Issues: Group II Written Notice with suspension (failure to follow supervisor's instructions), and failure to provide procedural due process; Hearing Date: 07/02/04; Decision Issued: 07/13/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 714,738; Outcome: Employee granted partial relief; **Administrative Review: Hearing Officer Reconsideration Request received: 07/23/04; Reconsideration Decision issued 08/09/04; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 07/23/04; DHRM Ruling issued 12/01/04; Outcome: HO's decision affirmed; Judicial Review: Appealed to the Circuit Court in Chesterfield County on 12/30/04; Circuit Court ruling issued 03/28/05; Outcome: HO's decision affirmed; Judicial Review: Appealed to the Court of Appeals on 04/28/05; Court of Appeals Ruling issued 08/30/05; Outcome: HO's decision affirmed [Case No. 1003 05 2].**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 714 / 738

Hearing Date: July 2, 2004
Decision Issued: July 13 2004

PROCEDURAL HISTORY

On February 20, 2004, Grievant was issued a Group II Written Notice of disciplinary action with two workdays suspension for:

> *Failure to follow supervisor's instructions. On 3-5-03, you were instructed by [Chief Probation and Parole Officer] not to request more than 12 weeks for completion of PSI's unless there were extreme circumstances. On 2-11-04, [Chief Probation and Parole Officer] received an email from the Clerk's Office indicating you had requested no PSI returns until 6/22/04. You responded by email to the Clerk's Officer on 2-14-04 stating you "never asked for 4 months to do a Presentence Report," and you indicated [Judge R] did not have enough criminal days in May. [Chief Probation and Parole Officer] spoke with [Judge R] on 2-12-4 and he stated you have always asked for 4 months on PSI's.*

On March 18, 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 and she requested a hearing. On June 2, 2004, the Director of the Department of Employment Dispute Resolution consolidated another grievance with the grievance challenging disciplinary action.[1] On June 3, 2004, the Department of Employment

[1] See, Compliance Ruling of Director, Ruling Number 2004-730.

Dispute Resolution assigned this appeal to the Hearing Officer. On July 2, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with two workday suspension for failure to follow a supervisor's instruction.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The burden of proof is on Grievant to show that the Agency misapplied policy regarding her removal. 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 Corrections employed Grievant as a Probation Officer Senior until her removal on April 5, 2004. She received an overall rating of Contributor on her 2003 evaluation.[2] No evidence of prior disciplinary action against Grievant was presented during the hearing.

The purpose of Grievant's position was:

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[2] Agency Exhibit 7.

> Supervises a specialized caseload of adult offenders, performs investigations, casework and administrative services.[3]

One of Grievant's duties included presenting presentencing reports to court judges for their consideration prior to determining what sentences to give to criminal defendants.

Grievant was assigned to Judge R. Judge R required that no more than five presentence reports could be presented on any criminal docket day.

In March 2003, the Chief Probation and Parole Officer set a standard that presentence reports had to be completed within a time frame of 12 weeks, from conviction to sentencing dates. All Court Officers were made aware of this standard even though it was not written into policy. For the period September 1, 2003 to February 3, 2004, Grievant scheduled due dates of approximately four months for 42 of 45 presentence reports. Grievant completed a significant portion of her reports from two to four weeks before they were presented in Court.[4] Thus, she could have presented the reports to the Court sooner.

Scheduling presentencing reports in Judge R's court became an issue in February 2004. On February 10, 2004, the Deputy Clerk sent an email stating:

> I can see this is going to be a problem in [Judge R's] courtroom very soon. [Grievant] has asked us not to set any pre-sentence returns until 6/22/04 and I have already set one for that date. At this rate, I will need July dates by next week.

The Chief Probation and Parole Officer received a copy of this email and sent Grievant an email stating:

> You need to clear this up right away. There is no reason in the world that you need 4 months to do a PSI with the current format. Please get with me today and get this straightened out.

Grievant send the Clerk's office employee an email with a copy to the Chief Probation and Parole Officer stating:

> I have never asked for 4 months to do a Presentence Report. The status quo has been 90 days turn around time for all the court staff. In reference to [Deputy Clerk's] concern, we had only went to June because [Judge R] does not have that many criminal days in May. [Judge R] does not want any more than five sentencings set on a criminal day. Sometimes he has a couple criminal days in a week, however, it is too much to do 10 or more

[3] Grievant Exhibit 3.

[4] Grievant Exhibit 5.

> Psi's weekly. I have spoken to [Deputy Clerk] to try and resolve this problem. We are going to back step and set Presentence Reports on days that coincidentally only four were set and utilized June 14 if need be, to be within the 90 day time frame by the end of March.

Judge R and the Chief Probation and Parole Officer discussed Grievant's email statement denying she had ever asked for four months to complete a presentence report. Judge R believed Grievant's statement was untruthful and told the Chief Probation and Parole Officer that he did not want Grievant to have any contact with the Court in any capacity. Judge R did not want Grievant presenting any presentencing reports or supervising any offenders for his Court.

When Grievant was presented with the Group II Written Notice on February 20, 2004, she met with the Deputy Director. He instructed Grievant not to contact the Clerk's office staff to discuss the dispute. He told her to speak with the Chief Probation and Parole Officer before speaking with Judge R. Grievant reasonably interpreted this instruction as indicating she should not speak with Judge R at all. Grievant refrained from speaking with staff in the Clerk's office and with Judge R.[5]

The Circuit Court appointed Grievant as a Probation and Parole Officer for its court. On December 21, 1992, the Court entered an Order confirming that appointment and reappointing Grievant for an indefinite term. On April 2, 2004, the Circuit Court issued an order signed by all four judges ordering Grievant's "authorization as an Officer of the Circuit Courts be rescinded effective immediately."[6] With this order, Grievant became unable to perform her duties as a Probation and Parole Officer in that Circuit Court. On April 5, 2004, Grievant received a letter from the Agency terminating her employment.[7]

CONCLUSIONS OF POLICY

Disciplinary Action

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." Department of Corrections Procedure Manual "(DOCPM") § 5-10.15. 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." DOCPM § 5-10.16.

[5] Grievant argues she could have resolved Judge R's concern if she had been permitted to speak with him. Nothing in policy prohibits the Agency from instructing Grievant not to speak with one of the persons complaining about Grievant's work performance.

[6] Agency Exhibit 3. Grievant Exhibit 2.

[7] Agency Exhibit 4.

Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

"Inadequate or unsatisfactory job performance" is a Group I offense. In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant's job performance was unsatisfactory because she failed to adequately plan and schedule her presentence report presentations. For some weeks, Grievant should have increased the number of days she presented reports to the Court, given Judge R's five case per day restriction.

The Agency contends Grievant failed to follow a supervisor's instruction. The evidence showed that the comments of the Chief Probation and Parole Officer were made to all staff in order to establish a general performance guideline. This standard was not written into policy and the Agency did not establish any means of monitoring staff performance. The Chief Probation and Parole Officer's statements did not constitute a specific instruction to Grievant for which Grievant intentionally disregarded. Grievant was attempting to comply with the general performance expectation, but she did so inadequately. She limited herself to presenting presentence reports on one day per week, instead of selecting days as her caseload increased. As a result, she scheduled presentence report presentations over the 12 week expectation. Several other Parole Officers scheduled cases over the 12 week period, but none were disciplined. This also suggests that the Chief Probation and Parole Officer's comments were general performance standards rather than a specific instruction from a supervisor which must be complied with without exception. Other Parole Officers were not disciplined because they did not exceed the 12 week guideline to the same degree as did Grievant.

Grievant argues she was denied due process of law because the Agency failed to provided her with the opportunity to respond to the allegations against her before she was presented with the Written Notice. Although the Agency did not give Grievant a reasonable opportunity to respond to the charges as required by DOCPM § 5-10.14(A)(3), the Agency's action was harmless error. To the extent Grievant could have presented any defenses to the Agency on the day she received the Written Notice, she has been given the opportunity to present those defenses to the Hearing Officer during the hearing.

Removal from Employment

DOCPM § 5-10.12(A)(3) provides that:

> An employee unable to meet the working conditions of employment, due to circumstances such as those listed below may be removed under this

> section. Examples of such circumstances include … loss of license or certification required for the job, etc.

Va. Code § 53.1-143 provides that the "judges of the judicial circuit to which an officer is assigned shall authorize the officer to serve as an officer of the court …." When the Circuit Court removed Grievant's authorization to serve as a probation and parole officer, Grievant became unable to meet the working conditions of her employment. Grievant was no longer certified to perform her job and the Agency was authorized to remove her under DOCPM § 5-10.12(A)(3). Accordingly, the Agency's removal of Grievant must be upheld.

Grievant contends that the Agency and the Circuit Court failed to provide her with procedural due process regarding her removal. DOCPM § 5-10.12(C) states:

> Prior to such removal, the appointing authority and personnel officer shall gather full documentation supporting such action and shall notify the employee, verbally or in writing, of the reasons for such a removal, giving the employee a reasonable opportunity to respond to the charges. All removals under this section must have the written approval of the Director of Human Resources. Final notification of removal should be via memorandum or letter, not by a Written Notice form.

The Agency did not give Grievant a reasonable opportunity to respond to the charges and no evidence of a written approval for removal by the Director of Human Resources was presented. Although the Agency failed to comply with this policy, its non-compliance is harmless error. Grievant had the opportunity to present to the Hearing Officer any responses she would otherwise have given to the Agency at the time she was removed from employment. Moreover, policy does not set forth any consequences if the Director of Human Resources does not issue written approval for the removal.

Agency and State policy does not govern actions by Circuit Court Judges. In this instance, the Circuit Court Judges did not provide Grievant with any notice or opportunity to respond to their rescission of Grievant's authorization to serve as a Probation and Parole Officer in their court. To the extent the Court's order was objectionable, Grievant would have to challenge it outside of the grievance process.

Grievant contends she is being placed in double jeopardy and being retaliated against because of the Court's actions. This argument fails because the Circuit Court's actions were independent of the Agency's actions. Removing Grievant's authorization to serve was not the action of the Agency.

Grievant asks the Hearing Officer to order the Agency to transfer her into an open position in another Court. *Grievance Procedure Manual § 5.9(b)* specifically removes a Hearing Officer's authority to order an agency to transfer an employee. Grievant's request must be denied without considering the merits of that request.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **reduced** to a Group I. Because the normal disciplinary action for a Group I offense is issuance of a Written Notice, Grievant's suspension for two workdays is **rescinded**. 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. Grievant's request for relief regarding her loss of certification and removal from her position is **denied**.

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. 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 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.[8]

[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

[8] 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: 714 / 738-R

Reconsideration Decision Issued: August 9, 2004

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.

Cases 714 and 738 were consolidated by the EDR Director for a single hearing before the Hearing Officer. Although there was one hearing and one decision, the issues were distinct. One involved disciplinary action and the other involved Grievant's ability to meet the conditions of her employment.

The Agency prohibited Grievant from discussing the disciplinary action with the Circuit Court. The Agency did not prohibit Grievant from discussing its decision to rescind her appointment. The Court did not notify Grievant prior to its decision and did not give her any opportunity to explain why the Court should refrain from rescinding her appointment. Although the Court's failure to provide any due process may be unfair, the Hearing Officer has no jurisdiction over a Circuit Court. The Agency has no authority to force the Circuit Court to change its decision. If the Agency had (1) provided Grievant with reasonable notice that she was being removed from her position because she no longer met the conditions of employment (2) obtained the written approval of the Director of Human Resources, and (3) met with Grievant to hear her reasons why she should not be removed, the fact remains that the Circuit Court rescinded her authorization. She no longer met the conditions of her employment. Anything that Grievant could have said to the Agency prior to her removal could not have affected the Circuit Court's decision since the Agency did not make the decision to rescind Grievant's appointment. In addition, all of Grievant's arguments that she would have made to the Agency prior to her removal were or could have been made to the Hearing

Officer. Based on these facts, the Agency's failure to provide Grievant with pre-termination due process is harmless error.

The Circuit Court's disqualification in its Court did not exclude Grievant from performing her duties in other Circuit Court. Those Circuit Court had available positions in which Grievant could serve. Nothing in State policy requires the Agency to afford one of those positions to Grievant prior to her removal. Even if the Hearing Officer were to find that the Agency should transfer Grievant to another position, the Hearing Officer does not have the authority to issue such an order. *Grievance Procedure Manual § 5.9(b)* specifically removes the Hearing Officer's authority to transfer any employee.

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 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.

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Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter with the
Virginia Department of Corrections
December 1, 2004

The grievant, through her representative, has appealed the hearing officer's July 13, 2004, decision in Case No. 714/738. The grievant is challenging the decision because she contends that the decision is inconsistent with and contrary to state and agency policy. More specifically, the grievant alleges that the hearing officer's application of Department of Human Resource's Policy No. 1.60, Standards of Conduct, is improper because the grievant was not afforded due process during her dismissal and the hearing officer concurred with the Department of Corrections' decision.

The agency head has requested that I respond to this appeal.

FACTS

The Virginia Department of Corrections (DOC) employed the grievant as a Senior Probation and Parole Officer until she was terminated. On February 20, 2004, the DOC issued to the grievant a Group II Written Notice for "Failure to follow supervisor's instructions." On April 5, 2004, she was removed from employment because the circuit court judge to whom she was assigned determined that she could no longer work for him.

The purpose of the grievant's position was to supervise a specialized caseload of adult offenders, perform investigations, casework and administrative duties. In addition, she presented presentencing reports to court judges for their consideration prior to determining what sentences to give to criminal defendants. In March 2003, the Chief Probation and Parole Officer set a standard that required presentencing reports to be completed and submitted to the judges within a time frame of 12 weeks from conviction to sentencing. This was a standard that all courts officers were made aware of and were expected to follow. It was alleged by management officials, however, that the grievant tended to submit reports that exceeded that acceptable time frame. Thus, she was charged with "Failure to follow supervisor's instructions" with respect to submitting the reports to the judges in a timely manner. She was issued a Group II Written Notice with a two-day suspension on February 20, 2004.

After she was issued the disciplinary notice, she was instructed not to contact the Clerk of the Court's office to discuss the issues surrounding the written notice. She was given permission to discuss with the issue judge for whom she worked only after she received permission from management officials. She erroneously concluded that she

was not to contact the judge under any circumstance to discuss her not submitting her reports within the 12-week time frame.

During the agency's investigation to determine if the grievant actually did not follow her supervisor's instructions, management contacted the judge for whom she worked. The judge was concerned that her dishonesty regarding whether she had asked for additional time to submit reports was a reflection on how honest she would or could be in completing her daily assignments. Therefore, he stated that he no longer wanted her to work for him and the other judges in the court concurred. By signed order, she was dismissed from her court appointed position, and the agency officials concurred. Because she could no longer perform her duties, she was terminated from her position in accordance with the provisions of DHRM Policy No. 1.60.

She filed one grievance regarding the issuance of the Group II Written Notice and suspension and a second one regarding the termination from her job. Because they were related to the same issue, the Department of Employment Dispute Resolution consolidated the grievances so that the same hearing officer could hear them. He reduced the Group II offense to a Group I offense but upheld the termination on the basis that the grievant was dismissed from her duties based on the judges' decision. The agency terminated her from employment because she was not able to perform the duties of the job for which she was hired. She requested that the hearing officer reconsider his decision but he refused.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, states that it is the Commonwealth's objective to promote the well being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. The examples are not all-inclusive. In addition, Policy No. 1.60, Section IV. A., in part, states that "An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section. Those reasons include, *but are not limited to*, loss of driver's license that is required for performance of the job; incarceration for an extended period, loss of license or certification required for the job.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify

reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the

discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenges must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the evidence supported that the grievant did not follow the instructions as set forth by management officials regarding submitting presentencing reports to the judge in a timely fashion. However, the evidence supported that other similarly situated employees also, to a lesser degree, exceeded the time periods for submitting the reports in a timely fashion. In light of that evidence, the hearing officer reduced the Group II Written Notice to a Group I Written Notice with no suspension.

However, the hearing officer sustained the termination because the circuit court judges submitted a signed order that relieved the grievant of her duties and responsibilities in working for the judges. This signed order essentially terminated her employment in that she could not carry out her duties and responsibilities as listed in her job description. Therefore, DHRM has no reason to interfere with the execution of the hearing officer's decision.

If you have any questions regarding this correspondence, please call me at (804) 225-2136.

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Ernest G. Spratley, Manager
Employment Equity Services