

Issue: Group II Written Notice with termination (failure to follow supervisor's instructions and perform assigned work); Hearing Date: 05/02/03; Decision Date: 05/27/03; Agency: Dept. of Health; AHO: Carl Wilson Schmidt, Esq.; Case No. 5637; **HO Reconsideration Request received 06/06/03; Reconsideration Decision dated 06/20/03; Outcome: No newly discovered evidence or incorrect legal conclusions. Request to reconsider denied.**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5637**

Hearing Date: May 2, 2003  
Decision Issued: May 27, 2003

**PROCEDURAL HISTORY**

On July 23, 2002, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

*Failure to follow supervisor's instructions. Failure to perform work in a forensically expert and timely manner. Unacceptable continuous number of cases pending and undictated. Information from the Attorneys for the Commonwealth regarding lack of confidence in answers during pre-trial meetings and during court testimony.*

On August 22, 2002, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On April 1, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 2, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee

Agency Counsel  
Eight witnesses

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal for failure to follow supervisor's instructions and perform assigned work.

## **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 Virginia Department of Health employed Grievant as an Assistant Chief Medical Examiner at one of its regional offices. He began working for the Agency on January 10, 2001 as a full time forensic pathologist until his removal effective July 23, 2002. Grievant's responsibilities included conducting autopsies, dictating autopsy reports, and testifying in court as an expert witness. On March 20, 2002, Grievant received a Group II Written Notice for: "Failure to give proper notice of time off needed. Failure to perform assigned work in a timely manner. Cases from Dec. 01 and Jan 02 still undictated. 33 outstanding cases (6 from 2001). Call from Commonwealth Attorney regarding unsatisfactory testimony."<sup>1</sup>

Two other Assistant Chief Medical Examiners worked with Grievant at a regional office. Because of the volume of cases, the Agency expected each forensic pathologist to dictate his or her cases on the same day of the autopsy. If that was not possible, then dictation should occur no later than the day after the autopsy.<sup>2</sup> Autopsy cases are assigned a number and records relating to each autopsy must be kept in the appropriate autopsy file. Since more than one pathologist may need access to a

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<sup>1</sup> Agency Exhibit 7.

<sup>2</sup> Some dictations could occur at a later date if a complicated issued had to be referred for analysis by another pathologist with greater expertise.

particular autopsy file, files with missing documents could create confusion and incorrect analysis by a pathologist reviewing an incomplete file.

Grievant's organizational skills were below those required by the Agency. He sometimes removed documents from autopsy files and had them scattered about his office. He sometimes made copies of autopsy documents thereby making it difficult for other pathologist (or other staff) in the office to determine which documents were current and original. After dictating autopsy reports, he frequently asked secretaries to revise those reports, sometimes making up to 40 changes. His number of revisions exceeded those of two other pathologists working with Grievant.

On February 6, 2002, the Chief Medical Examiner counseled<sup>3</sup> Grievant regarding:

1. Unacceptable outstanding caseload.
2. Undictated old cases.
3. Not identifying issues early.
4. Not working from a case list.
5. Unnecessary use of computer.
6. The importance of getting caught up.
7. Improve court testimony.
8. Review first draft dictations with not more than two revisions.
9. Manage time.

On March 20, 2002, the Chief Medical Examiner presented Grievant with a Notice of Improvement Needed/Substandard Performance<sup>4</sup> setting forth an Improvement Plan:

Within the next 30 days (by April 24, 2002) it is expected that:

- All outstanding cases will be caught up.
- All of your cases will be completed with no more than 20 cases pending for various acceptable reasons (such as waiting for toxicology reports.)
- During the next 30 days it is expected that:  
All cases are dictated within 48 hours maximum, and copy proofed and read within 48 hours of typing and presentation to you. In order to catch up, you are removed from the autopsy schedule starting tomorrow until all your cases are dictated. Recent court difficulties indicate that for the time being you are not to do any homicide cases. After testimony practice with other pathologists and some practice with [the Chief Medical Examiner], a decision will be made to put you back onto homicide cases.

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<sup>3</sup> Agency Exhibit 5.

<sup>4</sup> Agency Exhibit 8.

On April 1, 2002, a local Commonwealth's Attorney and two Senior Assistant Commonwealth's Attorneys wrote a letter<sup>5</sup> to the Chief Medical Examiner stating, in part:

We are writing this letter to express our concerns regarding [Grievant]. Let us say at the outset; that we do not in any way question [Grievant's] medical credentials or his training in the field of pathology. However, in light of our dealings with [Grievant] during the prosecution of a recent homicide in our jurisdiction we have regrettably lost confidence in his ability to testify credibly as an expert witness on behalf of the Commonwealth. \*\*\* The decision to write this letter was made after careful deliberation. In writing this letter it is not our intent to malign [Grievant] or to call into question his fitness as a pathologist. We do not doubt his credentials. We do, however, have grave doubts as to his ability to testify clearly. Sadly, should the situation arise in the future, we would likely again refrain from calling him as a witness on behalf of the Commonwealth.

In June 2002, the Chief Medical Examiner received a call from an Assistant Commonwealth's Attorney who stated Grievant was not able to properly present testimony in court as an expert witnesses.<sup>6</sup> The Assistant Commonwealth's Attorney reported that Grievant appeared confused, he stared off into space, and did not inspire confidence in those listening to him.<sup>7</sup>

On July 1, 2002, Grievant received a performance evaluation with an overall assessment of Below Contributor. The Chief Medical Examiner commented that Grievant "has made some improvement with concerted effort to improve his fund of knowledge and autopsy performance activities but is still unable to perform fully even without any administrative or teaching responsibilities or assignments that are also part of the position."<sup>8</sup>

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<sup>5</sup> Agency Exhibit 11.

<sup>6</sup> The Assistant Commonwealth's Attorney making the June 2002 complaint worked in a different county from the Assistant Commonwealth's Attorneys who wrote the April 1, 2002 letter to the Chief Medical Examiner.

<sup>7</sup> Grievant presented evidence of court proceedings in which he testified competently. Although Grievant may have done a good job testifying in some cases, it does not mean the Commonwealth's Attorneys are wrong when they say Grievant testified poorly in their cases. Because more than one Commonwealth's Attorney complained about Grievant's ability to testify (and such complaint are unusual), it is likely that Grievant's courtroom performance was inadequate.

<sup>8</sup> Agency Exhibit 15.

Grievant typically had more than 20 undictated cases from April through July 17, 2002. His caseload and the caseload of two other Assistant Chief Medical Examiners working in the same office are as follows:<sup>9</sup>

<b>Year 2002</b>	<b>Grievant</b>	<b>Dr. F</b>	<b>Dr. R</b>
April 03	23	16	22
April 10	17	16	18
April 17	22	16	21
April 25	24	14	25
May 01	24	15	17
May 08	17	9	17
May 16	21	10	19
May 22	26	8	16
May 29	29	14	18
June 05	28	20	19
June 12	33	13	22
June 19	31	15	19
June 26	unknown	unknown	unknown
July 03	25	14	12
July 10	26	16	19
July 17	30	19	20

Dr. F and Dr. R, two of Grievant's colleagues, testified at the hearing that they had reviewed Grievant's work over a several month period of time and doubted his ability to reach regularly the correct conclusions from an autopsy.

### **CONCLUSIONS OF POLICY**

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." DHRM § 1.60(V)(B).<sup>10</sup> 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." DHRM § 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." DHRM § 1.60(V)(B)(3).

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<sup>9</sup> Grievant Exhibit 9.

<sup>10</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 a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.<sup>11</sup> Grievant was not properly performing his duties. His undictated cases exceeded the number permitted by the Agency. He was unable to keep files organized and avoid unnecessary edits of dictations. Assistant Commonwealth’s Attorneys from two different jurisdictions reported that Grievant’s performance in Court was so inadequate that they preferred not to call him as an expert witnesses. The Agency has established it was justified in issuing Grievant a Group II Written Notice.

Accumulation of a second active Group II Written Notice “normally should result in discharge.”<sup>12</sup> Grievant had a prior active Group II Written Notice issued March 20, 2002. With the issuance of a second Group II Written Notice, the Agency had the authority to remove Grievant from employment. There are no mitigating circumstances supporting a reduction in disciplinary action. No credible evidence exists for the Hearing Officer to believe that if Grievant were reinstated that he would be able to perform the requirements of the position as expected by the Agency.

There is little doubt that the Agency informed Grievant of the need to improve his performance. Through informal and formal counseling, the Agency informed Grievant that he needed to improve his timeliness. His performance did not improve significantly enough to meet the Agency’s reasonable expectations.

Grievant contends he met the Agency’s standard regarding undictated cases. Grievant met the 20 case standard only two of 15 weeks of reported case results. The Agency expected Grievant to develop a pattern of meeting the 20 case limit rather than meeting it on occasion.

Grievant contends several illnesses in his family influenced his performance. Although Grievant had to deal with serious and tragic family matters, the evidence is insufficient for the Hearing Officer to conclude that Grievant’s performance would have differed had he not encountered those unfortunate events. Grievant’s work performance upon which the disciplinary action is based is not materially different from his performance over the prior year.

Grievant is an extraordinarily intelligent and capable person with numerous talents. Grievant’s inability to meet the Agency’s requirements results not so much from any lack of intellectual skills, but from a lack of organizational skills. Grievant’s weakness in keeping files organized, quick dictations, and monitoring his caseload masked his otherwise outstanding abilities.

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<sup>11</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>12</sup> DHRM § 1.60(VII)(D)(2)(b).

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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>13</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>13</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.





**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 5637-R**

Reconsideration Decision Issued: June 20, 2003

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant argues that he was not unorganized and that his inability to reduce the number of pending cases resulted from micromanagement by Dr. R. and Dr. F. The evidence showed that Grievant had an excessive number of pending cases contrary to the instructions of the Chief Medical Examiner and that he was not micromanaged.

Grievant argues that he met all of the requirements of the Notice of Improvement Needed/Substandard Performance issued on March 20, 2002. Grievant’s Exhibit 9 shows that Grievant had more than 20 cases pending contrary to the requirements of the Notice.

Grievant disagrees with the opinion expressed by the Commonwealth’s Attorney in an April 1, 2002 letter to the Chief Medical Examiner. The April 1 letter was received by the Agency after the March 20, 2002 Group II written notice. That letter supports the conclusions offered by other Commonwealth’s Attorneys offering similar opinions. Grievant points out that he did not testify in court but rather had three pretrial conferences with the Commonwealth’s Attorneys. The hearing decision does not state that Grievant testified in court. The Assistance Commonwealth’s Attorney did not find it necessary to have Grievant testify in court before reaching the conclusion that Grievant was not capable of testifying effectively. The Agency’s conclusion that Grievant was unable to effectively testify in court is substantiated by the evidence.<sup>14</sup>

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<sup>14</sup> Grievant presented evidence from defense attorneys suggesting Grievant’s court performances were good. Grievant was being called by Commonwealth’s Attorneys to testify on behalf of the Commonwealth

Grievant contends that Grievant's Exhibit 9 reflects pending cases and not undictated cases as stated in the hearing decision. The evidence presented addressed both undictated and pending cases. If the Hearing Officer considers Grievant's Exhibit 9 to reflect only pending cases, the outcome of this case is unaffected.<sup>15</sup>

Grievant contends he is able to reach defensible medicolegal conclusions contrary to the assertion of two of his colleagues. Based on the evidence presented, the Hearing Officer finds that the assertions of Grievant's colleagues are supported by the evidence.

Grievant argues that he kept his files organized and that his performance was impeded by the behavior of his colleagues.<sup>16</sup> The evidence showed that Grievant was very disorganized as compared to the other professionals working beside him. His performance was not materially impeded by his colleagues. The assistance provided by Grievant's colleagues was designed to improve Grievant's performance.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant simply restates the arguments and evidence presented at the hearing. For this reason, 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:

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.

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in order to establish the cause of death for victims of crime. To the extent Grievant was unable to present such evidence, a defense attorney would find Grievant's testimony to be of value. Thus, the opinion of a defense attorney that Grievant did a good job testifying in court for the accused merely confirms the Commonwealth's Attorneys conclusion that Grievant was unable to testify adequately for the Commonwealth. Grievant also presented evidence from a Special Assistant U.S. Attorney indicating that Grievant adequately assisted in the preparation of a case. This evidence is not sufficient to rebut the Agency's conclusion that Grievant was an inadequate witness for the Commonwealth. In order to meet the obligations of his position, Grievant should have performed adequately in all criminal prosecutions, not just a few.

<sup>15</sup> Grievant's inability to maintain his caseload below 20 pending cases is in itself sufficient to support issuance of the Group II Written Notice for failure to follow a supervisor's instructions.

<sup>16</sup> Grievant contends that after January 17, 2002, he began keeping his files in an organized manner. The evidence showed that Grievant continued to have problems organizing files after that date. Moreover, he continued to make an excessive number of editing changes.

### 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.

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Carl Wilson Schmidt, Esq.  
Hearing Officer