

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 05/10/18;  
Decision Issued: 07/15/18; Agency: VDH; AHO: Neil A.G. McPhie, Esq.; Case No.  
11183; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA**  
Department of Human Resource Management  
Office of Employment Dispute Resolution

**DECISION OF HEARING OFFICER**

In re: The Virginia Department of Health

**Case Number: 11183**

Hearing Date May 10, 2018

Decision Issued July 15, 2018

**PROCEDURAL HISTORY**

**On June 29, 2017, Grievant was issued a Group 1 Written Notice of disciplinary action for unsatisfactory performance and failure to follow supervisor's instructions (Agency Ex. 8) During the internal grievance resolution steps, the Agency withdrew the charge of unsatisfactory performance and mitigated the disciplinary action to a Group 1 Offense. The hearing therefore considered only the charge of failure to follow supervisor's instructions. As to that charge, the Notice alleged that the grievant "did not follow supervisor's instructions provided via the May 12 and May 31 [2017] emails with accompanying spreadsheets identifying upcoming Risk-1 establishments and prioritize inspections accordingly to meet deadlines. Neglected verbal directive from Division Manager at the June 1 team meeting to have zero past due [inspections at] Risk-1 establishments."**

On or around July 29, 2017, Grievant timely filed a grievance. (Grievance Form A). Effective March 27, 2018 the Department of Human Resource Management (DHRM) assigned the matter to the undersigned Hearing Officer. On May 10, 2017, a hearing was held at a VDH conference room in the local Health District.

**APPEARANCES**

Grievant  
Agency Counsel

Associate Agency Counsel  
Agency Representative  
Three Witnesses for the Agency  
Agency HR Observer

### **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 1, 11, or 111 offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, aggravating circumstances existed that would overcome the mitigating circumstances?

### **EXHIBITS**

The Agency timely submitted a three-ring binder containing 15 exhibits numerically tabbed. Grievant did not object to any of the agency's exhibits. Grievant failed to prefile any exhibits. However, at the hearing, Grievant offered two exhibits marked A & B which were admitted over the agency's objections.

### **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. Grievant has the burden of raising and establishing any affirmative defenses to the discipline and any evidence of mitigating circumstances related to the discipline. (GPM § 5.9)

## FINDINGS OF FACT

After carefully reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact.

Grievant was employed as a classified state employee for 28 years. Grievant's current position is Environment Health Specialist, Senior (EHS) at a City Health District of the Virginia Department of Health (VDH). Grievant joined the Department in 1992. At the time Grievant received the disciplinary action that is the subject of this hearing, Grievant had approximately 25 years of service to VDH. Grievant had no prior disciplinary actions and good performance evaluations.

As an EHS, Grievant inspects and evaluates assigned food establishments in the Health District to verify compliance with applicable local, state and federal laws. These inspections are critical to maintaining good public health. (Agency Ex. 1).

Grievant's supervisor is experienced in food safety requirements. The Supervisor is the Environmental Health Manager for the District since February 2015. In that capacity, she has responsibility to oversee several programs including the food safety and inspection program. She has an amicable professional relationship with Grievant and for the relevant period was Grievant's second level supervisor. (Testimony of Supervisor)<sup>1</sup>

The Health Director of the local Health Department oversees all local Health District employees and programs. As the person on top of the chain of command, he gives direction to EHS's through their supervisor, in this case through the Supervisor. EHS's are required to follow supervisors' instructions to achieve the public safety mission of the agency.

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<sup>1</sup> Grievant's first line supervisor was no longer with the agency and no party requested her appearance at the hearing. The current Supervisor was intimately familiar with the underlying facts and played a significant role in the decision to discipline Grievant.

Beginning in late 2016, the entire VDH began emphasizing the legal requirement that Risk-1 establishments be inspected at least once every 12 months. The Health Director directed staff to make timely inspections of such establishments. He testified that this was an absolute directive and he relied on the supervisors to work with their staff to achieve this outcome.

It is undisputed in the exhibits and testimony that this shift in focus was clearly communicated to all EHS's including Grievant. For example, Grievant's Exhibit A which is an email dated 10-31-16 from Grievant's supervisor to Grievant and other EHS's, with the subject line "Establishments not inspected within the last year." The body of the email clearly stated, "We need to focus on getting the risk-1 establishments completed before their due dates". That focus is clearly expressed in Agency Exhibits, described by agency witnesses and conceded by Grievant.

By law, all permitted food service establishments, including Risk-1 establishments must be inspected within 12 months of the prior inspection. (12 VAC 35-105-290)<sup>2</sup>. Grievant testified she is familiar with the legal inspection requirement.

The Health District maintains a data base, HealthSpace, in use since approximately 2010 that contained all information on due dates of food establishments. The data base was accessible to all EHS's, including Grievant. As such, EHS's utilize the data base to prioritize inspections of assigned establishments. Indeed, Grievant testified that she uses and is very familiar with HealthSpace.

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<sup>2</sup> 12VAC35-105-290. Food Service Inspections.

*Any location where the provider is responsible for preparing or serving food shall request inspection and shall obtain approval by state or local health authorities regarding food service and general sanitation at the time of the original application and annually thereafter. Documentation of the most recent three inspections and approval shall be kept on file. This section does not apply to sponsored residential services or to group homes or community residential homes.*

To assist EHS's in adjusting to the new focus, Grievant's first line supervisor at the time created an Excel spreadsheet showing overdue and upcoming inspections for each EHS. (Agency Exhibits 2&3). Exhibit 3 is an email dated May 31, 21017 from Grievant's supervisor to all EHS's including Grievant with the subject line "Allocations for June [2017]". The email reminded EHS's "You are responsible for tracking and completing the inspections in your area. If you have any questions about how to do this, please come see me". Grievant did not seek assistance from her supervisor. No alarms were raised when Grievant did not seek assistance because she is an experienced EHS and the email explained how to pull up the information on the spreadsheet. In addition, "The last tab of the excel sheet also includes a list of establishments that have not been or will not be inspected in one year by July 4, [2017]". The list of Risk-1 inspections identified four such establishments assigned to Grievant.

On June 1, 2017 the supervisor held a team meeting with all EHS's at which the supervisor instructed that no late Risk-1 inspections were acceptable. At the hearing, the supervisor described this as a "line in the sand." Grievant attended the meeting and acknowledged that Grievant heard and understood the instruction.

Nevertheless, on June 9, 2017, Grievant informed the supervisor that she had missed timely inspections on four Risk-1 establishments. Upon further investigation by the supervisor, it was determined that Grievant had missed seven Risk-1 establishments. Thereafter the disciplinary process was initiated as set forth in the Due Process Memorandum Notice dated June 16, 2017 to Grievant. (Agency Exhibit 6)

During that process and at the Hearing, Grievant acknowledged that she had made a mistake. Grievant claimed that she missed the inspections because she had failed to choose the right print orientation when she printed her cases from HealthSpace. According to her, she failed to print all the pages with her cases. Had she opened the information correctly she would have seen the due dates for all her cases and could have effectively prioritized her Risk-1 inspections. This explanation is not credible considering the many emails she received on the

need to identify and prioritize inspections of Risk-1 establishments, Grievant has the most years of experience as an EHS Specialist, Senior and had used HealthSpace the longest. (Agency Exhibits 7 & 8).

During the step process and at the hearing, Grievant continued to assert that the discipline was unwarranted because Grievant self-reported the mistake before management became aware of the mistake, the mistake was not intentional, her years of service, discipline free record and good performance history. She also asserted that she did not have adequate time after June 1, to complete her Risk-1 inspections by their due dates and other EHS's had late Risk-1 inspections and were not disciplined.

### **ANALYSIS AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employees and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989)

Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides in pertinent part:

*It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.203001.*

In disciplinary actions for failure to follow supervisor's instructions, the agency must show by a preponderance of evidence that the disciplinary action

was warranted and appropriate under the circumstances. Grievance Procedure Manual (GPM) § 5.8.

The Department of Human Resource Management (DHRM) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees. Policy 1.60. (Agency Ex. 9) “The purpose of the policy is to set forth the Commonwealth’s Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee’s ability to do his/her job and/or influences the agency’s overall effectiveness.” A legitimate goal of the policy is to “enable agencies to fairly and effectively discipline and/or terminate employees... where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination.” Id.

Under the Policy, unacceptable behavior is divided into three types of offenses, according to their severity. Group II offenses “include acts of misconduct of a more serious nature that significantly impact agency operations such as **failure to follow supervisor’s instructions or comply with written policy**” (Attachment A of Policy 1.60). In this case the proposed disciplinary action was mitigated to a Group 1 because of Grievant’s years of employment with the health district and previous good service record. (Agency Exhibits 10, 12).

The evidence in the case, clearly demonstrates that Grievant failed to follow the supervisor’s instructions.

**Grievant engaged in the behavior described in the written notice.**

Grievant does not dispute the behavior described in the Group Notice. Instead she offers an explanation that is not credible. She claimed that she missed the seven inspections because she had failed to choose the right print orientation when she printed her cases from HealthSpace. According to her, she failed to print all the pages with her cases. Had she opened the information correctly she would have seen the due dates for all her cases and could have effectively prioritized her inspections. This explanation is not credible considering



the many emails she received on the need to identify and prioritize inspections of Risk-1 establishments, Grievant has the most years of experience as an EHS Specialist, Senior and had used HealthSpace the longest. (Agency Exhibits 7 & 8). Moreover, no other EHS missed 7 inspections as Grievant. (Testimony of Supervisor).

**The behavior constituted misconduct.**

Under the Standards of Conduct (Agency Exhibit 9), Failure to Follow Supervisor's Instructions is a Group 11 offense. This is a serious offense and could have resulted in significant penalties to the Grievant. In this case it was mitigated to a Group 1 offense because of Grievant's service to the agency and good service record.

**The Agency's discipline was consistent with law and policy.**

Grievant argues that the discipline was not consistent with law because the mistake was not intentional and other EHS's had late Risk-1 inspections and were not disciplined. The evidence does not support Grievant. The undisputed evidence is that Grievant failed to prioritize inspections of assigned Risk-1 establishments and was therefore late on inspections at 7 Risk-1 establishments. There is no claim by the Agency that the failure was intentional or that Grievant refused to follow instructions. The clear evidence is that Grievant failed to follow the instructions provided her on emails and at the June 1 team meeting. Moreover, the explanation for the mistake was simply not credible.

Grievant offers Exhibit B to support her claim that other EHS' were not disciplined for late inspections of Risk-1 establishments. Exhibit B is a multipage document Grievant extrapolated on or around May 1, 2018 from HealthSpace. The document purports to show due dates and completed dates of all Risk-1 establishments assigned to Grievant and other EHS' in the District. Grievant acknowledged in testimony that inspection data is constantly updated in Health Space and the document may therefore not reflect the status of inspections as of June 1, 2017. Grievant offered no evidence to clarify or at the very least connect the data to her situation.

The Health Director testified that the Agency investigated the allegation and concluded that 9 Risk-1 inspections were missed, 7 by Grievant and one each by two unidentified EHS's who were not disciplined for legitimate reasons. In one case the inspection was late because the EHS could not access the establishment to conduct the inspection and in the other case the Agency utilized progressive discipline contemplated by the Standards of Conduct.

**There were no mitigating circumstances justifying a further reduction or removal of the disciplinary action.**

**Grievant had adequate time to timely complete the inspections.**

Grievant argues that she/he did not have adequate time after June 1, to complete assigned Risk-1 inspections by their due dates. That argument is not supported by the evidence. First, and perhaps the most obvious, Grievant knew that under Va. Law all food service establishments had to be completed at least once every 12 months. Moreover, the supervisor testified that she had reviewed Grievant's Time Analysis in Health Space and concluded that Risk-1 establishments inspections typically took Grievant one and a half hours to complete. The supervisor also reviewed Grievant's calendar in HealthSpace for June 2, 2017 (the day prior to any of the seven establishments being overdue) no work was recorded as having been completed for the 7 hours Grievant was scheduled to work and Grievant could not account for the time. For this reason, RS did not consider Grievant's excuse a mitigating factor but rather a failure to carry out Grievant's assigned duties. (Testimony of supervisor) (Agency Exhibit 12). Grievant offered no evidence to dispute the supervisor's testimony. Rather Grievant conjectured in her testimony that she could complete 3 to 4 Risk-1 inspections per day which is slightly less than the official time records. The Hearing Officer gives greater weight to the supervisor's testimony because her conclusion was based on official records that are not in dispute.

In hearings contesting formal discipline, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (11) the behavior constituted misconduct, and (11) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be

mitigated unless under the record evidence, the agency's discipline exceeds the limits of reasonableness." (GPM at § 5.9). The Standards of Conduct Policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that compel a reduction to promote the interests of fairness and objectivity or based on an employee's otherwise satisfactory work performance; or (2) an employee's long service or otherwise satisfactory work performance. Grievant already got the benefit of mitigation in the resolution steps when the charge was reduced from a Group 11 offense to Group 1 because of Grievant's years of employment and good service record. No further mitigation is warranted or appropriate.

### **DECISION**

The disciplinary action of the Agency is affirmed.

### **APPEAL RIGHTS**

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

Please address your request to:

Office of Equal Employment and 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 the decision becomes final.<sup>[3]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

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Neil A.G. McPhie  
Hearing Officer