two workday suspension for failure to follow a supervisor's instructions.

On April 6, 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 May 21, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 13, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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 Department of Forensic Science employs Grievant as a Forensic Scientist at one of its facilities. Her duties include performing forensic science analyses of items of potential evidence submitted to the Agency by law enforcement agencies.

In June 2009, the US Supreme Court issued a decision holding that a criminal defendant had the right to confront forensic science experts whose conclusions were reported in Certificates of Analysis as well as individuals involved in forming the "chain of custody" for the evidence. As a result of the Supreme Court's decision, the number of subpoenas issued for the Agency's employees increased significantly. In some cases, several Agency employees were subpoenaed to different courts on the same days creating a conflict. The Agency adopted a practice for employees receiving more than one subpoena requiring attendance on a particular day that the employee was to attend the court where the first subpoena was issued and the notify the other court or courts that the employee was unavailable. The Agency attempted to clarify this practice. The Laboratory Director sent the supervisors reporting to him an email asking them to inform their staff that:

> If the examiner is unable to speak with someone and document the communication that they have been released … or receive an email with confirmation from the individual who has requested the subpoena … that the examiner has been released, THE EXAMINER MUST issue a written notification to the clerk of the courts and the person who requested the subpoena … notifying them that the examiner is unavailable.

On August 29, 2011, the Supervisor forwarded the Laboratory Director's email and added:

> Please read [the Laboratory Director's] email below very carefully and implement this new policy effective today.
>
> Important points and clarification:
>
> (1) Each examiner may handle their own subpoenas. However, [Ms. L] will be assisting with sending out written notices (see template attached) for those of you who would like assistance. For now, place the subpoenas in [Ms. L's] box if you would like assistance.
>
> (2) If the examiner chooses to contact the attorney directly, the correspondence via telephone conversation or email from attorney's office must state "you are released", and not "I will forward this message to the attorney."
>
> (3) Call [Agency Counsel] if the CA will not release you from the second or third subpoena.
>
> (4) Template letters may be issued via fax or email.
>
> (5) You may place the original subpoena with noted correspondents in the case file or keep it for your own records.

Grievant received the email and replied as follows:

> I have a couple [of] suggestions that may make this new policy less time-consuming:
>
> (1) Could we create a file on the intranet that contains Commonwealth attorneys email addresses, either by requesting it in a memo or by having examiners add to some type of spreadsheet the email addresses they currently have (or both). I think having their email addresses will make it easier to get a hold of the CA and document our release, and also make it easier to send them our [a]void dates.
>
> (2) Would it be possible to draft a memo to the CA's letting them know about our new policy so they will understand the importance of being released/excuse from court.[1]

[1] Agency Exhibit 4.

On February 2, 2012, the Agency was served with a witness subpoena requiring that Grievant appear in the local Circuit Court on February 23, 2012 at 9:15 a.m. to testify on behalf of the Commonwealth in a Bench Trial in a criminal case. The Agency entered information regarding the subpoena into its database and that information was sent to Grievant.

On February 9, 2012, the Agency was served with a subpoena requiring that Grievant appear in the local General District Court on February 23, 2012 at 9 a.m. The Agency entered information regarding the subpoena into its database and that information was sent to Grievant.

On February 21, 2012 at 12:18 p.m., Grievant sent an email to the Victim Witness program of the local General District Court stating:

> [Ms. M] and I are unavailable for the above case set for February 23. Per department policy, we are to obtain either written (an email will suffice) or verbal acknowledgement of this conflict from the attorney, and to ask you to please release us. Could you please pass this email on to the attorney handling the case? Please call or email with any questions. Thank you.

On February 21, 2012 at 4:15 p.m., an employee with the Victim Witness program replied to Grievant's email:

> Your email was forwarded to Assistant Commonwealth's Attorney [Mr. J]. He can be reached at [telephone number]. Thank you.[2]

Grievant did not call the Assistant Commonwealth's Attorney, Mr. J.

On February 22, 2012, Grievant received a telephone call informing her that it was no longer necessary for her to appear in the local Circuit Court on February 23, 2012. This meant that Grievant no longer had a conflict with respect to appearing in the General District Court.

Grievant did not appear on February 23, 2012 at 9 a.m. in the local General District Court. In the morning of February 23, 2012, a woman identifying herself as an Assistant Commonwealth's Attorney with the General District Court called Grievant and asked why Grievant and Ms. M were not present in court. Grievant told her that she had sent an email to the Victim Witness coordinator and had received an email reply saying that Grievant's email had been forwarded to Mr. J. The Assistant Commonwealth's Attorney said that Mr. J was not the attorney handling the case but rather she was handling the case and that she had not received any message stating that Grievant and Ms. M were not available.

[2] Agency Exhibit 8.

On February 23, 2012, the Clerk of the local General District Court issued a Show Cause summons to Grievant to appear before the local General District Court to show cause, if any, why she should not, pursuant to Va. Code § 18.2–456 be imprisoned, fined, or otherwise punished for failure to appear in the court on February 23, 2012 at 9 a.m. The hearing date for the Show Cause Summons was April 13, 2012. Grievant appeared on that date in the General District Court. Grievant was not sanctioned by the Court; the matter against Grievant was dismissed

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."[3] 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."

Failure to follow a supervisor's instruction is a Group II offense.[4] Grievant's Supervisor instructed Grievant to resolve subpoena conflicts by obtaining an email from the attorney's office stating "you are released" and not one saying "I will forward this message to the attorney." Two days before the court date, Grievant sent an email to the Victim Witness coordinator indicating that she would not be present in court on February 23, 2012 because of a subpoena she received requiring her attendance in another court. Grievant received a reply email indicating that her email had been forwarded to an Assistant Commonwealth's Attorney. The response Grievant received was similar to the response the Supervisor specifically identified as unacceptable, namely, "I will forward this message to the attorney." Once Grievant was notified that she did not need to appear in the Circuit Court pursuant to the first subpoena, she could have appeared in the General District Court on February 23, 2012. Grievant failed to comply with the Supervisor's instructions thereby justifying the Agency's 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, the Agency's suspension for two workdays must be upheld.

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 Employment Dispute Resolution…."[5] 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

[3] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

[4] See, Attachment A, DHRM Policy 1.60.

[5] Va. Code § 2.2-3005.

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 contends the disciplinary action should be mitigated because the Agency inconsistently applied disciplinary action. When an employee claims that an agency has inconsistently applied disciplinary action, the question becomes whether the agency improperly singled out the employee for disciplinary action. Grievant argued that, Ms. D, a Senior Forensic Scientist, failed to comply with a witness subpoena and failed to comply with the Supervisor's instructions, yet she did not receive disciplinary action. The evidence showed that in November 2011, Ms. D had received subpoenas requiring her to be in two courts on the same day. She called the Commonwealth Attorney's Office who referred her to the Victim Witness office. Ms. D told a woman with the Victim Witness office that she was not available on the court date. The woman asked Ms. D for her avoid dates. The woman sent Ms. D an email asking why she was not available. Ms. D replied that she could not attend because she was scheduled to appear in another court. Ms. D did not obtain a statement from the attorney indicating she was released from her duty to appear. On the day of the scheduled hearing, Ms. D reported to the court that sent her the first subpoena. When she returned to her office, she had a message on her telephone voice mail from a caller saying that the judge wanted to show cause and that the caller tried to avoid having a show cause action taken against Ms. D. No show cause summons was issued. Ms. D informed the Agency of the call, but the Agency took no disciplinary action against her.

The facts in Ms. D's case and Grievant's case are sufficiently different to justify the Agency's decisions to issue Grievant but not Ms. D a Written Notice. First, Ms. D made a greater effort to contact the attorney to seek a release. Ms. D called the Commonwealth's Attorney and was then referred to the Victim Witness coordinator. Ms. D spoke with the Victim Witness coordinator, provided avoid dates, and also sent an email explaining why she could not be present on the scheduled court date. Grievant sent one email and make no follow up attempts to obtain a release. Second, Ms. D attended court in accordance with the first subpoena she received. Grievant had been released from her appearance in the Circuit Court and could have appeared in the General District Court on February 23, 2012. Instead, she worked in her office. Ms. D had an excuse for not reporting to court; Grievant had no excuse for failing to report to the General District Court. Third, the court did not issue a show cause summons against Ms. D. Grievant was served with a show cause summons by the General District Court. This suggests the impact and level of frustration by the court was greater in Grievant's case than in Ms. D's case. The Agency has presented sufficient evidence to show that it did not single out Grievant for disciplinary action. It established a reasonable basis to distinguish between Grievant and Ms. D. 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 a two 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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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 Street, 12th Floor
   Richmond, VA 23219

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 give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.[6]

[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

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