

Issue: Five Written Notices (Group II, failure to follow supervisor's instruction and perform assigned work; Group II, failure to follow supervisor's instruction and perform assigned work; Group II, failure to follow supervisor's instruction and perform assigned work; Group III, verbally reporting false information and violating written agency policy; Group II, unauthorized leave); Hearing Date: March 28, 3003; Decision Date: May 7, 2002; Agency: Department of Correctional Education; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5396; **Administrative Review: Hearing Officer Reconsideration Request; Date of Request: May 20, 2002; Reconsideration Decision Date: May 23, 2002; Outcome: Request untimely, request to reconsider denied.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5396

Hearing Date: March 18, 2002
Decision Issued: May 7, 2002

PROCEDURAL HISTORY

On August 21, 2001, Grievant was issued five Written Notices of disciplinary action for:

1. **Group II:** Failure to Perform Assigned Work and Follow Supervisor's Instructions. Since January 6, 2001, you have had the assignment to conduct a position audit for the tester at Dillwyn and Buckingham Correctional Centers and report that results to DCE's Deputy Superintendent for Adult Schools. To date, you have failed to do so. On January 8, you acknowledged receiving this assignment and responded that this task would be completed. There have been repeated unanswered requests for this audit information since January. It was not until I¹ was copied on the June 25 email from the Deputy Superintendent to you that I learned that this assignment was never completed.
2. **Group II:** Failure to Perform Assigned work and Follow Supervisor's Instructions. Since June 7, 2001, you have had the assignment to prepare a comprehensive, professionally prepared report of preliminary

¹ The Deputy Superintendent drafted the written notices.

SOL testing results for the spring testing period. To date you have failed to do so. You have met each request for an improved report with resistance, obfuscation and inadequate, incomplete charts, some of which contained erroneous information. On July 5, you wrote an e-mail message to me that was tantamount to direct insubordination, stating that your priorities took precedence over those I assigned to you, and that you would not submit the requested report until August 31, after you had attended first to your own priorities and completed the summer testing period.

3. **Group II: Failure to Perform Assigned Work and Follow Supervisor's Instructions.** Since July 20, you have had the assignment to conduct a pre-test and post-test performance report for the 2001 Woodcock-Johnson test administration. This report is used as a DCE performance measure for budgeting purposes and was due to me for submission to the Department of Planning and Budget on August 3. It has not been submitted, nor have you communicated with me about this report in any manner.
4. **Group III: Verbally Reporting False Information and Violating Written Agency Policy.** On July 25, 2001 DCE adopted a policy change which prohibited the use of direct-billing arrangements to pay for travel expenses. This policy also required all agency staff who anticipated professional travel twice or more per year to immediately apply for an agency-sponsored AMEX travel card. On August 5 you attended SPSS training in Alexandria and checked into the Courtyard Marriott Hotel. While you had your personal Master Card swiped to check into the hotel, you told employees you did not have the ability to pay the lodging expense either with cash or the credit card. On August 6, you instructed [another employee] to request from DCE's Finance Division an after-the-fact authorization for a direct billing arrangement to pay for these expenses, even as you continued to incur additional lodging costs. Your actions presented the perception of a crisis because the hotel officials confirmed that you told them you had no way to pay, reported that they could not accept a direct-billing arrangement for your expenses, and said that you would be expelled from the building unless DCE immediately delivered a check for your expenses on that same day. Later, this same hotel official called to say you had authorized the charges to be placed on your Master Card account, effectively resolving this false crisis. You have not applied for an agency-sponsored AMEX card, in further direct violation of written policy.
5. **Group II: Absence Without Leave.** On August 16, a day of summer end-of-course testing for the Standards of Learning, you did not report to work as scheduled and provided no notice to your supervisor for

your planned absence. You provided the wrong version of the SOL test to one school, but you were unavailable to rectify the problem when it was discovered on this day by a school principal and central office administrator. Upon finally locating you in Hampton VA via telephone, I instructed you to return immediately to Richmond. You failed to do so and took unapproved and unauthorized "annual leave" time for the balance of the day, according to a voice message left on my telephone. You were unable to provide a sufficient reason for your absence on a crucial testing day.

On September 19, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On February 22, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 18, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel
Deputy Superintendent
Deputy Superintendent for Adult School
Assistant Sup. Support Programs
Assistant Sup. Operations Youth Schools
Director of Finance
Assistant Sup. for Accountability
Deputy Sup. for Admin. and Finance
Academic Support Technician
Program Evaluation Analyst

ISSUE

Whether Grievant should receive four Group II Written Notices and one Group III Written Notice 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:

Grievant was employed by the Department of Correctional Education as the Director of Testing and Assessment. Her duties included all aspects of testing and assessment in the Agency's youth and adult programs. The purpose of her position was:

To provide supervision and direction for the educational assessments, [to] evaluate and audit standardized testing, and to monitor program compliance with state standards and the Department of Correctional Education's policies and procedures.²

Grievant's supervisor reported to the Deputy Superintendent. Rather than micromanaging employees, the Deputy Superintendent afforded a significant amount of independence and responsibility to directors including Grievant.

First Written Notice, Group II

The Agency had one person providing testing services to three schools under one of its principals. When the number of schools was reduced from three to two, a question arose regarding whether the responsibilities of the person providing testing services had been reduced by a third. Someone independent of those schools needed to determine whether the testing position should remain full time.

On January 5th, a division manager asked the Deputy Superintendent if Grievant could audit the testing position. Since Grievant had expertise in testing, she would be able to determine whether a full time position would be needed to serve two schools. Although Grievant did not have any prior experience in position audits and she was not employed specifically to conduct position audits, the Deputy Superintendent instructed Grievant on January 8, 2001 to perform the position audit.

Grievant's other obligations prevented her from starting on the project until February 2001. She conducted several interviews, collected documents and reviewed policies but had difficulty completing the assignment.

The division manager sent Grievant an email on May 24, 2001 asking for the status of her audit. On June 25, 2001, the Deputy Superintendent learned that Grievant

² Agency Exhibit 5.

had not completed the audit so she asked Grievant's supervisor for the status of Grievant's work.

On July 18, 2001, the division manager informed the Deputy Superintendent that he had not yet received the audit report. The Deputy Superintendent told Grievant's supervisor to instruct Grievant to complete the report on the following week. On July 23, 2001, Grievant informed her supervisor that she had only one more component of the audit to complete. By August 17, 2001, the audit had not been completed, and the Deputy Superintendent decided to take disciplinary action against Grievant.

Second Written Notice, Group II

The Agency's schools must meet certain accreditation standards. One of those requirements is that a certain percentage of its students must pass a standardized test.

On June 6, 2001, Grievant sent an email to school principals containing the preliminary Standards of Learning reports showing preliminary scores for each school. Grievant sent the Deputy Superintendent a copy of the email. On the following day, the Deputy Superintendent sent Grievant an email stating, "Please prepare a summary of the preliminary SOL reports by noon on Monday, June 11." Grievant responded "OK." A summary of the preliminary SOL reports would enable the Agency to compare schools and help determine how best to allocate its resources among schools.

On June 11, 2001, Grievant submitted a report entitled "Preliminary Report for Spring SOLS". The report contained several typographical errors. On June 12, 2001, the Deputy Superintendent thanked Grievant for providing statistical information regarding the number of students tested and discrepancy areas regarding the Agency's Spring SOLs, but asked for the preliminary passing percentages for each school. She instructed Grievant to provide the information by the following day so that the Agency Superintendent could include the information in his report to the Agency Board.

On June 14, 2001, the Agency Superintendent called Grievant regarding the SOL results. Grievant first informed him that the Agency did not have sufficient software to analyze the preliminary data, but then told him that the Agency had the software but she needed training on how to use it. Grievant sent the Deputy Superintendent an email stating, "As I explained to you and [the Agency Superintendent], this preliminary information, the purpose of the information is to identify errors and make corrections for the final report. The information has changed since its release." Once the Agency Superintendent realized Grievant would not provide him with the necessary information, he reviewed the preliminary report and using a calculator determined the percentage of students passing at each school as well as an overall passing rate.

On June 22, 2001, Grievant sent school principals the final reports for SOL testing for certain of their students. On June 25, 2001, the Deputy Superintendent emailed Grievant asking to receive a copy of these final reports. Grievant did not

respond to the email. On July 3, 2001, the Deputy Superintendent sent Grievant an email stating:

Once again, I find myself in a position of having to request the same SOL results and analysis information from you that I initially asked for several weeks ago. As you should know, this information and your analysis of it is much too important to the agency's mission to remain so long overdue. Most recently, I sent you an e-mail request on June 25 to which you have not responded. You have not indicated that there is any confusion about the information I requested, only that, for some reason, you are determined not to respond in a courteous or professional manner, if at all. This continued non-responsive posture on your part is not acceptable.

To be clear, what I expect to receive is a school-by-school report of SOL scores results from the May testing period, along with a substantive, value-added analysis of the raw numbers in which you provide a comparison of our school-by-school results from the same testing period last year, identification of school-by-school trends or significant movement in the numbers of which the Superintendent and Board Members should take particular note, a general statement of how you analyzed the data and set of conclusions, projections and recommendations drawn from this analysis. I do not expect any additional cryptic reports or cursory spreadsheets, although the quality of its content should outweigh its length. This report should be comprehensive, insightful and accurate.

I fully expect that you will complete this report and submit it before taking leave from the office. Submit this report to [another employee] no later than this Friday at 5 p.m. If, for any reason, you will not submit this report by this deadline, you are to notify me in writing no later than this Thursday by noon. I do not intend to request this information from you again.

Grievant responded on July 5, 2001 by email stating:

You have made several accusations that presume either I have not communicated with you or that I have been delinquent submitting information in which you requested. As documented by e-mail. I have neither hesitated to respond to you nor your request.

On June 6th, I announced that I was sending preliminary information to the sites. You requested copies of the preliminary information and received it on June 7th. On June 11th, you requested a summary of the preliminary SOL information, and you received it on June 14th. On June 12th, you asked for passing percentages for each school. As indicated to you on June 15th the purpose of the preliminary information is to make corrections. On the 25th of June, you requested copies of the final reports. I assumed you were asking for duplicates of the reports in which I

announced I had received. July 3rd is your first request for a report comparing the raw numbers of each school.

The information you are requesting takes longer than one day to compile. My present priority has been preparation for the LPT. This administration is scheduled for the week of July 16th. The SOL writing test is scheduled for June 24th and 25th. The summer SOLs will be administered during the week of August 23rd. Considering the schedule, I will submit the report you are requesting on August 31, 2001 after summer testing.

Grievant submitted a brief school-by-school comparison on July 18, 2001. Her report did not meet the Deputy Supervisor's expectations or instructions regarding the depth of the report.

Third Written Notice, Group II

The Agency annually submits performance reports to the Department of Planning and Budget and the General Assembly. Included among these reports is the Woodcock-Johnson report which is suppose to provide demographic information such as race, age, gender, achievement etc. about the Agency's students. On July 20, 2001, the Deputy Superintendent assigned Grievant with responsibility to conduct a pre-test and post-test performance report for the 2001 Woodcock-Johnson test administration. Grievant could have taken the prior four quarters and assembled an annual report. Grievant did not realize this and believed an annual report meant for all four quarters in 2001. The report was due on August 3, 2001. Grievant did not submit the report by the deadline and did not contact the Deputy Superintendent to offer an explanation for the delay.

Fourth Written Notice, Group III

On August 5, 2001, Grievant attended training requiring overnight stay at a hotel. She had a poor credit history and was at the maximum credit level on her credit card. When she checked in to the hotel, she asked the hotel staff to bill the Agency for her stay. The hotel staff would not permit this and demanded immediate payment otherwise she would be removed from the hotel. Grievant immediately contacted the Agency's staff responsible for travel and asked that they do something to resolve the crisis. Agency staff made several calls to the hotel and to Grievant to attempt to prevent Grievant's removal from the hotel. The Agency's Director of Finance made an exception to the Agency's direct billing policy to permit the hotel to directly bill the Agency for Grievant's stay. Meanwhile, Grievant contacted her credit card company and explained the situation and asked for an increase in her credit limit. The credit card company approved the request on the last day of Grievant's stay and Grievant was able to pay for the hotel with her credit card.

Fifth Written Notice, Group II

Grievant resides in Hampton Virginia, a city approximately 80 miles from her office in Richmond. On August 16, 2001, the Agency learned that one of its schools had been provided with the wrong SOL test. Grievant was in Hampton when she was notified of the problem. The Deputy Superintendent spoke with Grievant instructed Grievant to return to Richmond immediately. She wanted Grievant to spend the remainder of the day helping to calm those Agency staff who had received the incorrect test. Grievant decided not to drive to Richmond. She remained in Hampton and attempted to correct the problem. Once the crisis had been resolved and the school received the correct test, Grievant felt there was no longer any need for her to come to Richmond. She called later in the day and left a message on the Deputy Superintendent's voice mail that Grievant was taking annual leave for the balance of the day.

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).³ 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).

First Written Notice

Grievant's failure to complete the position audit rises to the level of a Group I Written Notice and not to a Group II Written Notice. Although it is true that Grievant failed to perform an assigned task, the task did not contain a deadline⁴, it was a task in addition to her regular duties, and it was a task outside the scope of her normal expertise. Even after the Deputy Superintendent learned in June that Grievant was not performing the task, Grievant was not given a deadline for completion of the task until July 18. These factors show that Grievant's behavior constituted inadequate job performance but not that she knowingly failed to perform an assigned duty. The Agency's issuance of a Group II Written Notice must be reduced to a Group I Written Notice.

Grievant contends she was not trained to perform position audits and she did not have the time to adequately research the position given her other priorities. The Hearing Officer concludes that Grievant was responsible for performing the position

³ The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM") setting forth Standards of Conduct for State employees.

⁴ The division manager expected the audit to be completed in February but did not communicate this to Grievant.

audit even though she lacked any formal training because an employer retains the right to direct the work of an employee even if that work is not the work for which an employee was specifically hired. If Grievant was having difficulty completing the work, she should have contacted the Deputy Superintendent and asked for assistance regarding prioritizing her work schedule.

Second Written Notice

Grievant received specific instructions with a deadline regarding the type of report she was expected to produce. Grievant could have taken the information she had and prepared a preliminary passing percentage for each school yet she failed to do so. Grievant objected to the request because she believed the data was preliminary in nature and subject to change. She did not prepare the report as directed even though the information sought was not difficult to calculate. Her objection to preparing the report is unfounded because the Deputy Superintendent did not ask for a final report, she asked for a preliminary report. Grievant's concerns about the unreliability of the data and the usefulness of the report were not concerns sufficient to excuse Grievant's failure to perform the assigned task.⁵ Rather than failing to prepare the report, Grievant should have prepared her report and included in the report a discussion about the reliability of the data and explain that the results were subject to change. It was up to the Agency's managers regarding how they intended to utilize the information. The Agency's issuance of a Group II Written Notice must be upheld.

Third Written Notice

Grievant's failure to prepare the Woodcock Johnson report is a Group I offense and not a Group II offense. Although failure to perform assigned work is normally a Group II offense,⁶ the underlying assumption is that the nature of the assignment was clear to the employee. In this case, the Hearing Officer is not convinced that the Agency took adequate measure to ensure Grievant understood what she was supposed to do.⁷ This does not completely excuse Grievant's behavior, however. Grievant knew of a pending deadline for the report but did not submit anything. Grievant did not ask for further assistance from the Deputy Superintendent. Grievant's behavior is unsatisfactory work performance.

Fourth Written Notice

⁵ In Grievant's July 5th email to the Deputy Superintendent she informs the Deputy Superintendent that she will produce on August 31, 2001 a report the Deputy Superintendent instructed Grievant to produce by July 6th. It is not up to Grievant to revised a supervisor's instructions. Grievant's tone was one of recalcitrance bordering on insubordination.

⁶ P&PM § 1.60(V)(B)(2)(a).

⁷ This is in contrast to the significant degree of effort the Agency devoted to explaining Grievant's assignment in the facts of the Second Written Notice.

The Agency contends Grievant misrepresented her ability to pay the hotel bill. The evidence, however, showed that although Grievant originally could not place the charge on her credit card, she later contacted her credit card company had obtained a higher credit card limit enabling her to place the hotel charge on her credit card. At the time Grievant contacted the Agency's staff and reported she could not put the charges on her credit card, she was making truthful statements. Thus, Grievant did not report false information.

The Agency contends Grievant's actions were contrary to its written policy requiring all agency staff who anticipated professional travel twice or more per year to apply for an agency-sponsored AMEX travel card. The evidence showed that Grievant did not expect to travel twice or more per year. She was not obligated by the Agency's policy to apply for the travel card and, thus, did not act contrary to written policy.

Although Grievant did not engage in behavior justifying a Group III Written Notice, she exercised poor judgment. She knew she had poor credit and should have determined whether she had available credit balances before leaving for her trip. By failing to properly plan for her trip, Grievant created unnecessary frustration and distraction on the part of Agency staff. Her behavior constitutes unsatisfactory work performance thereby justifying a Group I Written Notice.

Fifth Written Notice

Failure to follow a supervisor's instruction is a Group II offense.⁸ The instruction to come to Richmond was appropriate and reasonable within the context of Grievant's employment obligation and the Agency's employment objectives. The Agency has the right to expect the person in charge of testing to be working on the day of testing. Grievant knowingly and intentionally refused to follow the instruction because she disagreed with the instruction. The Group II Written Notice must be upheld.

Grievant contends the need for her to travel to Richmond was no longer necessary and traveling one and a half hours was time devoted to travel rather than to solving the problem. Grievant's argument is unfounded because she was making decisions that should have been made exclusively by the Deputy Superintendent. Grievant assumed that the Deputy Superintendent later would see the wisdom of Grievant's considerations and agree with Grievant that the trip to the main office was no longer necessary. This was both a false assumption and one that Grievant lacked the authority or responsibility to make.

Conclusion

⁸ P&PM § 1.60(V)(B)(2)(a).

An employee who accumulates a sufficient number of active group notices may be removed from employment.⁹ Grievant has a sufficient number of group notices to support her removal. There are no mitigating circumstances that would warrant a lesser action.

DECISION

1. The Agency's issuance to the Grievant of the First Written Notice of disciplinary action is **reduced** to a Group I Written Notice.
2. The Agency's issuance to the Grievant of the Second Written Notice is **upheld** as a Group II Written Notice.
3. The Agency's issuance to the Grievant of the Third Written Notice is **reduced** to a Group I Written Notice.
4. The Agency's issuance to the Grievant of the Fourth Written Notice is **reduced** to a Group I Written Notice.
5. The Agency's issuance to the Grievant of the Fifth Written Notice is **upheld** as a Group II Written Notice.

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 three 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 Resource 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.

⁹ See P&PM § 1.60(VII) et seq.

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 DHRM, 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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5396-R

Reconsideration Decision Issued: May 23, 2002

PROCEDURAL HISTORY

On May 7, 2002, the Hearing Officer issued a decision in Case Number 5396. The Hearing Officer received Grievant's Request for Reconsideration on May 20, 2002. The Agency filed its comments on May 20, 2002.

DISCUSSION

"[A]ll 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." *GPM* § 7.2(a). (Emphasis original.) The decision issued May 7, 2002¹⁰ states:

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. (Emphasis original.)

May 17, 2002 was the due date for any Request for Reconsideration. The Hearing Officer received the request on May 20, 2002, after the due date. The request is untimely and must be denied.

¹⁰ At the request of the Office of the Attorney General, the Hearing Officer's practice is to have hearing decisions faxed to the Legal Assistant Advocate representing the Agency on the day of or the day following issuance of the Hearing Officer's decision.

RECONSIDERATION DECISION

For the reasons stated herein, the Grievant's request for reconsideration is **denied**.

APPEAL RIGHTS

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

3. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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