

Issues: Group II Written Notice (unsatisfactory performance and failure to follow instructions), and Termination due to accumulation; Hearing Date: 01/26/17; Decision Issued: 06/06/17; Agency: DCR; AHO: Carl Wilson Schmidt, Esq.; Case No. 10878; Outcome: No Relief – Agency Upheld; **Administrative Review: Ruling Request received 06/22/17; EDR Ruling No. 2017-4572 issued on 07/07/17; 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: 10878**

Hearing Date: January 26, 2017  
Decision Issued: June 6, 2017

#### **PROCEDURAL HISTORY**

On August 16, 2016, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance and failure to follow instructions. Grievant was removed based on the accumulation of disciplinary action.

Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 29, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 26, 2017, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
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 Department of Conservation and Recreation employed Grievant as a Fixed Asset and Leasing Accountant. She began working for the Agency in 2008. Grievant had prior active disciplinary action. She received a Group II Written Notice on April 13, 2015 for failure to follow instructions.

Unit employees have a shared network computer drive designated as the I drive. Grievant was expected to post her work to the I drive instead of saving it to her personal computer drive. Electronic documents she kept on her personal computer drive were not usable by other employees needing them. The R drive was a personal computer drive.

Grievant was placed on an Improvement Plan. On January 21, 2016, the Manager told Grievant she was rescinding the Improvement Plan. The Manager told Grievant she must perform all of the duties listed in her Employee Work Profile. Grievant was advised that all work related files must be maintained on the shared I drive with no restrictions to access.

Grievant saved files that were part of the Fixed Assets Accounting and Control System (FAACS) on her personal computer drive (R drive) and not on the shared I drive as instructed. Examples of these files included the:

Controlled Access Lists  
Construction in Progress and Land Closed Projects

Monthly Certifications of FAACS users  
Depreciation and Nomenclature Code Files  
FAACS User ID Listings  
Master File Downloads at Year End.

On February 1, 2016, the Supervisor reminded Grievant that her Lease Accounting System (LAS) reports were due to the Supervisor within 30 days after the end of each quarter for review and signature. On February 1, 2016, the Supervisor sent Grievant an email stating:

Please ensure a comprehensive lease report is provided within 30 days after the end of each quarter. This means a report is due to me for review and signature January 30, April 30, July 30, and October 30. \*\*\* In addition, please have the report for quarter ended 12/31/2015 to me for review by 2/12/2016.<sup>1</sup>

Grievant did not submit the December lease report by January 30. Grievant was given a revised due date of February 12, 2016. Grievant did not provide the lease report by February 12, 2016. Grievant was reminded that she did not meet the due date for the report. Grievant provided a lease report on February 16, 2016 that did not meet the requested format and date requirements. The Supervisor sent the report back to Grievant and informed Grievant how to present the report. Grievant did not provide any additional lease reports.

The Agency presented additional evidence regarding Grievant's work performance. The Hearing Officer will not address this evidence because the allegations do not rise higher than Group I offenses or were unnecessary to support the Group II Written Notice.

## 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."<sup>2</sup> 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."

Failure to follow instructions is a Group II offense.<sup>3</sup> The Supervisor instructed Grievant to keep all work related files on a shared drive not her personal drive. Grievant

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<sup>1</sup> Agency Exhibit 2, Tab C.

<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

placed work related files on her personal computer drive thereby acting contrary to the Supervisor's instruction. Grievant was instructed to submit her LAS reports on January 30, April 30, July 30, and October 30. She submitted one report late and after being advised to correct the report she failed to do so. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that she often used the U drive and that the Supervisor had access to the U drive. She asserted that she used the R drive while she was working on documents. Grievant's assertions are not persuasive. The Supervisor instructed Grievant to use the I drive for her work because it might be necessary for other employees to access the most current version of work products that were intended to be shared.

Grievant argued that some agencies had two employees performing the duties she performed by herself. The Hearing Officer does not believe Grievant was unable to comply with the Supervisor's instructions because of an excessive workload.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two active Group II Written Notices thereby justifying the Agency's decision to remove her from employment.

*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>4</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. 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 removal is **upheld**.

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<sup>4</sup> Va. Code § 2.2-3005.

## 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 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>5</sup>

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<sup>5</sup> 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