

Issue: Group II Written Notice (failure to follow instructions and insubordination);
Hearing Date: 06/01/18; Decision Issued: 06/29/18; Agency: DJJ; AHO: Jane E.
Schroeder, Esq.; Case No. 11202; Outcome: Full Relief; **Administrative Review:**
Ruling Request received 07/13/18; EEDR Ruling No. 2019-4761 issued 09/06/18;
Outcome: Remanded to AHO; Outcome pending.

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

DECISION OF THE HEARING OFFICER

In the matter of Case #11202

Case Heard: June 1, 2018

Decision Issued: June 29, 2018

PROCEDURAL HISTORY

The Grievant was employed by the Department of Juvenile Justice (“DJJ” or “Agency”). On February 8, 2018, the Agency issued a Group II Written Notice to the Grievant for failure to follow a supervisor’s instructions and insubordination, citing the assignment to complete two charts and the reassignment of an employee to a new position. The Grievant filed a Grievance on February 26, 2018. The relief requested by the Grievant was to have Group II Notice and all references to it removed from his file.

A pre-hearing conference was held on May 10, 2018. The date of the hearing was set for June 1, 2018. The case was heard on June 1, 2018, beginning at 9:30 a.m., and concluding at 7:45 p.m. The Grievant attended and was represented by counsel. An agency representative attended and was represented by counsel. The Grievant’s Exhibit Book, pages 1-124, was entered into evidence without objection. The Agency’s Exhibits 1-22 were entered into evidence, over the objection of counsel to the Grievant to Exhibit 17. During the hearing, the Agency submitted 21 pages to be added to Exhibit 18. These 21 pages were entered into evidence without objection. Four witnesses for the Agency testified. Three witnesses for the Grievant testified. The hearing was recorded on a digital recorder and stored on one USB Flash Drive. Due to the late hour of the testimony of the last witness, it was agreed that closing arguments would be submitted in writing. The Agency submitted their closing argument on June 7th and the Grievant submitted his on July 11, 2018.

APPEARANCES

Grievant

Attorney for the Grievant

Representative for the Agency

Attorney for the Agency

Witnesses for Agency:

1. Regional Program Manager
2. Intake Officer for local Court Services Unit
3. Supervisor, local Court Services Unit

- Witnesses for Grievant:
4. Deputy Director of the DJJ
 1. County Administrative Manager
 2. County Probation Officer
 3. Grievant

ISSUE

Whether the Group II Written Notice Issued to the Grievant on February 8, 2018 for failure to follow supervisor's instructions and insubordination should be sustained, modified or revoked.

BURDEN OF PROOF

In disciplinary actions, the agency must present its evidence first and the burden of proof is on the Agency to show by a preponderance of the evidence that its action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not (Grievance Procedure Manual). This case is a disciplinary action. In this case, the agency must prove that it is more likely than not that the Grievant failed to follow instructions or policy and/or that the Grievant was insubordinate. The agency must prove that issuing Group II Written Notice was warranted and appropriate.

FINDINGS OF FACT

1. On February 8, 2018, the Grievant was issued Group II Written Notice for failure to follow a supervisor's instructions and insubordination. The Written Notice was issued by the Regional Program Manager ("RPM"), the direct supervisor for the Grievant. In an attachment, the RPM stated that there were two issues that resulted in the Written Notice. The first issue was a written assignment of two charts that the Grievant had not completed as instructed. The second issue was regarding the reassignment of an employee by the Grievant, after the RPM instructed the Grievant to return the employee to his prior duties.¹
2. The Grievant was employed by the Department of Juvenile Justice ("DJJ") for a number of years. In December, 2016, he was appointed by the judges of juvenile and domestic relations district court ("J&DR court") to the position of court services unit director for the local court services unit ("CSU").²
3. The position of CSU director is a supervisor position. According to the Employee Work Profile for this position, the Grievant is responsible for the following position objectives:

¹ Agency Exhibit 2, Pages 4 and 6

² Agency Exhibit 16. Grievant Exhibit Page 1

“Provides leadership to and manages the operations of the court service unit, manages human and capital resources, and ensures the proper application of all pertinent policies and procedures according to departmental, state, local and judicial requirements. Collaborates with local stakeholders, community partners, and the judiciary.”³

4. The CSU provides support services to the J&DR court, but the CSU is not part of the judicial branch. The CSU is part of the DJJ in the executive branch. The CSU director is an employee of the DJJ. In the management of human resources, the CSU director supervises the personnel in the CSU, some of whom are employees of the DJJ and some of whom are employees of the county. The Regional Program Manager (“RPM”) is a DJJ employee who is the direct supervisor of CSU directors.⁴
5. It is clear from the evidence presented, including the testimony of the RPM and the Grievant, that the CSU was not functioning well when the Grievant became CSU Director. The previous director had not dealt with issues or made decisions. The staff did not have direction from the Director and there were many complaints and problems between staff. The RPM described the CSU at that time as dysfunctional. When the Grievant began as the CSU Director, the RPM and the Grievant discussed the many problems and possible solutions to the chaos.⁵
6. The County Administrative Manager for the unit (who had been there for 22 years) testified that the unit had been disorganized and there was a lot of in-house backstabbing. When the Grievant became CSU Director, the supervisors (who were supervised by the CSU Director) did not want to take directions from the Grievant, including when the Grievant required the staff to sign in and account for their time.⁶
7. On February 27, 2018, the Grievant discovered there were a group of employees on the unit that met periodically for at least the last six years at the Green Turtle Restaurant to discuss problems with management. The intake officer testified that he was part of that group of co-workers. The Grievant wrote a memo which he sent to the DJJ to share his concern that this group, known as the “Turtle Group” or “Turtle Club” used their working hours to disrupt the operation of the CSU.⁷ The Deputy Director of the DJJ testified that she is still investigating the Turtle Group.⁸

FACTS REGARDING COMPLETION OF THE CHARTS

8. On January 11, 2018, the RPM attended a supervisor’s meeting with the Grievant. At

³ Grievant Exhibit Page 7

⁴ Testimony of Regional Program Manager and Grievant. See also Agency Exhibit 15, p.77.

⁵ Testimony of RPM and Grievant.

⁶ Testimony of County Administrative Manager

⁷ Grievant Exhibit pages 18-28; Testimony of intake officer, Grievant

⁸ Testimony of Deputy Director

that time, the RPM sketched out a template of charts of state and county employees in the CSU. Columns included: Worker Name, Position, Prior Position, Date Changed, Date discussed with local HR, and Date discussed w/RPM. She asked the Grievant to make the charts, and the Grievant said that he could complete the charts in a week.⁹

9. One week later, on January 19, 2018, at 2:22 p.m., the RPM sent an email to the Grievant, reminding him of the chart assignment, and stated, "I do not know if you are prepared to have it to me by COB today, but if not, I will need that no later than COB Monday 1/22/18."¹⁰
10. On January 19, 2018, at 6:46 p.m., the Grievant sent an email to an employee he supervised, and asked him to fill out the charts. The email did not mention that the RPM wanted the charts completed by Monday, January 22.¹¹
11. On January 24, 2018, at 4:28 p.m., the RPM sent the Grievant an email stating: [Grievant], Attached please find the notes from our 1/11/18 meeting. Please review." The attached minutes outline a contentious meeting between the RPM and the Grievant. At one point during the meeting, the RPM would not continue the meeting until a third party joined the meeting by telephone. The minutes then included the statement, "[RPM] provided [Grievant] with a written draft of a chart to track employee positions and asked [Grievant] to have an electronic version of the chart with all information completed to her by the end of next week(January 19th.)"¹²
12. The RPM testified that she asked the Grievant for the electronic version of the charts. The Grievant testified that the RPM had not asked for an electronic version of the charts in the 1/11/18 meeting. The Grievant stated that his employee came up with the idea of the electronic version of the charts. The Grievant also testified that he was out ill some time in January, that January was a very busy time on the unit with late nights and weekend work, and that the chart assignment got lost in shuffle.
13. On January 24, 2018, the employee to whom the Grievant had asked to fill out the charts sent the Grievant an electronic version of the charts, which the Grievant showed to the RPM, but the charts were incomplete. On February 6, that employee, after getting assistance from other employees (state and local), sent the Grievant the charts. The RPM testified that she received the charts on February 6, 2018, but the last two columns were blank.¹³
14. The two charts, one for state employees and one for county employees, are reproduced

⁹ Testimony of RPM and Grievant

¹⁰ Agency Exhibit 6, page 27-28

¹¹ Grievant Exhibits page 39

¹² Agency Exhibit 9, pages 41-43

¹³ Agency Exhibit 3, Page 7, 15.

five times in the Exhibits. In each case, the charts are unchanged. The last two columns in each chart, Date discussed with local HR, and Date discussed w/RPM are blank.¹⁴ The RPM testified that the column, “Date discussed with local HR” would be blank for the chart for state employees. The Grievant testified that he could not fill out the dates for those two columns because he had no records of the dates of those discussions.

FACTS REGARDING THE REASSIGNMENT OF AN EMPLOYEE TO A NEW POSITION

15. In the fall of 2017, the Grievant and J&DR judges of the local CSU had discussion regarding the need for another probation officer in the Supervised Release Program (“SRP”). In the SRP, juveniles were to be monitored 24 hours a day, seven days a week. The juveniles in this program were electronically monitored, with the probation officer for that case given an alert if the juvenile was not in place. The Grievant, who was the supervisor of the probation officers’ supervisor, was concerned that the alerts were not monitored by the probation officers or their supervisors. The Grievant requested a report from the vendor, and discovered that 12,000 alerts were not answered. The Grievant then had a meeting to discuss the problem with the employees involved. The employees agreed to answer the alarms. Other changes, including reducing the case loads, moving some juveniles to house arrest, or requiring juveniles to call in, helped to improve the system.¹⁵
16. The Grievant decided that one of the probation officers, currently working as an intake officer, would be good in the new SRP probation officer position. He told that probation officer’s supervisor to discuss this with that intake officer. On December 18, 2017, the intake officer filed a Grievance, stating the issue as follows: “On 12-5-17, I was informed verbally by Intake Supervisor [name] that Director [Grievant] is deciding to place me in January 2018 to house arrest P.O. position with of 12 pm-9pm -24/7 as needed; consider this a demotion possible retaliation” The relief he requested was to remain in his current job position as intake officer.¹⁶
17. The Intake Supervisor met with the intake officer on December 18th, and wrote a written response for the First Resolution Step that day, denying the relief requested. The intake officer then informed the CSU Director [Grievant] that he waived the meeting with the CSU Director and requested a written response for the Second Resolution Step. The CSU Director provided a written response on December 20th, denying the relief requested, and the intake officer advanced his grievance to the third step.¹⁷

¹⁴ Agency Exhibits Pages 13,14,33,34,67,68. Grievant Exhibits Pages 37,38,46,47.

¹⁵ Testimony of Grievant

¹⁶ Agency Exhibit 19

¹⁷ Agency Exhibit 19, pages 130-135.

18. The Regional Program Manager met with the intake officer in late December, 2017, and issued a Step III Grievance Response on January 23, 2018. In her response, the RPM stated that the proposed change in position was not a demotion, nor was the proposed action retaliatory in nature. The majority of the two-page response outlined the mistakes of the CSU Director made regarding the new position. “[Grievant] did not have a definite description of the duties and has not completed the procedure regarding the Supervised Release Program.”¹⁸
19. The last paragraph of the response is as follows:

“At this juncture it is unreasonable to change this or any employee’s position to the intended SRP position until it is better defined. The unit currently has a vacant state and local position, either of those positions should be used to fill the SRP position once the duties are clearly defined and an EWP is created.”¹⁹
20. The RPM sent the Step III Grievance response to CSU Director and the Human Resource (HR) Manager of the DJJ by email at 4:39 p.m. on January 23, 2018. She did not send a copy of the response to the intake officer who filed the grievance until instructed to do so by DJJ HR the following day.²⁰
21. The Grievant testified that, when he received the response, he understood that no one could be placed into the position until an EWP (Employee Work Profile) was created. He then instructed one of the supervisors that worked for him to prepare an EWP. On January 24th, at 2:13 p.m, the Grievant wrote an email to the intake officer who had grieved his proposed reassignment to ask his input to the intake officer’s supervisor regarding a proposed EWP.²¹
22. At 2:17 p.m., the intake officer, who had not yet received the Step III Grievance Response from the RPM, forwarded to the RPM the 2:13 p.m. email from the CSU Director. The RPM testified that she then sent the Step III Grievance response to the intake officer who had filed the grievance.
23. At 2:51 p.m, the RPM then sent the following email to the Grievant: “The email below [the 2;13 p.m. email from the Grievant to the intake officer] was forwarded to me. While the findings do not indicate retaliation or demotion, they do provide specific steps for moving forward with the SRP position. Please do not continue with moving this employee. Follow the direction given by me in the step II grievance response. Please let

¹⁸ Agency Exhibit 8.

¹⁹ Agency Exhibit 8, Page 37.

²⁰ Agency Exhibit 9, Page38, Testimony of the RPM

²¹ Agency Exhibit 9, page 39.

me know if you need any assistance.”²²

24. At 3:07 p.m., the Grievant sent the following email response to the RPM:

“[RPM], there is no valid reason why I should differential assignments and/or pick or choose who does what based on their ability to circumvent and influence the chain of command. Everytime my people do it, you are involved. It is well within my purview to assign workers where I see fit on this unit. That’s my job. I’ve been hired to do so and my ability to do this job has only been questioned by you.

I’m incredibly clear that you did not chose me for this position and its starting to interfere with my ability to turn this rather dysfunctional unit around. A Unit that you described yourself as manipulative and dysfunctional. One that you oversaw for 3 years before I got her with very little movement forward. This is a touch environment but we are moving forward. You’re continuation to interfere with my ability to operate this Court Service Unit is uncalled for and undeserved and feels retaliatory in nature.

You took 5 sentences to address Mr.[intake officer]s grievance that didn’t qualify for a grievance and over 25 sentences to publically bash my decisions that are based on reasonable judgement and much discussion around the management table. Your 25 sentences actually had little to do with providing information to Mr. [intake officer] that was useful except for supporting his belief that I was somehow wrong in this. You missed a perfect opportunity to show this very divided staff that we stand together and that when an employee has a disagreement, they need to follow the chain of command to problem solve.

Respectfully, [Grievant]”²³

25. The RPM testified that this three paragraph message sent to her by the Grievant was “insubordinate in all its wording.”²⁴
26. At 4:42 p.m., the Grievant sent an email to one of the supervisors that worked for him to “Please start working on an EWP and an SRP job description that meets DJJ Expectations. [Co-worker] may be a great help with this. Most of it should be a straight forward PO EWP.”²⁵
27. At 4:28 p.m., as previously noted in facts paragraph 8 above, the RPM sent the Grievant an email with the notes from the 1/11/18 meeting. At one point during that meeting, the RPM would not continue the meeting until a third party joined the meeting by telephone.

²² Agency Exhibit 9, Page 39.

²³ Agency Exhibit 9, Page 40.

²⁴ Testimony of RPM

²⁵ Agency Exhibit 9, Page 38.

28. At 6:17 p.m., the Grievant sent the RPM an email criticizing the RPM for the way the RPM was micromanaging his work as the CSU Director. In his last paragraph, he states, “I’d rather not keep this dialogue going right now. I am again requesting to process this with a third party most appropriately from DHRM Dispute Resolution Department or their equivalent.”²⁶
29. The RPM and her supervisor, the Deputy Director of the DJJ both testified that the Grievant’s request for third party mediation was not processed through the DHRM Dispute Resolution Department as requested by the Grievant. Instead the Grievant was offered to have a management coach through the local county HR handle the problems between a DJJ CSU Director and a DJJ Regional Program Manager, two DJJ management employees.²⁷
30. On February 6, 2018, the RPM sent the Grievant a memo outlining her intent to issue a Group II Offense for insubordination and failure to follow a supervisor’s instruction.²⁸
31. On February 8, 2018 at 11:40 a.m., the Grievant sent a three-page letter to the RPM by email responding to the Group II Letter of Intent. In the letter, the Grievant reiterated that he was continuing to develop the SRP position and that the intake officer had the gang training needed and was the most qualified for the position. He explains that position was a must fill position and “it was clear to me that you wanted me to develop the position more before we moved Mr. [intake officer]. *I did not understand that you were advocating for Mr. [intake officer] to not be reassigned at all.*” (emphasis in the original)...The Grievant went on to state that Mr. [intake officer] has not been moved to the new position.²⁹
32. On that same day, February 8, 2018, the RPM issued the Group II Written Notice to the Grievant. In the Attachment to the Written Notice, the RPM stated the following: “On January 24, 2018, in response to an employee grievance regarding your decision to change to his job duties and work hours, I instructed you to return the employee to his prior duties and work hours consistent with the relief I granted in my third step grievance response.... Your deliberate disregard of my instructions significantly undermines my ability to provide direction and oversight of the management of the [local] Court Service Unit.”³⁰
33. In fact, the Grievant had never removed the employee from his prior duties and work hours. The Grievant continued work on the EWP for the new position, as instructed by

²⁶ Agency Exhibit 9, Page 44.

²⁷ Testimony of RPM and Deputy Director

²⁸ Agency Exhibit 4.

²⁹ Agency Exhibit 12.

³⁰ Agency Exhibit 2, Page 6.

the RPM.³¹

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code ' 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions for a grievance 2-1201 and §53.1-102.procedure. The Act balances the need for orderly administration of state employment 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 government interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653,656 (1989).

The Operating Procedure, “*Standards of Conduct*,” under Code of Virginia §2.2-1201 and §53.1, sets forth the Standards of Conduct and disciplinary process that the Agency must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace or outside the workplace when the conduct impacts an employee’s ability to do their job, or influences the agency’s overall effectiveness.

Standards of Conduct provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Unacceptable behavior is divided into three groups, according to the severity of the behavior, with Group I being the least severe and Group III being the most severe.

Section 2.b. provides that Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws.” An example pertinent to this proceeding is failure to follow supervisor’s instruction.³²

In the present case, the Grievant was issued a Group II Written Notice for failure to follow a supervisor’s instruction and insubordination. In the attachment to the Written Notice, the RPM sites two issues: the completion of two charts and the reassignment of an employee to a new position.

In the Rules for Conducting Grievance Hearings, Section VI., Scope of Relief, B. Disciplinary Actions, section 1: Framework for Determining Whether Discipline was Warranted and Appropriate@ states as follows:

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was

³¹ Testimony of Grievant, and RPM

³² Agency Exhibit 18: pages 8 & 128.

warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; and (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with the law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense). ...If the Agency does not prevail as to any of the elements (i) through (iii) above, the disciplinary action should not be upheld.³³

Using this framework, this Hearing Officer will analyze this case.

(i) Whether the employee engaged in the behavior described in the Written Notice

On January 11, the Grievant was given the task of filling out two charts by the RPM, his direct supervisor. However, the RPM did not send the minutes to that meeting to the Grievant until January 24. By then the charts were made, but the last two columns which asked dates of conversations, were not filled in. The Grievant had said he could get them completed in a week, but it took longer, even with the help of his employees, and charts were turned in four weeks after the assignment was given. The five copies of the charts submitted into evidence are all the same, with no entries into the last two columns. For this task, I find that the Grievant engaged in the behavior described in the Written Notice, in that the charts were not completed in the time frame requested by the RPM.

The Grievant was also cited for disregarding the instructions of the RPM regarding moving an employee to another position. The Grievant never moved the employee. The instructions given to the Grievant in another employee's Third Step Response were to develop the EWP before the position was filled. The Grievant followed those instructions. The Grievant did not, as charged in the Written Notice, deliberately disregard of the instructions of the RPM. I do not find that the Grievant was insubordinate, in that the Grievant did not, in fact, disregard the instructions of the RPM. I do not find the Grievant engaged in that behavior described in the Written Notice.

(ii) Whether the behavior constituted misconduct

The issue here is whether turning the charts late constitutes misconduct. The Grievant was given the instruction in a meeting to complete the charts on January 11. When asked when he could get them done, he replied, in a week. The Grievant did not ignore the instructions of the RPM. The evidence showed that he had employees assisting in completing the charts. During the time the charts were being completed, the Grievant was ill for some period of time, and he was working nights and weekends to complete his work. During this time, the RPM not only refused to meet with the Grievant without a third party present, but did not arrange for third party

³³Rules for Conducting Grievance Hearings, VI.B1. Effective Date 7/1/2012.

mediation through the DHRM Dispute Resolution Department as requested by the Grievant. I do not find that missing the deadline for turning in the charts was misconduct. The Grievant did not violate the Standards of Conduct when he followed the supervisor's instructions to prepare the charts, but turned them in late. I find that the Grievant's behavior did not constitute misconduct.

Since I have determined that the Grievant's behavior did not constitute misconduct, the Agency does not prevail as to elements (i) and (ii) above. Therefore, the disciplinary action is not upheld.

The Grievant was given a Group II Written Notice. . I do not find that the action taken by the agency in this case of issuing a Written Notice was warranted and appropriate. This Hearing Officer finds that the agency's discipline of imposing a Group II Written Notice in this case is not upheld.

DECISION

The Group II Written Notice issued to the Grievant on February 8, 2018 is rescinded. The Agency is instructed to remove the Written Notice from the Grievant's personnel file.

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 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 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.[1]

[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].

June 29, 2018

Jane E. Schroeder
Jane E. Schroeder, Hearing Officer

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