Issues: Group III Written Notice with Termination (leaving work without permission), and Retaliation (grievance activity); Hearing Date: 05/05/15; Decision Issued: 05/22/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10595; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 05/25/15; EDR Ruling No. 2015-4158 issued 06/16/15; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 05/25/15; DHRM Ruling issued 06/22/15; 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: 10595**

Hearing Date: May 5, 2015
Decision Issued: May 22, 2015

## PROCEDURAL HISTORY

On March 16, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for leaving the work site without permission, abuse of State time, and falsifying records.

On April 2, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 15, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 5, 2015, a hearing was held at the Agency's office.

## APPEARANCES

Grievant
Grievant's Counsel
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?

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 Department of Behavioral Health and Developmental Services employed Grievant as a Security Officer III at one of its facilities. Grievant worked at a Facility with several buildings on a campus. He was responsible for patrolling the campus to ensure safety of the Agency's clients and employees. He had been employed by the Agency for approximately four years. No evidence of prior active disciplinary action was introduced during the hearing.

Security officers at the Facility were required to carry an Agency-owned cell phone during their shifts. The Security Director wanted to track the activities of security officers as they worked their shifts. He obtained permission from Agency managers to install a tracking software application on the cell phone. The Agency's information technology employee loaded the software application onto the cell phone. An icon for the application remained on the cell phone and was visible to users. The tracking application used the "ping" signals between the cell phone and cell phone towers to determine the longitude and latitude of cell phone's location. The application generated a report showing the longitude and latitude of the cell phone over time in approximate five or ten minute intervals. The Agency did not notify Grievant or other employees that a tracking application had been placed on the Agency's cell phone.

Grievant's regular shift consisted of a "straight eight" meaning that he worked an eight hour shift without taking a meal break. Grievant worked two shifts on January 4,

2015. He came to work at approximately 6:02 a.m. and left the Facility at approximately 10:11 p.m. Grievant could take short breaks during his shift as needed but he was expected to remain on grounds during his breaks. Grievant was reminded by an email dated July 17, 2014, "Do not leave [Facility] while on duty."[1]

At approximately 7:23 p.m., Grievant left the Agency's campus and went to a Shopping Center located over a mile away from the Facility. At approximately 7:28 p.m., Grievant was at the Shopping Center. At approximately 7:33 p.m., Grievant was at the Shopping Center. A video image showed Grievant returned to the campus at approximately 7:39 p.m. The tracking application showed he returned at approximately 7:44 p.m. Grievant did not obtain permission from a supervisor prior to leaving the campus. He did not leave the campus for any business-related reason.

## 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."

"[L]eaving the work without permission" is a Group II offense.[3] On January 4, 2015, Grievant left his work place without permission from a supervisor. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Under the Standards of Conduct:

> 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.)

Grievant was a security officer responsible for patrolling the Agency's campus during his shift. He was responsible for responding to emergencies. His absence without permission was a circumstance justifying the elevation of disciplinary action from a Group II offense to a Group III offense. Upon the issuance of a Group III Written

[1] Agency Exhibit O.

[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.

Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that he did not leave the campus but rather he left the cell phone in his car and co-worker asked permission to "test drive" his vehicle. While she was driving Grievant's vehicle, she left the Agency's campus with the cell phone thereby giving the appearance that Grievant left the campus. This assertion is not supported by the evidence. Grievant's vehicle was located in the parking lot. If this claim were true, a significant number of points of longitude and latitude would appear in the parking lot. From 4:46 p.m. until 7:23 p.m., there are approximately 25 points of longitude and latitude. Only one of those points is clearly within the parking lot and that point was at 4:46:48 p.m. A video image shows Grievant opening the door to the gym at 4:44:28 p.m. His vehicle appears in the parking lot. Although each point is an estimation of location and has a margin of error[4], a pattern of points would appear around the parked vehicle if Grievant's assertion were true. Instead, a pattern of points appears around the gym where Grievant was working inside.

Grievant questioned the accuracy of the tracking data. He asserted that the data reflects an excessive margin of error and that when the data was entered into a mapping website the reliability of that website cannot be confirmed. The evidence showed that the Agency collected data throughout Grievant's shift. Although an occasional data point may have been inaccurate by several feet, there were enough data points before and after the inaccurate data point to establish a reliable trend of data showing Grievant's approximate location on the campus.

The disciplinary action against Grievant rests on consideration of data collected by placing a software application on a cell phone that Grievant was required to carry. If this evidence were disregarded, insufficient evidence would remain to support the disciplinary action. Thus, the disciplinary action would have to be reversed.

Grievant argued that the Agency's evidence to show his location was obtained by illegal means.[5] He argued that the Agency acted contrary to *Va. Code § 18.2-60.5* when it placed a tracking device on the cell phone. This statute provides:

> A. Any person who installs or places an electronic tracking device through intentionally deceptive means and without consent, or causes an electronic tracking device to be installed or placed through intentionally deceptive means and without consent, and uses such device to track the location of any person is guilty of a Class 3 misdemeanor.

[4] On April 24, 2015, the Supervisor tested the accuracy of the tracking system by leaving from a point on campus, going to another point away from campus and then returning. He testified that the location data points were accurate based on his observation.

[5] At a minimum, it would have been a better management practice for the Agency to inform security officers that their movements were being tracked. An agency's management practices, however, typically are not within the Hearing Officer's authority to correct.

B. The provisions of this section shall not apply to the installation, placement, or use of an electronic tracking device by:

1. A law-enforcement officer, judicial officer, probation or parole officer, or employee of the Department of Corrections when any such person is engaged in the lawful performance of official duties and in accordance with other state or federal law;

2. The parent or legal guardian of a minor when tracking (i) the minor or (ii) any person authorized by the parent or legal guardian as a caretaker of the minor at any time when the minor is under the person's sole care;

3. A legally authorized representative of an incapacitated adult, as defined in §18.2-369;

4. The owner of fleet vehicles, when tracking such vehicles;

5. An electronic communications provider to the extent that such installation, placement, or use is disclosed in the provider's terms of use, privacy policy, or similar document made available to the customer; or

6. A registered private investigator, as defined in § 9.1-138, who is regulated in accordance with § 9.1-139 and is acting in the normal course of his business and with the consent of the owner of the property upon which the electronic tracking device is installed and placed. However, such exception shall not apply if the private investigator is working on behalf of a client who is subject to a protective order under § 16.1-253, 16.1-253.1, 16.1-253.4, 16.1-279.1, 19.2-152.8, 19.2-152.9,19.2-152.10, or subsection B of § 20-103, or if the private investigator knows or should reasonably know that the client seeks the private investigator's services to aid in the commission of a crime.

C. For the purposes of this section:

"Electronic tracking device" means an electronic or mechanical device that permits a person to remotely determine or track the position and movement of another person.

"Fleet vehicle" means (i) one or more motor vehicles owned by a single entity and operated by employees or agents of the entity for business or government purposes, (ii) motor vehicles held for lease

> or rental to the general public, or (iii) motor vehicles held for sale by motor vehicle dealers.

The Hearing Officer will assume for the sake of argument that the Agency engaged in a criminal act by placing software on a cellphone and then used them to track Grievant's location without his knowledge or permission. This outcome of this case does not change under that assumption. Grievant asks the Hearing Officer to disregard evidence illegally obtained against him. When evidence is obtained illegally by a government agency, the evidence may be excluded in a criminal prosecution. This exclusion rule does not apply in a civil or administrative proceeding. This matter before the Hearing Officer is an administrative proceeding and the criminal exclusionary rule does not apply. The Hearing Officer will consider the Agency's evidence even if obtained contrary to Virginia statute.[6]

Grievant argued that if he left the Facility, he did so to go to another Agency site or to get gas for his vehicle. The evidence showed that these locations were not in the direction of off campus location. In other words, the Hearing Officer does not believe Grievant left the campus to perform work duties at another Agency location on January 4, 2015.

The Agency argued that Grievant falsified a log of his daily activities. The evidence is insufficient to establish this allegation. The Agency did not establish the length of time Grievant would need to complete some of his duties such as patrolling buildings.[7] In some instances Grievant performed the duty but inaccurately reported the time. For example, he opened the gym at approximately 4:44 p.m. but wrote in the log that he opened it at 5:55 p.m. The Agency did not establish that Grievant had been given an instruction to make contemporaneous entries in the log. An inaccurate entry is not necessarily a falsified entry.

*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-

[6] Grievant also argued that the Agency used the data contrary to the terms of service created by the software developer. If the Hearing Officer assumes the allegation were true, it would not render the Agency's evidence inadmissible.

[7] In other words, possibly Grievant could have completed his duties between the times data was collected on the cell phone.

[8] Va. Code § 2.2-3005.

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 other security staff left the campus during their shifts. In addition, some staff would take breaks in an area adjacent to the campus. Grievant's argument is unpersuasive. Grievant did not establish that employees who left the campus did so without permission of a supervisor and that Agency managers were aware staff were leaving without permission. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[9] (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[10]

Grievant has established that he engaged in protected activity because he filed a grievance. He suffered an adverse employment action because he received disciplinary action. Grievant has not established a connection between the protected activity and the disciplinary action. The Agency took action against Grievant because it believed Grievant violated the Standards of Conduct and not as a form of retaliation.

## 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**.

[9] See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[10] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

## 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
   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.[11]

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

[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