Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 06/13/12; Decision Issued: 07/6/12; Agency: DFS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9836; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9836

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

PROCEDURAL HISTORY

On March 14, 2012, Grievant was issued a Group II Written Notice of disciplinary action 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 Lab Specialist III at one of its facilities. She began working for the Agency in 1997. One of her duties includes accounting for and handling potential evidence submitted to the Agency by law enforcement agencies for examination by Forensic Scientists. No evidence of prior active disciplinary action was introduced during the hearing.

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 are 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 to Grievant 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.

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.

In December 2011, Grievant scheduled an appointment with her Medical Doctor for February 23, 2012 and 8:30 a.m. She would not have been able to attend her medical appointment if she complied with the subpoena. She knew that it would be difficult for her to reschedule her medical appointment and possibly jeopardize her health if she complied with a subpoena. Grievant did not have as much experience with obtaining releases from subpoenas as did the Forensic Scientist. The Forensic Scientist also received a subpoena requiring that she appear in the local General District Court on February 23, 2012 at 9 a.m. Grievant spoke with the Forensic Scientist. The Forensic Scientist told Grievant that she would contact the local General District Court and obtain releases for both of them, as the Forensic Scientist had

received a subpoena requiring that she appear in a local Circuit Court on that same date. On several occasions, Grievant asked the Forensic Scientist if she had made telephone calls necessary to attain Grievant's release from the subpoena. The Forensic Scientist assured Grievant that she would take care of the matter.

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

> [Grievant] 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 e-mail with any questions. Thank you.

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

> Your email was forwarded to Assistant Commonwealth's Attorney [Mr. J]. He can be reached at [telephone number]. Thank you.[1]

The Forensic Scientist did not call the Assistant Commonwealth's Attorney, Mr. J.

On February 22, 2012, the Forensic Scientist 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 attended her medical appointment on February 23, 2012. She did not appear on February 23, 2012 at 9 a.m. in the 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 the Forensic Scientist and asked why the Forensic Scientist and Grievant were not present in court. The Forensic Scientist told her that she had sent an email to the Victim Witness coordinator and had received an email reply saying that the Forensic Scientist's email had been forwarded to Mr. J. The female 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 the Forensic Scientist and Grievant were not available.

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

[1] Agency Exhibit 8.

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.

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."[2] 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."

"[U]nsatisfactory work performance" is a Group I offense.[3] Grievant received a subpoena as part of her employment with the Agency. Grievant knew she was obligated to comply with the subpoena[4] or take action to be released from the subpoena as an expectation of her employment. Grievant spoke with the Forensic Scientist and authorized the Forensic Scientist to contact the court on her behalf. The Forensic Scientist failed to obtain a release for Grievant. The local General District Court expected Grievant to appear on February 23, 2012 but she did not do so. Grievant's failure to obtain a release from the subpoena caused the local General District Court to issue a Show Cause Summons against her and raised concern among Agency managers that the Agency's reputation with the local court could be damaged by Grievant's actions. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

When Grievant chose to rely upon the Forensic Scientist to obtain the release, she did so at her own risk. The Forensic Scientist was not Grievant's supervisor or someone otherwise entrusted by the Agency to act on Grievant's behalf. The Forensic Scientist's failure to act as she had promised to Grievant is not a basis to eliminate or mitigate the disciplinary action.

The Agency contends that Grievant should receive a Group II Written Notice for failure to follow a supervisor's instructions. When an employee fails to comply with one of his or her general work responsibilities, the employee may be subject to disciplinary action beginning with a Group I Written Notice. Depending upon the nature of the employee's behavior there may exist a basis to elevate the disciplinary action. For

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

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

[4] Grievant had received approximately five subpoenas from 1997 to 2009. From July to 2009 through February 23, 2012, Grievant received 19 subpoenas. The subpoena for her court appearance on February 23, 2012 was the first time she had a conflict.

example, if a supervisor instructs an employee to perform a specific task and the employee fails to do so, the agency may elevate the level of discipline to a Group II Written Notice. In this case, Grievant knew of her obligation to comply with the subpoena or obtain a release. She knew of this obligation prior to receiving the August 2011 instruction from the Supervisor. The August 2011 instruction was consistent with Grievant's prior knowledge regarding her responsibilities, but it did not modify her responsibility because the instruction was not directed to her. The Supervisor's August 29, 2011 email specifically refers to the Agency's expectations for an "Examiner." An Examiner would include a Forensic Scientist but it did not include Grievant in her position as a Forensic Lab Specialist III. Grievant testified that she "didn't pay a lot of attention to the email because it was addressed to an Examiner and I am not an Examiner." Because Grievant is not an Examiner, she did not receive a specific instruction from a supervisor that would justify elevating the disciplinary action from a Group I to a 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 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 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 the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further 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 **reduced** to a Group I Written Notice.

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:

[5] Va. Code § 2.2-3005.

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

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.