

Issues: Group II Written Notice (failure to follow instructions/policy), Group III Written Notice (insubordination) and Termination (due to accumulation); Hearing Date: 11/09/15; Decision Issued: 11/20/15; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 10662; Outcome: Partial Relief; **Administrative Review: DHRM Ruling Request received 12/07/15; DHRM Ruling issued 01/12/16; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10662

Hearing Date: November 9, 2015
Decision Issued: November 20, 2015

PROCEDURAL HISTORY

On June 19, 2015, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow policy or comply with agency policy. On June 19, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for insubordination.

On July 14, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 14, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 9, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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 Virginia State Police employed Grievant as a Compliance Officer. He began working for the Agency in October 2012. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant decided to run for the elected office of Sheriff in his locality. On January 19, 2015¹, Grievant sent the Superintendent a letter stating:

This letter is to respectfully inform you of my intent to run for the elective office of Sheriff of [locality] in the 2015 election. If I am duly elected sheriff by the voters, I will resign my current position with the department prior to taking office so as to avoid any potential conflict of interests. I have read and understand the department's policy on this matter, but I believe with careful, objective review of the policy and the specific intent thereof, that application of the policy in this specific case should be waived. In an attempt to comply with the department's policy I have considered taking other employment during my campaign; however, this option has proven both impractical and counter-productive. *** I request exemption from this policy restriction without prejudice.²

¹ The letter was re-dated January 27, 2015.

² Agency Exhibit 8B.

On January 20, 2015, Grievant obtained a domain name from a domain registration service for a website he intended to use to promote his campaign.

On February 9, 2015, the Superintendent replied:

This memorandum is in response to your request dated January 27, 2015 to continue in your current employment with the Department while a candidate for election to Sheriff of [locality]. *** The nature of the elective process being what it is, the candidacy for Sheriff by a current Department employee could irreparably damage the cooperation and communication between the various agencies involved. *** If it remains your desire to pursue a candidacy for the position of Sheriff of [locality] you must either retire, if eligible, or resign once you become a candidate for that office. A candidacy for public office becomes official when a person files a *Declaration of Candidacy*, as required by § 24.2-505 or § 24.2-520 of the *Code of Virginia* (form SBE-505/520).³

On February 18, 2015, Grievant submitted a Certificate of Candidate Qualification to the local voter Registrar. On March 6, 2015, he submitted a Statement of Organization Candidate to the Virginia Department of Elections showing March 14, 2015 as the date he would first accepted contributions to his campaign.

On March 14, 2015, Grievant gave a speech announcing his candidacy for Sheriff in the locality. On March 18, 2015, a local newspaper published an article stating that “[Grievant of locality] has announced his desire to serve as [locality’s] next sheriff, registering to run in the Nov. 3 general election as an independent candidate challenging incumbent [party name] who is seeking a second term.”⁴ Grievant wrote on a social media website that he was a candidate for sheriff “March 2015 – present”.⁵

On April 16, 2015, the Superintendent sent Grievant a memorandum stating:

This memorandum is an updated response to your request dated January 12, 2015⁶, to continue in your current employment with the Department while a candidate for election to Sheriff of [locality]. *** The nature of the elective process being what it is, the candidacy for Sheriff by a current Department employee creates a clear conflict of interest that could irreparably damage the cooperation and communication between the

³ Agency Exhibit 8C.

⁴ Agency Exhibit 17.

⁵ Agency Exhibit 18.

⁶ The date listed in the memorandum appears to be a typographical error.

various agencies involved. *** As evidenced by your website, fundraising, and filings, you have become a candidate for public office running against the current sheriff. If it remains your desire to continue to pursue a candidacy for the position of Sheriff of [locality], you must either retire, if eligible, or resign from the Department no later than the close of business on May 9, 2015. If you do not resign, the Department has no recourse but to proceed under the Standards of Conduct up to and including termination.⁷

Grievant did not resign from employment with the Department. On May 11, 2015, Grievant was administratively suspended with pay pending an official administrative investigation.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” General Order ADM 12.02(11)(a). Group II offenses “include acts and behavior of a more severe and/or repetitive nature and are such that an additional Group II offense should normally warrant removal.” General Order ADM 12.02(12)(a). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” General Order ADM 12.02(13)(a).

General Order ADM 11.06 governs Campaigning for or Serving in Elective Office. Section 1 states, [w]hen employees of the Department of State Police become candidates for or serve in certain elective offices, there may be interference with professional relationships between the Department and other law enforcement agencies. *** The Department’s law enforcement efforts would be severely hampered if it were unable to secure the full cooperation of other state and local law enforcement agencies. ***

Section 2(a) states:

“Candidate” means a person who seeks or campaigns for an office of the Commonwealth or one of the its governmental units in a general, primary, or special election and who is qualified to have his/her name placed on the ballot for the office. “Candidate” shall include a person who seeks the nomination of a political party or who, by reason of receiving the nomination of a political party for election to an office and/or is referred to as its nominee. The term “candidate” shall also include any write-in candidate.

⁷ Agency Exhibit 8D.

Effective April 1, 2015, Section 2 was amended to read:

“Candidate” means a person who seeks or campaigns for an office of the Commonwealth or one of the its governmental units in a general, primary, or special election and who is qualified to have his/her name placed on the ballot for the office. “Candidate” shall include a person who seeks the nomination of a political party or who, by reason of receiving the nomination of a political party for election to an office and/or is referred to as its nominee. A person shall be deemed a candidate once he/she has filed any one of the following forms: Certificate of Candidate Qualification (form 501); Declaration of Candidacy (form 505/520); or, Statement of Organization-Candidate Committee (form 947.1). The term “candidate” shall also include any write-in candidate.

Section 3 provides:

- a. That no employee shall be a candidate for or serve in any elective office which is charged with the duty of investigating, arresting, or prosecuting violators of the criminal laws of the Commonwealth or any political subdivision thereof, or with any other law enforcement duties.
- b. That no employee shall be a candidate for or serve in any elective office which is charged with, or is part of a body charged with, the selection of the chief or any other officer of a law enforcement agency of the Commonwealth or any political subdivision thereof, or with the appropriation of funds for the operation of any such law enforcement agency.
- c. That candidate for other offices must report their candidacy to the Superintendent at which time the Superintendent may take whatever action he/she deems appropriate, considering all circumstances.

Group II Written Notice

“Failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy” is a Group II offense. General Order ADM 12.02(12)(b)(1).

Grievant was aware of the Agency’s policy preventing him from running for Sheriff while an Agency employee. In February 2015, Grievant knew the Agency would not grant him a waiver of the policy. In March 2015, Grievant began his campaign for Sheriff even though he remained an employee of the Agency. His action was contrary to the Agency’s policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Group III Written Notice

“Insubordination or serious breach of discipline” is a Group III offense. General Order ADM 12.02(13)(b)(4).

The Agency claimed Grievant was insubordinate because he failed to follow the Superintendent’s order to resign. A resignation is a voluntary decision to end employment with an agency. A supervisor cannot compel a subordinate to resign because that would render the employee’s decision involuntary. An employee need not comply with an instruction to resign. In this case, the Superintendent did not have the authority to order Grievant to resign from his position. Grievant’s failure to resign was not insubordination. There is no basis to uphold the issuance of a Group III offense.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The reason the Superintendent instructed Grievant to resign by May 9, 2015 was because Grievant remained in violation of the Agency’s policy. The Superintendent’s instruction was an attempt to force Grievant to become compliant with the policy. Because Grievant remained out of compliance with the policy and the Agency notified him of his ongoing noncompliance, the Agency was authorized to issue a second Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Accordingly, Grievant’s removal 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 Human Resource Management”⁸ 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 he was treated differently from another Compliance Officer who was elected to a local governing body. The evidence showed that the employee was elected but that Agency Managers in Richmond were not aware that the employee was running for office and did not take action to stop him. The employee’s supervisor did not know that the Agency’s prohibition applied to the employee because the

⁸ Va. Code § 2.2-3005.

employee was a part time employee and not a law enforcement officer. The evidence showed that after learning of the employee's election, the Superintendent informed the employee, "under Department policy you are not permitted to run for reelection to your current post or to continue in service by appointment beyond your current term."⁹ The Hearing Officer cannot conclude that Grievant was singled out for disciplinary action. The different treatment Grievant and the other employee received resulted from an oversight by Agency managers. 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 **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice is **reduced** to a Group II Written Notice. The Agency's decision to remove Grievant from employment 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 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

⁹ Agency Exhibit 16.

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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from EDR before filing a notice of appeal.