

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 09/10/18;  
Decision Issued: 09/20/18; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 11233; Outcome: No Relief – Agency Upheld.



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11233**

Hearing Date: September 10, 2018  
Decision Issued: September 20, 2018

**PROCEDURAL HISTORY**

On February 14, 2018, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On March 15, 2018, 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 12, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On September 10, 2018, 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 Juvenile Justice employs Grievant as a Trainer & Instructor II at one of its facilities. She has been employed by the Agency for approximately ten years. Grievant had a prior active Group I Written Notice.

The Agency maintains a Student Record for each student with the Agency. The Student Record is used for file reports with State and federal agencies and to ensure students are eligible to graduate. It is the "end all and be all" and must be accurate. Grievant was responsible for maintaining student files.

Students must pass six Standards of Learning (SOL) tests in order to graduate from high school. The Agency was responsible for determining whether a student has passed six SOL tests and was eligible to graduate. The Agency had access to an online database showing whether a student has passed an SOL test. Grievant had access to the online database.

A Student Detail by Question (SDBQ) is a preprinted form listing subjects by category relating to an SOL test. Based on a student's performance, a Tester fills in the student's score for each category and determines an overall performance level. The results of the SDBQ can be used for student remediation.

On January 24, 2018, the Student approached Grievant with a SDBQ form and told Grievant that he passed one of several history SOLs. The Student gave Grievant a SDBQ form containing his name and a score of 406 to show a performance level of

“Pass/Proficient”. On the side of the form, someone had written “I PASSED”. The Student had taken another student’s SDBQ form and changed the name on the form to show the Student had passed.

Grievant placed the Student’s SDBQ in the Student’s Record. During the week beginning January 22, 2018, Grievant went to Mr. D’s office to discuss the upcoming testing schedule. Grievant told Mr. D that the Student had passed a history SOL and only needed to pass one more SOL. Grievant said that the Student wanted to take the Earth Science SOL. Mr. D “made a note of it” on a post-it note and placed the note on his desk for future reference.

During the week, the Student took and passed the Earth Science SOL. He claimed he had passed the SOLs and was ready to graduate. Mr. D reviewed the online database to make sure the Student was ready to graduate. Mr. D could only identify five SOL tests passed by the Student. Mr. D went to the Student and told the Student he had passed only five SOL tests. The Student told Mr. D that Mr. D was mistaken and that the Student had passed all of his SOL tests. The Student said he had passed the history SOL test and that Grievant had a paper to prove this. Mr. D doubted the Student’s claim because Mr. D had taught history to the Student and the Student did not obtain a high enough score to pass the class.

Mr. D left the Student and went to speak with Grievant. Mr. D explained the situation to Grievant and asked to see the proof the Student was talking about. Grievant got the Student’s file and opened it to find the SDBQ form. Mr. D asked for a copy of the document and Grievant removed the hole-punched copy from the Student’s file and made a copy for Mr. D to have.

Mr. D took the copy of the SDBQ form “back to compliance where we pulled up the testing session from back in the fall 2016.” The Student received a failing score of 352 instead of the passing score of 406. Another student had passed with a score of 406. Mr. D compared the Student’s SDBQ form to the form for the other student and determined the Student had copied the other student’s form and inserted his name at the top.

## **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>1</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.”

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

“[U]nsatisfactory work performance” is a Group I offense.<sup>2</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

In January 2018, Grievant received a falsified SDBQ form from the Student and placed that form in the Student’s Record. Grievant told Mr. D that the Student had passed history even though the Student had not passed history. Grievant could have reviewed the online database and realized the Student had not passed history. Grievant’s work performance was unsatisfactory because she incorrectly informed Mr. D that the Student had passed the history SOL test. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that she knew the Student had not passed the history test and that she placed the SDBQ form in the Student’s file because otherwise it might be removed from her desk which was located in a “busy” office. Grievant denied telling Mr. D that the Student had passed the history SOL test.

Mr. D’s testimony was credible regarding what Grievant told him. Mr. D documented his recollection within a week of the event and his written statement supported his testimony at the hearing. Grievant has not presented any reason why Mr. D would be untruthful or mistaken about his conversation with Grievant. The Agency’s evidence is sufficient to support the disciplinary action.

*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>3</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 I Written Notice of disciplinary action is **upheld**.

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<sup>2</sup> See Attachment A, DHRM Policy 1.60.

<sup>3</sup> *Va. Code § 2.2-3005.*

## 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 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR 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 EEDR before filing a notice of appeal.