Issues: Group II Written Notice (failure to follow supervisor's instruction and perform assigned work) and second Group II Notice with 5-day suspension (failure to follow supervisor's instructions); Hearing Date: October 4, 2001; Decision Date: November 2, 2001; Agency: Department of Conservation and Recreation; AHO: Carl Wilson Schmidt, Esquire; Case Numbers: 5287 and 5289

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Numbers: 5287 and 5288

Hearing Date: October 4, 2001
Decision Issued: November 2, 2001

PROCEDURAL HISTORY

On April 13, 2001, Grievant was issued a Group II Written Notice of disciplinary action for:

> *Failure to follow supervisor's instruction and perform assigned work. Issue 1: Refusal to sign and seal contract documents as directed by a supervisor and as required by the State. Issue 2: Knowingly and willfully disregarding a supervisor's direct instruction and ignoring a state requirement.*

On April 18, 2001, Grievant was issued a second Group II Written Notice of disciplinary action with five days suspension for:

> *Failure to follow supervisor's instructions.*

On September 6, 2001, the Department of Employment Dispute Resolution assigned these appeals to the Hearing Officer. The Director of the Department of Employment Dispute Resolution issued a Compliance Ruling granting consolidation of Case Numbers 5287 and 5288. The Director stated,

> This Department has long held that grievances may be consolidated by mutual agreement of the parties, or absent such an agreement, by this Department whenever the grievances challenge the same action or series of actions or arise out of the same facts. EDR strongly favors consolidation and will grant a consolidation request unless there is a persuasive reason to process the grievance individually.[footnotes omitted].

See Grievance Procedure Manual ("GPM") § 8.5.

APPEARANCES

Grievant
Section Manager
Agency Representative
Division Director
Bureau Chief
Architect Senior
Architect Senior
Bureau Chief
Architect
President
Park Manager
Senior Architect
Project Manager
Architect

ISSUES

Whether Grievant should receive two Group II Written Notices of disciplinary action.

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 employs Grievant as an Architect Senior. He has been employed by the Agency for approximately five years. He is a creative, skilled, and knowledgeable architect.

Several buildings in various State parks needed roof replacements or improvements. The Agency received funds to pay contractors to make the needed repairs. In order to satisfy the funding requirements, the projects had to be bid and completed by June 18, 2001. In January 2001, Grievant was chosen by the Agency to serve as project manager for the design of six roof projects. He was given full authority over the design aspects of the projects.[1]

The Agency's Section reorganized in June 2000 and added in-house design as one of its functions. Grievant had experience in autoCAD software and believed he was capable of performing in-house design duties. He volunteered to perform in-house design and the Agency afforded him that opportunity.

On March 20, 2001, a peer review meeting was held to review the status of the roof projects. The Section Manager, Bureau Chief, and Architect Senior formed the review committee. The review committee discussed the projects and whether Grievant should sign and seal the plans using his architectural seal. Grievant expressed some concern about why he needed to sign and seal the documents. The Section Manager said Engineering and Buildings required signing and sealing the documents. He also said it was his personal requirement because he believed the project should be safe and secure for the public. The Section Manager presented Grievant with a memorandum dated March 20, 2001 in which the Section Manager lists eleven requirements including, "Sign, seal and date the drawings."[2]

Following the March 20, 2001 meeting, the Section Manager contacted Engineering and Buildings, the Office of the Attorney General, and external architect and licensing board to determining if having the plans signed and sealed would be a problem. He concluded that there was nothing illegal or unethical about requiring Grievant to sign and seal the plans. He informed Grievant of his conclusion.

Grievant sent the Section Manager a memorandum dated March 26, 2001[3] in which he states:

---

[1] Grievant contends he was not given sufficient authority to enable him to sign and seal the architectural plans. The Hearing Officer rejects Grievant's argument. Although he may not have had control of a budget or access to unlimited resources, Grievant was in full control of producing the plans as requested by the Agency. He had sufficient control to use his seal pursuant to 18VAC10-20-760(A).

[2] Agency Exhibit 1.

[3] Grievant Exhibit 2.

> Sealing roof repair documents is not required. I have always been told not to seal drawings without liability insurance or a clear supervisory role over the drawing preparation. If we intended to begin sealing drawings we will need to make some sort of policy and be sure we are covered with all of the board requirements of registration, and where it requires the Architect of record to be in a clear supervisory role over the production of the drawings. Once we work those things out I am happy to bring in my seal.

On March 28, 2001, a second peer review meeting was held. Grievant again stated his concern about signing and sealing the plans. The Section Manager again stated that Grievant needed to sign and seal the plans and that he should not advertise the plans for contract bids until Grievant has signed and sealed the plans. Grievant informed the committee that he was ready to advertise for bids and wanted to advertise beginning on April 1, 2001.

On Sunday, April 1, 2001, the roof projects were advertised to solicit bids from contractors but Grievant had not signed and sealed the plans. Upon learning this, the Section Manager met with Grievant on April 3, 2001 to ask why Grievant had not signed and sealed the plans before advertising them as the Section Manager had instructed. The Section Manager ordered Grievant to cancel the advertising. During this meeting, the Section Manager expressed concern to Grievant that Grievant was seeking out others within the Section regarding the issue of whether he should sign and seal the plans.

On April 5, 2001, the Section Manager sent Grievant a memorandum as a follow-up to their meeting of April 3, 2001. The Section Manager stated[4]:

> Additionally, I am directing you not to have any conversations regarding your concerns about this issue or any other issues that you have with management. If you have work related issues, then they are to be discussed only with your supervisor or myself. I am aware that you have sought out other staff in the office to discuss your relationship with your managers and work assignments and directions you have received. This is very disruptive to the office and creates a non-productive work environment.

Grievant presented conclusive evidence that on or before April 3, 2001 he had not discussed with co-workers his concerns with Agency management and that he had not disrupted the office.

On April 11, 2001, Grievant's Supervisor sent Grievant an email informing him to cease all work on the projects immediately.

---

[4] Agency Exhibit 2.

On April 16, 2001, at 2:39 p.m., Grievant sent an email to the Bureau Chief and Architect Senior asking:

> Is it your professional opinion that I should be required to certify these roof projects?? Is it your professional opinion that this is required?? Please let me know as I am researching the requirements and would like all of the professional opinions I can get.

Grievant sent them a second email that day at 2:46 p.m. asking:

> Is it your professional opinion that we are properly following the Architectural Board Certification requirements for Certifying Architectural Documents?? Please let me know your professional opinion as soon as possible as I am researching the requirements and would like to have your opinions as soon as possible. Please make the response in writing. Thank you.

At 2:51 p.m. on April 16, 2001, Grievant sent a third email asking the Bureau Chief and Architect Senior:

> Did you direct me to sign and seal the documents for the roof projects as part of your professional review of the current roof projects?? I would like to clarify this issue as part of my research concerning the Board requirements and our review process. Please let me know as soon as possible. Please make your response in writing. Thank you.

Neither the Bureau Chief or Architect Senior responded to Grievant's emails. The Architect Senior did not respond because he felt this dispute was a personnel matter and that he did not have enough information in order to respond. On April 17, 2001, the Architect Senior told Grievant he did not want to discuss the matter.

The Agency pays for legal services rendered by the Office of the Attorney General. In 1990, it implemented a policy stating, "Unless expressly agreed otherwise, the Director's Office approves initial contact with the Office of the Attorney General …." On July 19, 2001, the Section Manager sent staff in his section, including Grievant, a memorandum stating, in relevant part:

> Additionally, it has been brought to my attention the need to minimize the number of individuals corresponding with the A.G. Therefore, I ask that all correspondence, requests, phone calls, etc. be routed through me.

On April 16, 2001, Grievant sent an email to the Assistant Attorney General assigned to the Agency. The email[5] stated:

[5] Agency Exhibit 8.

> The week before last I called your office and left a voice message concerning an important issue. I have not received a return call so I am requesting the same information by e-mail. You may have responded to this question to others in [the division], but I have yet to get a definitive answer on this question. By a definitive answer I mean something in writing.
>
> My question. How is professional liability covered for a State Employee?? Is the professional liability covered now and in the future even if the professional leave State Service?? Is professional liability covered for all employees regardless of background and training? Is there a written policy giving guidelines and limits of coverage?
>
> This issue is very important to me as we have just recently been asked to certify all documents coming from our floor, regardless of who produces the documents…
>
> Also, I would like to know if possibly you had responded to my voice message to others in my division, and the message has just not gotten to me. You have been so helpful in the past, I figured you may have gotten me mixed up with someone else. Thank you for your help with this. I have been given the responsibility to thoroughly research this issue.

The Assistant Attorney General responded later that day by email[6]:

> You will need to check this out with your agency. I did receive a voice mail message but did not respond to it. I have discussed this problem with [Section Manager] and suggested that he might want to talk with the Division of Risk Management.
>
> On April 17, 2001, the Supervisor sent Grievant an email[7] stating:
>
> I am especially concerned about your sacrificing your project workload to conduct research regarding the sealing of documents. It is especially disconcerting that you have placed all your projects on hold while you are pursuing this research. Further, no one has assigned you to do the research. Neither [Section Manager] nor I have assigned you the work task of research. You have assigned that to yourself at the expense of your other work.

[6] Agency Exhibit 9.

[7] Grievant Exhibit 2.

Grievant replied to the Supervisor's email, "I though I was following instructions [from Section Manager] to obtain information as I needed it concerning licensing requirements."

On April 18, 2001, Grievant met with the Section Manager and offered a sincere apology. He also indicated he had changed his mind and would sign and seal the plans. Rather than terminating Grievant, the Section Manager chose to issue Grievant a second Group II Written Notice with five days suspension. On April 20, 2001, Grievant informed the Section Manager that he had changed his mind again and would not sign and seal the documents.

The projects were given later to other architects who drafted their own plans and signed and sealed them.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." P&PM § 1.60(V)(B). [8] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." P&PM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." P&PM § 1.60(V)(B)(3).

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. P&PM § 1.60(V)(B)(2)(a).

Refusal to Sign and Seal Plans

Grievant was instructed by a supervisor to prepare, sign, and seal plans. Grievant prepared the plans but refused to sign and seal them. His refusal constitutes a Group II offense.

Grievant was reluctant to sign and seal the plans for several reasons. First, he believed that by signing and sealing the plans, he may subject himself to personal liability separate and apart from the State's liability if a Court determined the plans to be negligently drafted. He was concerned that the State's insurance may not protect his personal assets and income. Second, Grievant needed to perform structural inspections of the buildings before designing new roofs. These inspections were necessary in order to make sure that the existing structures were safe for contractors to begin the process of installing new roofs. Third, the Section Manager incorrectly

[8] The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM") setting forth Standards of Conduct for State employees.

interpreted State policy and law and, therefore, incorrectly believed the plans had to be signed and sealed. Fourth, Grievant's seal is personal property and he cannot be ordered to use it.

Grievant's concern about assuming personal liability is a real[9] and legitimate concern.[10] Grievant's legitimate concern, however, does not excuse his failure to follow his supervisor's instructions. After raising his concern to the Section Manager and learning that the Section Manager insisted that the plans be signed and sealed, Grievant continued to work on the project while leading the Agency to believe he intended to sign and seal the plans.[11] If Grievant had initially and steadfastly refused to sign and seal the documents, the Agency could have immediately transferred the projects to another architect and not experienced any delays in implementing the projects. By leading the Agency to believe he intended to sign and seal the documents,[12] Grievant prevented the Agency from timely selecting another architect to complete the projects.

Grievant's concern about the absence of structural inspections is unsupported by the facts of this case. Once he knew on March 20, 2001 that the Section Manager wanted the plans signed and sealed, Grievant could have conducted the structural inspections himself so that he would feel comfortable knowing the structural integrity of the facilities.

Grievant presented evidence and argument suggesting the Section Manager incorrectly concluded that State law and policy required the plans to be signed and sealed. That evidence does not affect the outcome of this case. Even if Grievant is correct that neither State law nor State policy required the plans to be signed and sealed, the fact remains that the Section Manager instructed Grievant to sign and seal the documents and Grievant initially agreed to do so. The Section Manager's instruction was based both on his interpretation of policy and on his desire that any

---

[9] In many situations, State employees may enjoy the benefit of Sovereign Immunity with respect to their acts of ordinary negligence. See, Lohr v. Larsen, 246 Va. 81 (1993) and Gargiulo v. Ohar, 239 Va. 209 (1990). In other circumstances, State employees may be subject to personal liability depending on (1) the function the employee was performing, (2) the extent of the State's interest and involvement in that function, (3) the use of judgment and discretion by the employee, and (4) the degree of control and direction exercised by the State over the employee. See, James v. Jane, 221 Va. 43 (1980).

[10] It is not necessary for the Hearing Officer to address whether Grievant would have assumed any additional personal liability had he signed and sealed the documents. Even if Grievant would have assumed additional personal liability, he would not have been justified in refusing to sign and seal the plans after having repeatedly informed the Section Manager that he would do so.

[11] The Bureau Chief testified that Grievant had been asked four times to sign and seal the plans and each time Grievant agreed to do so. Thus, the Bureau Chief was surprised to learn Grievant refused to sign and seal the documents.

[12] Grievant's approach was to attempt to persuade the Section Manger that his request for sealing was unnecessary. By taking this approach, Grievant assumed the risk of the consequences he might face if he failed to persuade the Section Manager to discard the sealing requirement.

project built be one which is safe for contractors and the public.[13] His concern is reasonable and appropriate.[14]

An architect's authority and license to seal plans is his personal property much in the same way a physician's license is personal property authorizing the physician to exercise professional judgment. An architect's seal serves as the architect's personal representation that plans are drawn according to professional standards. The Hearing Officer agrees that an architect cannot be ordered to use his seal in every circumstance.[15] For example, if an architect believed a project was unsafe, an order from a supervisor requiring the architect to use his seal would be improper. Under the facts of his case, however, Grievant was given full authority over the projects. If there were problems with the projects that would otherwise prevent Grievant from using his seal, then he would have been in a position to and would have been expected to correct those problems.[16] Implicit in the Section Manager's instruction was to complete the work at a level of competency that would meet the standards of the architectural profession. This request was reasonable.[17]

---

[13] The Section Manager continues to require his architects to sign and seal plan drawings that are to be bid to the public. His objective is to protect citizens of the Commonwealth.

[14] In an April 5, 2001 memorandum to Grievant, the Section Manager expressed his concern as:

> Your position that you would have developed the documents differently had you known that you were going to have to sign and seal them, causes me great concern. I would expect that you would always generate quality drawings regardless of whether you have to sign and seal them. If you are not willing to sign and seal the drawings that you designed, then I have a lot of concern about the quality of [the] drawings.

Essentially, the Section Manager believes that the plans should be of such high quality that a private sector architect would not be afraid of assuming personal liability for the work.

[15] 18 VAC10-20-760(A) provides:

> The application of a professional seal shall indicate that the professional has exercised complete direction and control over the work to which it is affixed. Therefore, no regulant shall affix a name, seal or certification to a plat, design, specification or other work constituting the practice of the professions regulated which has been prepared by an unlicensed or uncertified person or firm unless such work was performed under the direction and supervision of the regulant while under the regulant's contract or while employed by the same firm as the regulant. If a regulant is unable to seal completed professional work, such work may be sealed by another regulant only after thorough review and verification of the work has been accomplished to the same extent that would have been exercised if the work had been done under the complete direction and control of the regulant affixing the professional seal.

[16] Grievant presented evidence that another architect inspected a "Shop Building" and determined that a structural defect existed. (Grievant Exhibit 1). This evidence does not show Grievant was justified in refusing to use his seal. It only shows that had Grievant performed the structural inspections necessary for him to use his seal, he would have found a building for which he needed to make changes to the plans to address the structural shortcoming.

[17] Grievant argues he could not seal the plans because he lacked the authority to hire roofing consultants and the opinions of roofing consultants was needed before he could apply his seal. Based on

Disruptive Emails

The Section Manager instructed Grievant "not to have any conversations regarding your concerns about this issue or any other issues that you have with management." By sending emails to the Bureau Chief, Architect Senior, and Assistant Attorney General, Grievant acted contrary to the Section Manager's instruction not to discuss his concerns with other staff and contrary to the Agency's policy restricting contact with the Assistant Attorney General. This behavior would otherwise constitute a Group II offense.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance. P&PM § 1.60(VII)(C)(1).

Mitigating circumstances exist to reduce the April 18, 2001 Group II Written Notice to a Group I Written Notice. On April 3, 2001, the Section Manager was concerned[18] that Grievant's discussions with co-workers about the dispute may have disrupted the office. His concern appears to have been overstated. The Agency did not present any credible evidence that Grievant had attempted to adversely influence his co-workers on or before April 3, 2001. Grievant presented credible evidence showing that he did not interfere with the division's operations or otherwise involve co-workers in his dispute with division managers before April 3, 2001. In addition, the Section Manager did not clearly prohibit Grievant from conducting his own research into the issue of whether sealing was required.[19] Grievant's contacts were not intended to disrupt the office but were in furtherance of his research.[20] He solicited information from the Bureau Chief and Architect Senior who he believed were knowledgeable regarding architectural standards and who were members of his peer review committee. Grievant

---

the evidence presented, the Hearing Officer concludes that even if the opinion of roofing consultants had been provided to Grievant, he would have refused to sign and seal the documents.

[18] See Agency Exhibit 2 where the Section Manager states, "I am aware that you have sought out other staff in the office to discuss your relationship with your managers and work assignments and directions you have received. This is very disruptive to the office and creates a non-productive work environment."

[19] In his April 5, 2001 memorandum to Grievant, the Section Manager states:

> You have indicated that you would like to research some issues regarding the use of your seal. With that in mind, and realizing time is of the essence I will set up a meeting for Monday morning in which we can discuss this further. At that time, I will need an answer as to whether you will seal the drawings or not.

The Section Manager's tacit approval of Grievant's research activities reduces the significance of his directive not to discuss the sealing issue with others.

[20] Grievant's emails references his research objective.

believed the Section Manager had authorized him to conduct research. Even though Grievant believed he was properly conducting research, he should not have contacted the Assistant Attorney General directly. His behavior constitutes unsatisfactory job performance which is a Group I offense.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice, dated April 13, 2001, is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice, dated April 18, 2001, with suspension is **reduced** to a Group I Written Notice. Because the normal disciplinary action for a Group I offense is issuance of a Written Notice, Grievant's suspension for five days is **rescinded**. GPM § 5.9(a)(2). P&PM § 1.60(D)(1)(a). The Agency is directed to provide the Grievant with **back pay** for the period of suspension less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3). P&PM § 1.60(IX)(B)(2).

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a**

challenge that a hearing decision is inconsistent with law may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

_____

Carl Wilson Schmidt, Esq.
Hearing Officer