

Issues: Group I Written Notice (unsatisfactory performance), Group II Written Notice (computer misuse), and Group III Written Notice with Termination (failure to follow policy); Hearing Date: 11/10/16; Decision Issued: 11/30/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10884; Outcome: Partial Relief;

Administrative Review: EDR Ruling Request received 12/12/16; EDR Ruling No. 2017-4459 issued 01/17/17; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 12/12/16; DHRM Ruling issued 01/24/17; 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: 10884

Hearing Date: November 10, 2016
Decision Issued: November 30, 2016

PROCEDURAL HISTORY

On September 23, 2016, Grievant was issued a Group I Written Notice of disciplinary action for failing to sign a post order. On September 23, 2016, Grievant was issued a Group II Written Notice for improper use of her Agency-issued computer. On September 23, 2016, Grievant was issued a Group III Written Notice with removal for failing to notify Agency managers of a report of an offender who absconded.

On September 28, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 11, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 10, 2016, 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 Notices?

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?
5. Whether the Agency retaliated against Grievant?

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 employed Grievant as a Lieutenant in one of its Units. She began working for the Agency in 2009. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant served as the Unit's primary point of contact. She received incident reports from external sources and analyzed them to determine how to respond. She was responsible for classifying and disseminating information concerning threats to the safety and security of the Department of Corrections and the community at large. Grievant's usual work shift was from 6 p.m. until 6 a.m.

The Agency has Post Orders providing employees with guidance regarding how to perform the duties of the posts to which they were assigned. The Agency required employees to review their post orders and sign a Post Order Review Log showing they had reviewed and understood the Post Order. An employee's supervisor was supposed to meet with the employee to address the employee's questions. The employee certification read:

I CERTIFY THAT I HAVE READ, DISCUSSED WITH MY SUPERVISOR AND UNDERSTAND THE POST ORDERS INDICATED ABOVE PRIOR TO SIGNING BELOW AND ASSUMING THE DUTIES OF THIS POST.¹

The Agency revised its post order for Grievant's post. Grievant was supposed to have signed the Post Order Review Log on or about July 1, 2016. She did not sign the log because she had questions about the Post Order and wanted to discuss her concerns with the Supervisor. On August 8, 2016, the Supervisor sent Grievant and the other lieutenants an email stating, "please sign your post orders on your next assigned shift."² Grievant did not sign the Post Order Review Log because she had unanswered questions. Grievant signed the Post Order on September 6, 2016.

The Sex Offender Specialist worked in the Locality.

The Offender was a sex offender required to wear an ankle bracelet with a global positioning monitor so that his position could be tracked at all times. He had been released from an institution into the Locality and was required to wear the ankle GPS monitor as a condition of his release from the institution. Shortly after 7 p.m. on September 1, 2016, the Offender cut off his GPS tracking monitor which sent a signal to the local agency. The Sex Offender Specialist went to the last location of the Offender and confirmed that he was not there and had cut off his ankle bracelet. The Sex Offender Specialist told others in her office about the incident and a probation warrant was issued for the Offender. The Sex Offender Specialist asked her supervisor if it was a matter that needed to be reported. The supervisor said to call the Unit.

At approximately 11 p.m., the Sex Offender Specialist called the Unit. Grievant answered the call. The Sex Offender Specialist told Grievant that she was calling from the Locality and needed guidance on whether an issue she had required notification of the Unit and filing of a serious incident report. The Sex Offender Specialist told Grievant that the Offender was required to wear a GPS brace. She told Grievant that she could not find the Offender and he had cut off his ankle brace. The Grievant asked the Sex Offender Specialist for the VACORIS³ number. The Sex Offender Specialist said she did not bring her computer home and could not identify the number. Grievant said that was "ok" because Grievant could look up the number. Grievant told the Sex Offender Specialist that she did not believe the incident fell under a Class I or II incident, but that she would inquire further.

Upon receiving the report from the Sex Offender Specialist, Grievant looked up the Offender's VACORIS number and confirmed that he was a sex offender. She completed an incident report for the Unit but took no action to report the incident to

¹ Agency Exhibit 14.

² Agency Exhibit 15.

³ VACORIS is the Agency's computer-based offender information management system.

anyone else in the Department. Grievant did not seek clarification from the Supervisor or Unit Head regarding whether the incident was a Class I incident.

At 5:10 a.m. on September 2, 2016, Lieutenant S reported to work and relieved Grievant from her post. Lieutenant S reviewed the “call in sheet” relating to the Offender. Lieutenant S recognized that the incident was one that needed to be reported to Agency managers. Lieutenant S called the Sex Offender Specialist to obtain additional information. The incident was then reported to other Agency managers in the Unit and outside of the Unit.

The Offender was captured only a short time before the hearing date.

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.”⁴ 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.”⁵ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁶

Group I Written Notice

Grievant was instructed to sign her Post Order but failed to do so. Her behavior would otherwise support the issuance of disciplinary action. In this case, however, mitigating circumstances (as discussed below) exist to reduce the disciplinary action.

The objective of having employees and supervisors sign the Post Order Review Log was to ensure the employees understood their Post Orders and had the opportunity to speak with supervisors if employees had any questions. Grievant did not sign the Post Order Review Log because she wanted to meet with the Supervisor to address her questions about the Post Order duties. She could not certify that she had, “DISCUSSED WITH MY SUPERVISOR.” Grievant presented evidence showing that employees had signed a Post Order Review Log in January 2016 but the Supervisor had not counter signed the log at the time the employees signed the log. This shows the Agency’s approach to having Post Orders timely signed was not as significant as it claimed. The Group I Written Notice must be reversed.

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

⁵ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁶ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

Group II Written Notice

The Agency alleged that Grievant violated its internet use policy based on a review of Grievant's computer usage. The Information Security Officer reviewed Grievant's internet usage for September 1, 2016 from midnight until 8 a.m. and for September 2, 2016 from midnight until 6 a.m. Part of Grievant's responsibilities included checking weather reports and searching for news articles related to the Agency's cases.

The Agency has not presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency could not distinguish between Grievant's work related and non-work related internet activity. Without knowing the amount of time spent on non-work related internet activity, it is not possible to determine whether Grievant's personal use of the internet was more than incidental or occasional. Some of Grievant's internet searches might appear personal but were actually work related. For example, Grievant's access of a weather news site may have been work related or not work related. The Agency's issuance of a Group II Written Notice must be reversed.

Group III 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.⁷

DOC Operating Procedure 038.5 governs [Unit] and is intended to establish protocol and responsibilities for the Unit "to gather, collect, and analyze information and intelligence from internal and external sources to provide timely, informative, comprehensive reports and assessments to DOC Units and external partners."⁸ Section III defines "Incident" as:

An actual or threatened event or occurrence outside the ordinary routine that involves:

- The life, health, and safety of employees, volunteers, guests or offenders (incarcerated or under Community supervision) ***
- Exposure of the Department of Corrections to significant media or public attention.

DOC Operating Procedure 038.1 governs Reporting Serious or Unusual Incidents. Section IV(C) provides:

1. Serious or unusual incidents ... shall be reported by telephone to the [Unit]. ***

⁷ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

⁸ Agency Exhibit 5.

3. The [Unit] will be responsible for additional reporting of incidents as appropriate.
 - a) The [Unit] will generally make immediate reports of Class I incidents to Regional staff, Central Office administrators, Special Investigations Unit, and other units as necessary.
 - b) Notification of Class II incidents will generally be made through the daily briefing report.

Section IV(D)(1) defines Class I Incidents:

Class I incidents (listed below) shall be reported by telephone to the [Unit] immediately following an incident or commencement of the incident. ***

- q. Absconding or attempting to abscond from a Community Corrections facility or Probation and Parole absconders suspected of a violent criminal offense(s).

On September 1, 2016, Grievant received a call from a local Sex Offender Specialist informing Grievant that an Offender had cut off his ankle bracelet. The Offender was a sex offender who had absconded. Grievant did not realize that the incident constituted a Class I incident. Grievant was obligated immediately to report the incident to Regional staff and other employees outside of the Unit. Grievant's failure to timely report prevented Agency managers from being aware immediately of the incident and taking appropriate action they deemed necessary. Grievant failed to comply with Agency policy thereby justifying the issuance of a Group II Written Notice.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.) A primary purpose of the Unit was to receive information about incidents, analyze that information, and determine whether to inform Agency managers of that information. Grievant's failure to report a Class I incident undermined the Unit's purpose. The Agency has presented sufficient evidence to support the elevation of a Group II Written Notice to a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Mitigation

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”⁹ 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 further the disciplinary actions.

Retaliation

Grievant argued that she worked in a hostile environment and she had to file an EEOC complaint regarding another employee. The evidence showed that the Agency acted appropriately to Grievant’s complaint by moving the other employee to another shift. The Agency did not issue disciplinary action against Grievant as a form of retaliation or for any other improper purpose.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency’s issuance to the Grievant of a Group III Written Notice 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:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

⁹ Va. Code § 2.2-3005.

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 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.