

Issues: Group II (failure to follow instructions), Group III (falsifying records), Group II (insubordination and failure to follow instructions), and Termination (due to accumulation); Hearing Date: 06/05/17; Decision Issued: 09/26/17; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10994; 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: 10994**

Hearing Date: June 5, 2017  
Decision Issued: September 26, 2017

**PROCEDURAL HISTORY**

On February 13, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. On February 13, 2017, Grievant was issued a Group III Written Notice of disciplinary action for falsifying records. On February 13, 2017, Grievant was issued a second Group II Written Notice of disciplinary action with removal for failure to follow instructions and insubordination.

On March 15, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 3, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On June 5, 2017, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?

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 Social Services employed Grievant as a Program Admin Specialist II at one of its locations. Her working title was Program Consultant Senior. Grievant began working for the Commonwealth of Virginia in 2007. No evidence of prior active disciplinary action was introduced during the hearing.

If a User has a problem with Agency's computer system, he or she may submit a "ticket" to the Division in which Grievant worked. Once a ticket was assigned to Grievant through the computer system, Grievant was to take "ownership" of the ticket. Taking "ownership" of a ticket could be completed within 24 hour period. Grievant would be responsible for resolving the ticket to the customer's satisfaction.

Grievant had received a number of tickets which she had not processed. The Supervisor reviewed the computer system and discovered many tickets assigned to Grievant for which she had not contacted the customer who requested assistance.

On January 26, 2017 at 10:52 a.m., the Supervisor sent Grievant an email stating:

While researching a ticket assigned to me from DIS<sup>1</sup> that was originally assigned to you in September, I was disappointed to discover that you have almost 40 open tickets that date back to July 2015. I confirmed with [name] that they were assigned to you and that you received electronic notification for each one.

- 1) By 9 am tomorrow, go into the system and take ownership of all the tickets forwarded to you. As of this morning there are 37.
- 2) By 5 pm tomorrow, I need you to review the list on the attached document and fill in all the grey boxes. Do not leave any blanks unless a ticket is not resolved. In that case, fill in the initial and most recent contact date columns as well as the status column. Only the Resolved Date column can have any blanks. And only if you are actively working the ticket.
- 3) You may have already resolved the tickets and never closed them out. If so, indicate that by noting the date you resolved in the appropriate column and close the ticket, documenting in the system the resolution and resolution date.
- 4) If you have not contacted the customer yet, please do so in an email by 9 a.m. tomorrow and Bcc me. Ensure your emails are customized to reflect the age of the respected ticket.
- 5) Resolution does not mean that you assigned these to me or DIS. Even if they are an appeals ticket. If you feel that resolution requires DIS, indicate that in the Status field and indicate why. When you are done with the assignment, we will review any that you feel needs DIS involvement.
- 6) When you are done, I will be contacting a few of the customers at random to do Quality Assurance.

Moving forward, I expect you to adhere to the customer service standards we were trained on when we both took on tickets in April 2015.

- Take ownership of the ticket in the system (become the Current Officer) by the end of the business day the ticket is received.
- Make initial contact with the customer within 24 hours. (Bcc me until I say otherwise so I can have reassurance you are making contact in a timely manner.)
- Upon resolution, close the ticket on the same business day and thoroughly document in the system.<sup>2</sup>

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<sup>1</sup> DIS refers to Division of Information Systems, a unit within the Agency.

<sup>2</sup> Agency Exhibit 6.

The Supervisor met with Grievant on January 26, 2017 and instructed Grievant to complete the assignment described in his January 26, 2017 email by 5 p.m. on January 27, 2017. Grievant did not meet this deadline.

Grievant closed several of the tickets for the reason of "force majeure". Employees used this reason when no other reason was available. Customer K submitted a request on December 6, 2016 because she needed to "clear two VEMAT<sup>3</sup> cases." Grievant was assigned ticket number 1228980 on December 8, 2016. Grievant opened the ticket at 4:08:27 p.m. on January 27, 2017 and closed it at 4:08:53 with the reason "force majeure."

On January 30, 2017 at 12:30 p.m., the Supervisor sent Grievant an email stating:

I have not received the excel spreadsheet that I requested by 5 p.m. on Friday. Please immediately send to me. You also sent some tickets to DIS even though I specifically instructed you not to. After I have a chance to review the spreadsheet, I may have questions. I'll be in touch once I review.<sup>4</sup>

On January 31, 2017 at 9:36 a.m., the Supervisor sent Grievant an email stating:

It is after 9 a.m. and I still don't have the spreadsheet. I'm disappointed you were not able to follow my instructions for the 3<sup>rd</sup> day in a row. Before you start other tasks today, please finalize the attached and send back to me. I am in meetings until noon and will swing by your desk at 1 p.m.<sup>5</sup>

On January 31, 2017 at 10:06 a.m., Grievant sent the Supervisor a spreadsheet showing each "Call No", "Call state", "Your Initial Response Date", "Your Most Recent Response Date", "Resolved Date (Closed Ticket)" and "Status if Not Resolved (Provide Narrative)". Grievant "copied and pasted" the phrase "Unable to recall based on situation discussed with manager" into the section entitled "Your Initial Response Date".

On February 2, 2017 at 1 p.m., Grievant met with the Supervisor. The Supervisor explained to Grievant that the tickets had not been resolved properly and he wanted to discuss additional tasks necessary to resolve the tickets. Grievant told the Supervisor the assignment was done. The Supervisor told Grievant that the assignment was not done and explained how she was to complete the assignment. The Supervisor told Grievant that the information in the spreadsheet was not complete and had been copied line by line. The Supervisor wanted Grievant to update the spreadsheet to reflect completion of the remaining tasks. Grievant said she would not do the tasks

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<sup>3</sup> Virginia Enhanced Maintenance Assessment Tool.

<sup>4</sup> Grievant Exhibit 5.

<sup>5</sup> Grievant Exhibit 5.

described by the Supervisor. Grievant said she had already completed the spreadsheet. The Supervisor explained that she would be insubordinate if she refused to follow his instructions. He asked her again if she would perform the tasks and Grievant said no.

On February 2, 2017 at 3:45 p.m., the Supervisor sent Grievant an email stating:

Following the instructions in the attached email and as I instructed when we met face to face on 1/26/17 and 2/2/17. I need you to complete the spreadsheet in the attachment for all 37 overdue tickets you resolved last week. In the narrative field, identify the 2 tickets you assigned to DIS.

I am giving you a firm deadline of 5:00 p.m. today 2/2/17 to complete.<sup>6</sup>

Grievant did not comply with the Supervisor's instruction. On February 3, 2017, the Supervisor sent Customer K an email regarding ticket 1228980 and stating:

I'm with VDSS and I am trying to clean up some old VEMAT tickets. One of them is from you for 12/06/2016. Did you get resolution on this matter?

Customer K replied:

This issue is still there. I have two VEMATs in for the same child that have not been approved.<sup>7</sup>

Grievant was unable to produce any of the emails she was supposed to have sent to customers. After Grievant's removal, Agency managers were unable to locate any emails Grievant had sent to customers relating to the 37 tickets.

## 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>8</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."

### Group II

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<sup>6</sup> Grievant Exhibit 5.

<sup>7</sup> Agency Exhibit 9.

<sup>8</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Failure to follow instruction is a Group II offense.<sup>9</sup> On January 26, 2017, the Supervisor instructed Grievant to take certain actions to resolve tickets that had been unresolved for lengthy periods of time. Grievant did not comply with the Supervisor's instructions. Grievant did not take "ownership" of several tickets by 9 a.m. on January 27, 2017.<sup>10</sup> Grievant could not produce any emails showing she made initial contact with the customer within 24 hours. Grievant did not "blind copy" the Supervisor on her emails to the users. Grievant did not complete the spreadsheet and send it to the Supervisor by 5 p.m. on January 27, 2017. Grievant assigned several tickets to DIS even though the Supervisor instructed her not to do so.<sup>11</sup> The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that she used a function within the computer system to contact customers and ask them to confirm that the ticket issued had been resolved and, if not, to open another ticket. By using the computer system to contact customers, Grievant did not send emails to them. This argument is unpersuasive because the Supervisor's instruction was to blind copy him on her emails to customers. If the computer system would not have allowed her to blind copy the Supervisor, Grievant should not have used that system to contact customers.

Grievant argued that when a ticket was closed it was resolved. Resolving a ticket did not require her to contact the user or research the computer system. Grievant asserted that the Supervisor advised her during their meeting that she could close the tickets and was no longer required to complete the spreadsheet or copy him on emails she sent. The evidence showed that the Supervisor did not amend his instruction and it remained as specified in his email to Grievant.

### Group III Falsification

The Agency argued that Grievant documented that tickets had been resolved when in fact she had not contacted the customer and resolved the ticket. Insufficient evidence was presented to show that Grievant had the intent to falsify any documents. Grievant's actions resulted from her resistance to the assignment. Grievant's entries in the computer system resulted from her desire to "cut corners" or complete the assignment as she wished to define it rather than from an objective of falsifying records.

### Group II Written Notice

On February 2, 2017, the Supervisor instructed Grievant to complete the remaining parts of the original assignment. Grievant refused to perform any more on the assignment even though it was not completed as originally required. The Agency

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<sup>9</sup> See, Attachment A, DHRM Policy 1.60.

<sup>10</sup> Grievant eventually took ownership of all of the tickets.

<sup>11</sup> By sending tickets to DIS, Grievant did not resolve the customer's concern.

has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions.

Grievant argued that she had completed the assignment and could not perform any additional duties. The evidence showed that Grievant had not completed all of the tasks required of the original assignment and that the Supervisor advised Grievant she had not completed all of the assignment. For example, the Supervisor sent Customer K an email regarding ticket 1228980 and asking if her concern had been resolved. She indicated the problem remained. If Grievant had completed the assignment by contacting Customer K, she would have learned of Customer K's response and been able to report and address that concern.

### Accumulation of Disciplinary Action

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

### Mitigation

*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>12</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 further 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 for failure to follow instructions is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice for falsification of records is **rescinded**. The Agency's issuance to the Grievant of a second Group II Written Notice for failure to follow instructions is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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<sup>12</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.