

Issue: Group II Written Notice (unsatisfactory management); Hearing Date: 11/08/04; Decision Issued: 01/10/05; Agency: DOE; AHO: Carl Wilson Schmidt, Esq.; Case No. 7898; **Administrative Review: HO Reconsideration Request Received 01/25/05; HO Reconsideration Decision Issued 03/31/05; Outcome: Request does not identify any newly discovered evidence or incorrect legal conclusions. Request denied. Administrative Review: EDR Ruling requested 01/25/05; Outcome pending**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7898

Hearing Date: November 8, 2004
Decision Issued: January 10, 2005

PROCEDURAL HISTORY

On September 9, 2004, Grievant was issued an amended¹ Group II Written Notice of disciplinary action for:

- 1. The Superintendent has provided unsatisfactory supervision and management of the program resulting in improper development and implementation of students' Individualized Education Programs (IEPs); inaccurate reporting of required accountability data by the Department of Education (e.g., SPEDSYS); and improper conduct of the HR Office.*
- 2. Since issuance of complaint findings on April 12, 2004, the Superintendent has not initiated needed actions to determine if other students at the school may be impacted by circumstances identified in the case where a student was placed in a potentially unsafe situation.*

On June 13, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant

¹ The amendment was made after Grievant filed her grievance.

and she requested a hearing. On October 14, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 8, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant Counsel
Agency Party Designee
Agency Counsel
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action for unsatisfactory management.

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 Education employs Grievant as a Superintendent at one of its Schools. She reports to the Director of State Operated Programs. Grievant began working for the School on July 25, 2000. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

Grievant works at a School owned by the Commonwealth of Virginia and operated by the Department of Education. Grievant is responsible for all operations at the School. All School employees ultimately report to Grievant. The number of students at the School can vary from approximately 66 to 76. A majority of students reside at the School. They come to the School on Sunday and return home on Friday after school is finished.

Grievant was not working from September 29, 2002 to November 2002 due to short term disability. She had another short term disability from February 10, 2003 to August 5, 2003. Ms. MW, Director of Operations for a local school district worked as Acting Superintendent in Grievant's absence from February to August 2003.

The School is currently operating under a provisional six month license. When Grievant came to the School, the School had a three year license. Shortly thereafter, the School began receiving annual licenses until recently placed on a six month license.

When children are found eligible for special education, an Individualized Education Plan (IEP) is developed for each student. As part of that process, students are classified into different groups. Some students have more than one disability. The IEP identifies the child's strength and needs and sets learning goals and priorities. An IEP can be written for a time period of up to 365 days based on the child's needs. These plans are important because they represent a good faith agreement determining what programs and services the students receive.

IEPs are developed by a team of professionals along with the parents or guardian of the student. Case managers or teachers at the School collaborate with other professionals to develop student IEPs. Grievant is responsible for seeing that IEPs are developed for each student. She does not participate in the IEP committee. Grievant supervises the School Principal or a designee who completes the IEP.

Grievant had the authority and ability to designate someone to be responsible for making sure IEPs were complete and accurate despite vacancies in various positions within the School. Grievant hired an IEP coordinator in the Summer of 2004. For Grievant to sit on IEP committees, however, would be too much for her to accomplish.

In May 2002, Grievant was notified that the School would be given a one year license because it continued to have a systemic deficiency in the area of staff development and management of resident behavior which impacted the structured program of care. The Agency's report² concluded the School was not in compliance regarding "On-going training needed on new IEP format. Provide staff with sample IEPs." The Agency recommended to Grievant that the School,

- Ensure that IEP goals addressing behavior are written in measurable terms.
- Continue to monitor the development of IEPs using the new form and provide staff training as needs are identified.

² Agency Exhibit 6.

In June 2004, Grievant was notified that the School would be given a provisional six month license because the School continued to have systemic deficiencies³ in the areas of programs and services and in staff development.⁴ Multiple and recurring violations included:

1. Conducting and documenting eligibility determinations
2. Provision and documentation of related services
3. IEP development and implementation

In July 2004, the Agency⁵ reviewed 54 student records to determine whether certain documents were in compliance with State regulations and whether there was consistency among records. The reviewers identified several concerns:

1. IEP

- Present level of performance (PLOP) was poorly written. Assessments were not addressed within PLOP.
- Annual goals were not measurable or in order.
- Placement statements did not fully address participation with nondisabled students.
- Frequency of services was not spelled out in hours per week.
- The need for support services/aids for staff was not addressed.
- Duration of services did not include summer break if ESY did not apply.
- Parent and/or student signatures were missing.
- Diploma status was not addressed or checked incorrectly.
- Accommodations were unclear and did not address duration of services.
- IEPs need to include only those pages completed.
- IEP form needs to address student and not just “adult” student.

2. Special Education Process

- Parent and local school division letters were not in folders.
- Prior notice was not given, was not documented or was not completed.
- Dates of eligibility did not match with those on the IEP.
- Re-evaluations were late.

3. Student Records

- Service agreements need to be signed, updated or placed in folder.
- Documentation that parent received a copy of parent rights was not located.
- Information had not been filed in the student record, but was available.⁶

³ Systemic deficiency means violations documented by the regulatory authority, which demonstrate defects in the overall operation of the facility or one or more of its components.

⁴ Agency Exhibit 4.

⁵ A group of five people including Grievant conducted the review.

SPEDSYS is a computer system designed to enable schools to report data to the Department of Education. Grievant's School is required to submit data using SPEDSYS. Having accurate information in the SPEDSYS is important because the accuracy of data determines the accuracy of Federal funding.

In August 2003⁷, the Director of State Operated Programs informed the Grievant that the SPEDSYS data system was not matching information in student school records and would need to be corrected for the 2003/2004 school year. Grievant assured the Director that the data will be verified by hand for student records and corrected before another submission scheduled for December 2003.

Grievant spoke with an administrative assistant responsible for entering data into the SPEDSYS. Grievant learned that some data entered into SPEDSYS originated from face sheets drafted by classroom teachers who had not reviewed eligibility documents before completing the face sheets.⁸ These classroom teachers also sometimes failed to determine whether prior teachers had made mistakes in collecting information. As a consequence, earlier mistakes were repeated over several years without correction.

In May 2004, the Director of State Operated Programs selected 20 student files and reviewed the students' eligibility classification, how the information was reported in SPEDSYS, and how the disability was reported on the students' IEP.⁹ Her review showed that 19 of 20 student records had errors in reporting.

In April or May 2004, Mr. H, an employee at the Facility working on a part-time basis, applied for a full time position similar to his existing position. His application for employment was screened by the HR Manager and placed in a pile of applications for a position other than the one he sought. Consequently, he was not interviewed and did not receive the full time position he sought and for which he was well qualified.

Student M is a deaf day student living in the community. She turned 18 in July 2003.¹⁰ She was independent and regularly traveled on local buses. Student M's place

⁶ Agency Exhibit 8.

⁷ The Director of State Operated Programs also spoke with Grievant about the accuracy of SPEDSYS data in 2002.

⁸ The eligibility form improperly combined hearing impaired and deaf. If the box was checked, then one could not tell whether the student was impaired or deaf. A classification on the IEP included hearing impaired/deaf rather than creating two separate classifications. No reason was given for writing it that way. When the information was reported to SPEDSYS, the child was reported as hearing impaired because there was no way to report deafness.

⁹ Agency Exhibit 9.

¹⁰ Under Virginia law, Student M is entitled to services until she is 21 years old.

of residence changed and several School employees were notified of the change. The Assistant Education Director, however, instructed staff to place the student on a bus. She was transported to her old residence contrary to her wishes and the wishes of her Aunt. Student M did not understand why she was being put on the bus, but was told to go on the bus and she did so. When the Aunt attempted to pick up Student M at School and discovered that Student M was not there, the Aunt became very concerned. Ultimately, the Aunt located Student M and took her home. Grievant was not involved in the decision-making regarding where to send Student M.

Student M was not appropriately placed at the Facility. She should have been transferred to another Facility more suited to her needs. In the Spring 2003 IEP meeting, the Facility staff were asked to look into transferring Student M to another locality. Grievant's Facility staff should have cooperated with the local school district regarding Student M's placement.

Grievant has taken disciplinary action against her subordinates. The extent of that disciplinary action was not presented at hearing.

CONCLUSIONS OF POLICY

When Grievant began working at the School in July 2000, she knew the School had problems with correctly drafting IEPs. Although she took some steps to correct the problem, she did not take adequate and sufficient steps to resolve the problems. She also did not adequately monitor the progress of the actions by her staff to correct IEP problems. For example, Grievant should have taken periodic samples of those IEPs to measure whether progress was being made to ensure the accuracy of the IEPs.¹¹ Because of Grievant's failure to correct problems with IEPs, the School's license status declined to a six month license and placed the School in jeopardy of being unable to operate. Because Grievant knew of the problem, had more than adequate time to correct the problem, made inadequate attempts to correct the problems, and then failed to properly monitor progress, her actions rise to the level requiring disciplinary action.

Grievant contends inadequate staffing caused the IEPs to be problematic. This argument fails because Grievant's responsibility included monitoring IEP development and this responsibility did not depend on having someone else perform the monitoring. Grievant had adequate staff from 2002 forward with adequate knowledge of the IEP process and who could assist Grievant in reviewing student files.

To ensure proper funding and operation of the School, the SPEDSYS requires correct information to be entered about the School's students. Grievant was informed of the problem with data collection and entry in 2002 and again in August 2003. She took minor and ineffective steps to attempt to address the problem. In May 2004, the Director of State Operated Programs examined 20 student records and compared the

¹¹ Currently, Grievant and her staff review IEPs prior to, during, and after IEP meetings.

information in those records to the information reported in the SPEDSYS. Nineteen of the 20 files contained reporting errors. Grievant had adequate notice and opportunity to determine the extent of reporting errors and correct them. Her failure to act aggressively¹² to resolve problems with SPEDSYS data collection rises to the level requiring disciplinary action.

A manager is not absolutely liable for the mistakes of a subordinate unless there is some evidence to show that the manager's mismanagement caused the mistakes. The Agency has not presented sufficient evidence to show that Grievant should be disciplined for the mistakes of her subordinates in the human resource office at the School.¹³ The Agency contends Grievant is responsible for hiring employees outside of the appropriate salary range based on existing budget assumptions. The evidence showed that Grievant was not directly involved in the decision but rather relied on the human resource staff to implement the hiring.¹⁴

The Agency contends Grievant is responsible for Student M going to the wrong address. Grievant was not involved in sending Student M to the wrong address and her management decisions were not the cause of the error. The error resulted from miscommunication between the parties coordinating Student M's transportation. Accordingly, Grievant is not responsible for the error.

The Agency contends Grievant is responsible because an existing part-time employee's application for full time employment was screened and placed in a pile for a different position for which he sought. Grievant is not responsible for the clerical mistakes of a subordinate employee simply because Grievant is the Superintendent. No evidence was presented suggesting Grievant made the mistake or engaged in poor management practices that caused the mistake. Thus, Grievant is not responsible for the hiring error.

The Agency contends Grievant and her managing staff improperly told a teacher that the School would not permit the teacher to end her employment contract several months early. The teacher complained to the Director of State Operated Programs who then concluded that the teacher would not remain employed at the School. Although the teacher spoke with Grievant, the teacher did not express all of the reasons why she

¹² Grievant contends she engaged in a more strategic approach by seeking to identify and eliminate the underlying source of the reporting problems. Grievant met with staff and concluded that data sources (Face Sheets) for entries into SPEDSYS often contained inaccurate information. Although Grievant's approach was appropriate, it was not enough to correct existing reporting errors upon which federal funding and major managerial decisions depended. In addition to her strategic approach, Grievant should have reviewed the student records as did the Director of State Operated Programs and immediately corrected SPEDSYS.

¹³ A January 12, 2004 report criticizes the School's human resource function. Many of these criticisms related directly to the primary responsibilities of the Human Resource Officer. See, Agency Exhibit 2.

¹⁴ Hiring authority was taken over by the Director of State Operated Programs in April 2003. See, Agency Exhibit 11.

should be let out of her contract. Only during her conversations with the Director of State Operated Programs did the teacher provide a complete explanation. Based on the information Grievant had about the teacher and her preference that teachers honor their contracts, Grievant's decision-making was correct and her refusal to end the teacher's contract early was appropriate.

When the evidence is examined as a whole, the Agency's issuance of a Group II Written Notice must be upheld. Grievant had adequate notice of problems at the School and an adequate opportunity to correct those problems. Given the high status of her position and the consequences to the School such as the receipt of a provisional license, disciplinary action is appropriate.

DECISION

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

APPEAL RIGHTS

You may file an administrative review request within **15 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400

Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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.¹⁵

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁵ 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: 7898-R

Reconsideration Decision Issued: March 31, 2005

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 asks the Hearing Officer to reopen the hearing to receive testimony from an Assistant Superintendent. Grievant contends this witness was unavailable to comply with the Order of the Hearing Officer to appear for the scheduled hearing. Grievant does not explain why the witness was unavailable or what testimony the witness will provide.

Witness testimony is voluntary in grievance hearings. If a witness refuses to testify, that fact alone is of no consequence. If a witness cannot physically appear at a hearing, that witness may testify by telephone. If a witness can only testify during a certain time of the day, that witness may be called out of order. If a witness is crucial to a party’s case but cannot testify on the hearing date, that witness may testify by telephone conference at a later date prior to the issuance of the Hearing Decision. The Hearing Officer has no recollection of Grievant seeking any of these alternatives. In the absence of a party seeking one of these alternatives prior to or during a hearing, the testimony of a witness cannot be considered as possible newly discovered evidence.

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. 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 15 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