

Issue: Group III Written Notice with Termination (failure to follow instructions); Hearing Date: 09/30/15; Decision Issued: 10/14/15; Agency: Virginia Parole Board; AHO: Carl Wilson Schmidt, Esq.; Case No. 10673; 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: 10673**

Hearing Date: September 30, 2015  
Decision Issued: October 14, 2015

#### **PROCEDURAL HISTORY**

On July 10, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow instructions and policy.

On August 7, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 1, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 30, 2015, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
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 Parole Board employed Grievant for approximately five years prior to her removal. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency had several master keys to its offices. A person in possession of a master key could enter any office in the Board's suites including the Agency Head's office.

Ms. W retired from the Agency but forgot to return her master key when she left. She gave the master key to Grievant at Grievant's home for Grievant to return to the Agency. Grievant did not take the master key to the Agency. She kept it at her home.

A new Agency Head began supervising the Board in May 2014. She was concerned about security and privacy in the Board's offices. She wanted employees to have access to their own offices but not the offices of other employees. To accomplish this objective, she had to identify employees with master keys and ask them to return those key to her.

Grievant told the Agency Head she had the former Agency Head's master key. Grievant provided the Agency Head with the former Agency Head's master key. The Agency Head asked Grievant who had Ms. W's master key. Grievant said she did not know even though Grievant knew she was in possession of Ms. W's key. The Agency

Head asked Grievant to call Ms. W. The Agency Head later asked Grievant if she had called Ms. W. Grievant said Ms. W did not know where her key was located.

On July 9, 2014, the Agency Head sent employees including Grievant an email stating:

The information that our office handles is of a sensitive nature. Therefore, I am asking that you do not open or unlock [other offices]. Our offices are to remain locked when we are not in the office. \*\*\* If you believe you need to obtain something from one of these locked offices you will need to have [two other employees] obtain it for you. They will have the only master keys and they will retrieve what you need. Master keys will be retained by them at all times and not loaned out to anyone.<sup>1</sup>

On September 4, 2014, the Supervisor sent an email to several employees including Grievant stating:

As a follow up to [Agency Head's] email regarding safety concerns .... \*\*\* If anyone has a key to an office other than their office or a master key that was not assigned by [Agency Head], please turn it in to me immediately.<sup>2</sup>

On September 4, 2014, Grievant used her Agency email account to forward a copy of the Supervisor's email to Ms. W. On September 5, 2014, Ms. W sent Grievant an email from her personal email account to Grievant's Agency email account stating, "Do you think she found out I gave you my key?" Grievant replied a few hours later, "No and I am not telling. LOL".<sup>3</sup>

After the Agency confronted Grievant, Grievant went to her home, obtained Ms. W's master key, and returned it to the Agency.

## 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>4</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

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

<sup>2</sup> Agency Exhibit 3B.

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

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

warrant removal.”<sup>5</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>6</sup>

DHRM Policy 1.60 lists numerous examples of offenses. These examples “are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.”

In the Agency’s judgment, Grievant should receive a Group III Written Notice. The Agency’s judgment is supported by the evidence. Grievant was deceptive and dishonest in her responses to the Agency Head and her interaction with the Supervisor. Grievant was in possession of property owned by the Agency. She knew that she was no longer authorized to possess that property. She knew that she had been asked to return that property to the Agency Head. Instead of admitting she had Ms. W’s key and returning the key, Grievant retained the key and remained silent about possessing the key.

Group III offenses include, “falsification of records” and “theft or unauthorized removal of state records/property”. The essence of these offenses is an intent to deceive. In this case, Grievant demonstrated an intent to deceive by refusing to respond truthfully to questions about Ms. W’s key. She deceived the Agency into believing she was not in possession of the key and did not know its whereabouts. The Agency Head testified she felt she could no longer trust Grievant. Grievant’s acts were consistent with a Group III offense and support the Agency’s decision to issue a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

The Agency also alleged that Grievant acted contrary to its information technology policy when Grievant sent Ms. W a copy of the Supervisor’s email. The Agency did not establish this allegation. The evidence showed that many employees used their Agency issued email addresses to send personal email and nothing about Grievant’s email to Ms. W was unusual or exceptional. Nevertheless, even if the Hearing Officer assumes for the sake of argument that Grievant acted contrary to the Agency’s information technology policy, her behavior would only rise to the level of a Group II offense.

Grievant argued that her behavior did not severely impact the Agency and, thus, the matter does not rise to a Group III level. The Agency is not obligated to show an employee’s behavior severely impacted the Agency in order to establish a Group III Offense. The Agency is only obligated to show that the behavior is of “such a severe

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<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

nature that a first occurrence normally should warrant termination.” The Agency Head testified she no longer trusted Grievant. The absence of trust would have the effect of undermining the Board’s effectiveness. The Agency has met this burden.

*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>7</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.

Grievant has apologized for her behavior and confirmed that she had no intent to use the master key. She points out that she has been a good and valuable employee of the Agency and requests that a more appropriate and lesser level of disciplinary action be imposed. Although it is clear that the Agency could have imposed a lesser level of discipline and effectively addressed Grievant’s behavior, once the Agency has met its burden of proof, the Hearing Officer cannot substitute his opinion as to the appropriateness of the sanction for the Agency’s opinion. 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 III Written Notice of disciplinary action with removal 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:

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<sup>7</sup> *Va. Code § 2.2-3005.*

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>8</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>8</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.