

Issues: Group I Written Notice (unsatisfactory job performance), Group II Written Notice with suspension (violating personnel policies governing confidentiality), retaliation); Hearing Date: 03/20/06; Decision Issued: 03/24/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8263,8264,8283; Outcome: Employee granted partial relief; **Administrative Review: HO Reconsideration Request received 04/07/06; Reconsideration Decision issued 04/17/06; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 04/07/06; Request withdrawn Administrative Review: DHRM Ruling Request received 04/07/06; Request withdrawn**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8263 / 8264 / 8283**

Hearing Date: March 20, 2005  
Decision Issued: March 24, 2006

**PROCEDURAL HISTORY**

On August 26, 2005, Grievant was issued a Group II Written Notice of disciplinary action for violating personnel policies governing confidentiality. On September 21, 2005, Grievant filed a grievance to challenge the disciplinary action. During the grievance step process, the Notice was reduced to a Group I Written Notice for unsatisfactory job performance.<sup>1</sup> On September 16, 2005, Grievant was issued a Group II Written Notice with suspension from September 19, 2005 to October 7, 2005<sup>2</sup> for violating personnel policies governing confidentiality. On September 21, 2005, Grievant filed a grievance to challenge the Agency's disciplinary action. On December 2, 2005, Grievant filed a Grievance alleging retaliation for participating in a protected activity. The outcomes of the Third Resolution Steps to these grievances were not satisfactory to the Grievant and she requested a hearing. On February 16, 2006, the

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<sup>1</sup> The Agency argues that because Grievant did not conclude her grievance after the disciplinary action was lowered, the matter before the Hearing Officer is a Group II Written Notice and not a Group I Written Notice. Nothing in the third resolution step respondent's response indicates the reduction from a Group II to a Group I was contingent on Grievant concluding her grievance. Accordingly, the Agency reduced the disciplinary action to a Group I Written Notice during the step process and it is a Group I Written Notice that is to be addressed by the Hearing Officer.

<sup>2</sup> During the grievance step process, the length of suspension was reduced to ten workdays.

Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 20, 2006, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUE**

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether the Agency retaliated against Grievant for engaging in a protected activity?

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks in the third grievance should be granted. 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 employs Grievant as an Office Services Specialist at one of its Facilities. The purpose of her position is to provide “Human Resources support to staff members of the institution.”<sup>3</sup> One of the competencies expected of Grievant to successfully perform her position is the “ability to maintain confidential information.”<sup>4</sup> Grievant reports to the Human Resource Officer (HRO). Grievant transferred to the human resource office on November 10, 2004.<sup>5</sup> No evidence of prior disciplinary action against Grievant was introduced during the hearing.

On August 2, 2005, Corrections Officer J asked Corrections Officer C to go to the human resource office and pick up a document for him. Corrections Officer J and Corrections Officer C lived in the same residence and were in a romantic relationship. Grievant was aware of that relationship.<sup>6</sup> Corrections Officer C arrived at the human resource office. She asked for the document and said that Corrections Officer J had sent her to obtain the document. Grievant told Corrections Officer C that the HRO was out of the office and to go down the hall to see if the HRO was in the Warden’s office. Corrections Officer C did so, but could not find the HRO. Corrections Officer C restated her request to receive the document. Grievant walked to the HRO’s desk and found a signed letter face-up and prepared for Corrections Officer J. Grievant looked at the letter and it appeared to be consistent with the document Corrections Officer C indicated she was seeking. Grievant took the original letter, folded it, placed it in an envelope, sealed the envelope, and gave the envelope to Corrections Officer C. When the HRO returned to her office, Grievant told the HRO about the letter.

Corrections Officer J testified during the hearing that he had asked Corrections Officer C to go to the human resource office and obtain the letter that Grievant gave to Corrections Officer C. He was in the parking lot outside the Facility while Corrections Officer C was at the human resource office.

On August 26, 2005, the HRO met with Grievant and presented Grievant with a memorandum setting forth “Expectations for Employment.”<sup>7</sup> The memorandum stated, in part:

2. All HR information, memos, etc are to be held in strictest of confidence. Under no circumstances is any information to be given to parties not authorized to receive such information.

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<sup>3</sup> Agency Exhibit 6.

<sup>4</sup> Agency Exhibit 6.

<sup>5</sup> Grievant had been employed by the Commonwealth for approximately 15 years.

<sup>6</sup> Corrections Officer J had informed Grievant that Corrections Officer C was his girlfriend.

<sup>7</sup> Grievant signed the memorandum to indicate she had “received these expectations and understand them as explained.” See Agency Exhibit 1.

In September 2005, Grievant was asked to compute the available leave balances for an employee at the Facility. Grievant's Co-worker was more experienced with computing available leave balances. Grievant had difficulty computing the correct balance. The Co-worker gave Grievant a template for computing leave balances along with actual leave information regarding an employee. Grievant took the information she received from the Co-worker to Grievant's home. Grievant was scheduled to be out of the office and wanted to complete the leave computation as soon as possible. She used the leave information provided to her and created an electronic spreadsheet describing the employee's leave balances. She wanted to email the spreadsheet to the HRO but did not know the HRO's email address.<sup>8</sup> Grievant did not attempt to call the HRO and ask for the HRO's address because Grievant did not wish to speak with the HRO. The HRO was available and could have provided Grievant with the address. On September 2, 2005, Grievant emailed the spreadsheet to a Co-worker in the human resource office and to an information technology employee and asked them to forward the spreadsheet to the HRO if they knew the HRO's email address.<sup>9</sup> Grievant sent the email to the information technology employee because she believed he would know the HRO's address and because she trusted him to keep the information confidential. The subject line of the email names the employee associated with the spreadsheet level balances.

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

### Confidentiality of Records

DOCPM § 5-18.10 addresses confidentiality of personnel records. Section A states:

Personnel records are confidential and may be released only to authorized personnel. Employees responsible for the preparation, maintenance, and custody of personnel records shall hold the content of such records in

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<sup>8</sup> The Agency had recently changed the email addresses for its employees and Grievant did not know the HRO's new email address.

<sup>9</sup> Grievant also emailed the spreadsheet to a third individual.

strict confidence, except as provided by law and the Department procedure.

DOCPM 5-18 does not define “personnel records”, “release” or “authorized personnel.”

### Group I Written Notice

“[I]nadequate or unsatisfactory job performance” is a Group I offense.<sup>10</sup> 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.

The Agency contends Grievant violated DOCPM § 5-18.10 by taking a confidential memorandum from the HRO’s desk and giving it to Corrections Officer C, who was not authorized to receive the information. DOCPM § 5-18 does not define “authorized personnel.” Grievant interpreted this section to mean that an authorized person would be someone authorized by Corrections Officer J to obtain a document for him. Corrections Officer C was authorized by Corrections Officer J to obtain the memorandum on his behalf. Grievant’s interpretation is reasonable. Grievant released the memorandum to an authorized person and, thus, did not act contrary to DOCPM § 5-18.

Under some circumstances removing items from another employee’s desk might be inappropriate. In this case, however, Grievant was responsible for providing support and assistance to the HRO. Grievant reviewed the memorandum and concluded it was in final form and not draft form. This conclusion was not contested by the Agency. Grievant attempted to locate the HRO prior to delivering the memorandum. Grievant knew that Corrections Officer J had discussed the memorandum with the HRO earlier in the day. Grievant’s motive was to provide good customer service and avoid having an employee wait for the HRO to return. Grievant knew Corrections Officer C and Corrections Officer J lived in the same residence and had a romantic relationship thereby making it likely that Corrections Officer J would chose Corrections Officer C to pick a document for him. In light of these facts, the Hearing Officer cannot conclude that Grievant knew or should have known not to remove the letter from the HRO’s desk. No evidence was presented that Grievant had been instructed or should otherwise have known prior to August 2, 2005<sup>11</sup> that she should never remove items from the HRO’s desk. The Agency has not presented sufficient evidence to support its issuance to Grievant of a Group I Written Notice.

### Group II Written Notice

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<sup>10</sup> DOCPM § 5-10.15(B)(4).

<sup>11</sup> On August 26, 2005, the HRO notified Grievant not to remove items from her desk.

DOCPM § 5-18.10 states, “[p]ersonnel records are confidential and may be released only to authorized personnel. Employees responsible for the preparation, maintenance, and custody of personnel records shall hold the **content** of such records in strict confidence, except as provided by law and the Department procedure.” (Emphasis added). On August 26, 2005, Grievant received a memorandum from the HRO advising Grievant that “[a]ll **HR information**, memos, etc are to be held in strictest of confidence. Under no circumstances is any information to be given to parties not authorized to receive such information.” (Emphasis added).

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense. DOC Operating Procedure 135.1(XI)(B)(1).<sup>12</sup> Leave records and balances for a particular employee constitute “HR information” and “content” of personnel records. Grievant knew or should have known not to release HR information to unauthorized personnel. There is no reason to believe the information technology employee had any authorization to receive HR information. Accordingly, Grievant released confidential HR information to an unauthorized person thereby justifying the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, the Agency may suspend an employee for up to ten workdays. Grievant’s suspension is consistent with the Standards of Conduct policy.

Grievant contends the disciplinary action should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution....”<sup>13</sup> Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### Retaliation

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: “Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. ‘whistleblowing’).” To establish

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<sup>12</sup> The Department of Corrections revised its Standards of Conduct effective September 1, 2005. Since Grievant sent the email on September 2, 2005, the revised Standards of Conduct are applicable.

<sup>13</sup> *Va. Code § 2.2-3005.*

retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>14</sup> (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity.

Grievant submitted a summary of the retaliatory actions she claims the Agency took against her. The only protected activity Grievant listed was that she filed a grievance on June 27, 2005. The grievance was administratively closed because it was filed more than 30 days after the events giving rise to the grievance, according to the Agency. The Hearing Officer reviewed the documents submitted by Grievant and listened to her testimony regarding treatment she received from the HRO that she considered to be retaliatory.

The conflict between Grievant and the HRO began on April 25, 2005 when Grievant observed the HRO receive a late application for employment. The HRO accepted an application for employment between 8 a.m. and 9 a.m. on a Monday for a position opening that closed on the prior Friday. Grievant had set the date stamp to show Monday's date, but the HRO changed the stamp date to read the prior Friday's date and then stamped the application. The effect was to create the impression that the application for employment had been received timely by the human resource office on a Friday when it actually was received on a Monday.<sup>15</sup>

Grievant observed the HRO backdating the application and asked what the HRO was doing. When the HRO indicated to Grievant that Grievant should not pay attention to the HRO, Grievant stated "Oh, you're back dating an application" thereby indicating to the HRO that the HRO was engaging in improper behavior.<sup>16</sup> Grievant made the statement within hearing distance of a Co-worker. The HRO did not like being challenged by Grievant. Later in the day on April 25, 2005, Grievant and a Co-worker engaged in a conversation that the HRO overheard. Subsequently, the HRO issued Grievant a written counseling regarding that conversation.

Based on the evidence presented, it is clear that the HRO's attitude towards Grievant changed on April 25, 2005. The poor treatment that Grievant considered to be retaliatory began on April 25, 2005. It did not begin when Grievant filed her June 27,

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<sup>14</sup> See Va. Code § 2.2-3004(A)(v). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>15</sup> The HRO testified that after considering the matter, she was in error for backdating the application and had the authority to accept the application on Monday because the applicant had contacted her prior to the due date and expressed an inability to timely file the application due to other duties.

<sup>16</sup> Grievant did not report the HRO's behavior or make a formal complaint to Agency managers higher in the chain of command. Thus, Grievant did not engage in a protected activity by merely questioning the HRO's action.



2005 grievance. The HRO did not like working with Grievant prior to Grievant's filing of a grievance. The HRO's treatment of Grievant did not change after she filed the grievance – it continued as it had been prior to the filing of the grievance. In other words, even if Grievant had not filed the June 27, 2005 grievance, the HRO's behavior towards Grievant would not have changed. There is no basis to conclude that when Grievant engaged in protected behavior by filing a grievance that the Agency began to retaliate against her by taking an adverse employment action.<sup>17</sup>

The Hearing Officer is not in a position to determine whether Grievant is receiving adequate or inadequate supervision. Even if the Hearing Officer were to find that an agency was poorly supervising an employee, the Hearing Officer would lack the authority to order that agency to change its behavior in the absence of some policy defining the agency's obligation.

### **DECISION**

For the reasons stated herein, the Agency's issuance on August 26, 2005 to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. The Agency issuance on September 16, 2005 to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**. Grievant's request for relief due to retaliation is **denied**.

### **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 14<sup>th</sup> St., 12<sup>th</sup> Floor

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<sup>17</sup> The taking of disciplinary action against an employee would constitute an adverse employment action. In this case, however, the Agency took disciplinary action against Grievant because Agency managers believed Grievant had acted contrary to the Standards of Conduct. Agency managers did not retaliate against Grievant by issuing her Written Notices.

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.<sup>18</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>18</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: 8263 / 8264 / 8283-R**

Reconsideration Decision Issued: April 17, 2006

**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. Both Grievant and the Agency seek reconsideration.

Grievant restates her claim that the Agency retaliated against her. She states that her Supervisor acted contrary to policy. When Grievant reported that violation to the Supervisor, the Supervisor began retaliating against Grievant. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: “Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. ‘whistleblowing’).” Grievant's claim fails because she did not report "violation of law." At most, Grievant reported a violation of policy. In addition, the report was not made to a proper authority. If Grievant had reported her concerns to the Agency's Office of the Inspector General or to the Warden, Grievant would have reported the matter to a proper authority. Instead, Grievant addressed her comment to the person engaged in the inappropriate behavior, who was not likely to investigate and impose sanctions against herself.

Grievant contends that the Agency failed to refer her allegation of retaliation and a hostile work environment to the EEO Investigator. Grievant had the opportunity to present to the Hearing Officer any evidence necessary to support her claim. Having failed to establish retaliation or improper discrimination, Grievant's claim is now moot.

Grievant's other assertions for reconsideration were presented during the hearing and rejected by the Hearing Officer in the hearing decision.

The Agency seeks reconsideration of the hearing decision regarding the reversal of a Group I Written Notice. The Agency restates its argument that Grievant should have known not to give the memorandum to Officer C based on office etiquette and practice. The Agency's assertion alone is insufficient to establish this point. The Agency failed to present sufficient evidence for the Hearing Officer to conclude that Grievant knew or should have known not to give the document to Officer C. The Agency now argues that the memo was regarding a very serious issue. The Agency chose not to introduce the memo as evidence during hearing. The Agency's assertion that the memo was "very serious" cannot be verified.

The Agency's and Grievant's requests for reconsideration do not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, both requests for reconsideration are **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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer