



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11399**

Hearing Date: October 28, 2019  
Decision Issued: November 18, 2019

#### **PROCEDURAL HISTORY**

On May 10, 2019, Grievant was issued a Group II Written Notice of disciplinary action with a ten workday suspension for failure to follow instructions.

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 July 29, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 28, 2019, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Corrections employs Grievant as a Specialist at one of its locations. No evidence of prior active disciplinary action was introduced during the hearing.

The Former PO was responsible for preparing a monthly "Sex Offender 957/958 Budget" that he provided to the Chief. Preparing the budget included receiving reports from providers, adding and updating financial information, and identifying treatment information.

On October 30, 2018, Grievant drafted an email confirming her duties would include:

SOV- Monthly Report  
Monthly Report for [Chief] (How many probationers on GPS, DNA needed, SIDS number, Monday left for 957/958)  
Maintaining Budget for 957/958<sup>1</sup>

The Former PO stopped working at the Facility on November 30, 2018. He trained Grievant regarding how to prepare the budget prior to leaving. The Former PO

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<sup>1</sup> Agency Exhibit 5.

met with Grievant and spent approximately two or three hours showing Grievant how to complete the budget. Grievant told the Former PO she understood his training.

Grievant began preparing the monthly budget and would provide copies of the budget to the Chief and Deputy Chief as expected by the Agency. Grievant completed budgets from December 2018 through March 2019. Grievant did not complain that she did not know how to prepare these budgets.

SPO K began working at the Facility on April 20, 2019. He began supervising Grievant. He was to begin completing the budget once he “got up to speed”. He had prior experience completing budgets. SPO K asked Grievant for any information she had regarding the budget including what money was used for and what money was left. Grievant said that Ms. M had the information he wanted. SPO K spoke with Ms. M but Ms. M only had limited information. SPO K spoke with the Chief Deputy and indicated he could not obtain the necessary information.<sup>2</sup> The Chief Deputy spoke with the Chief and indicated that SPO K could not get the necessary information for the budget.

On April 22, 2019 at 5:10 p.m., the Chief sent Grievant an email stating:

Please forward to me the balance remaining on the Sex Offender Treatment/Polygraph Funds by close of business tomorrow, April 23, 2019. Additionally, let me know if there are any changes with being within our two percent range.<sup>3</sup>

On April 23, 2019 at 4:52 p.m., Grievant sent the Chief an email:

Per our conversation, these are the numbers I retrieved from the Share Drive \$2,713.00 (Sex Offender treatment) and \$2,990.00 (Sex Offender polygraph), however please confirm with [SPO K] and [Ms. M.] As far as being under the two percent range, please ask [SPO K] and [Ms. M].<sup>4</sup>

On Thursday April 25, 2019 at approximately 11 a.m., Grievant and the Chief met to discuss the Chief's email to Grievant. The meeting ended at approximately 11:30 a.m. At 11:36 a.m., the Chief sent Grievant an email stating:

Today, we met to discuss the email that I sent you on April 22, 2019 requesting the balance remaining on the Sex Offender Treatment/Polygraph funds by close of business April 23, 2019. Additionally, I requested for you to let me know if we [are] within the two percent range. You provided me with the information that you retrieved from the shared

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<sup>2</sup> For example, SPO K would not be in a position to determine if the Agency was under the two percent range.

<sup>3</sup> Agency Exhibit 6.

<sup>4</sup> Agency Exhibit 6.

drive, however, you did not inform me if we are within the two percent spending range. I need to know if we are within the two percent range.

**Additionally, I need the projections for the number of polygraphs that were scheduled in March, April, and May as well as the number of clients scheduled for treatment.**

During our meeting, you mentioned several times that [SPO K] is currently doing the budget; however, I made it clear to you that I am requesting the information from you, as [SPO K] has only been at the district for a short time and you have the information. I also made you aware that when I talked with you on Monday April 22, 2019, you went back and forth and debated with me in reference to my request. I informed you that my directives in my email were clear and I expected you to provide me with the information that I requested, as my directives are not debatable. I also informed you that the Healing Environment starts with you.

Please provide me with the information in bold by close of business today, April 25, 2019.

I believe in staff having a voice; however, sharing your voice does not always mean that the outcome will always be what you want. Going forward, you are expected to follow my directives and the directives of supervisors in this district.<sup>5</sup>

On April 29, 2019 at 5 p.m., Grievant sent the Chief an email stating:

I asked [SPO K] and he stated he does not know if we would be under the 2 percent range but he has a meeting with [Ms. M] tomorrow or Wednesday. For the Sex Offender Treatment budget the numbers are March \$2,430, April \$2,090, and May the numbers are not updated in the system. For the Sex Offender Polygraphs, the numbers have not been updated in the system for March, April, and May.<sup>6</sup>

## 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>7</sup> Group II offenses “include acts and behavior that are more severe in

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<sup>5</sup> Agency Exhibit 8.

<sup>6</sup> Agency Exhibit 8.

<sup>7</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

nature and are such that an accumulation of two Group II offenses normally should warrant removal.”<sup>8</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>9</sup>

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.<sup>10</sup> The Chief instructed Grievant to inform the Chief whether the Facility’s Sex Offender budget would be within the two percent range. Grievant failed to answer the Chief’s question and instead referred the Chief to SPO K and Ms. M – neither of whom could answer the question. The Chief also instructed Grievant to provide a projection for the number of polygraphs and clients for March, April, and May 2019. Grievant did not answer the Chief’s question. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant’s 10 workday suspension is upheld.

Grievant argued she was not properly trained to interpret the budget and that preparing the budget was the responsibility of SPO K. The evidence showed that Grievant had adequate training regarding preparing budgets and had done so for several months. Grievant had adequate training to answer the Chief’s questions and had access to the necessary information to do so. SPO K was not ready to assume the duty of preparing the budget and the Chief had the authority to instruct Grievant to provide the information requested. Grievant was obligated to comply with the Chief’s instruction.

Grievant argued that the Chief had been informed of her serious medical problems and that Grievant was going to the doctor. The evidence presented is not sufficient for the Hearing Officer to conclude that Grievant’s medical problem were serious<sup>11</sup> and that the Chief was aware of how serious were Grievant’s medical problems.

Grievant contends the disciplinary action should be mitigated. *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>12</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to

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<sup>8</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>9</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>10</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

<sup>11</sup> Grievant did not testify during the hearing.

<sup>12</sup> Va. Code § 2.2-3005.

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 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 ten workday suspension is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>[1]</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>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.