

Issues: Group I Written Notice (unsatisfactory work performance), Group II Written Notice (failure to follow a supervisor's instructions), Group II Written Notice with termination (due to accumulation) (leaving the work site without permission); Hearing Date: 04/13/06; Decision Issued: 04/24/06; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8315; Outcome: Employee granted partial relief; **Administrative Review: HO Reconsideration Request received 05/10/06; Reconsideration Decision issued 06/16/06; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 05/10/06; EDR Ruling No. 2006-1383 issued 08/07/06; Outcome: HO's decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8315**

Hearing Date: April 13, 2006  
Decision Issued: April 24, 2006

**PROCEDURAL HISTORY**

On January 25, 2006, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance. On January 24, 2006, she received a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. On January 30, 2006, Grievant received a Group II Written Notice of disciplinary action for leaving the work site without permission. Grievant was removed from employment effective January 30, 2006.

Grievant timely filed grievances 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 March 20, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 13, 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?

### **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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as an Administrative Office Specialist III until her removal effective January 30, 2006. She had been employed by the Agency for approximately two years.

In August 2005, Grievant was responsible for entering salary data into the Personnel Management Information System (PMIS). The Virginia Department of Accounts sends reports to agencies identifying discrepancies between entries in the CIPPS and PMIS databases. Grievant received those reports by email from a VDOA employee. Grievant was responsible for making entries in the PMIS system to make sure that system was consistent with CIPPS.

On August 25, 2005, an Agency employee received a promotion with a pay increase. Another employee transferred to another position but with a pay increase. In

order for the pay increases to be properly recorded, the information was to be entered into the Personnel Management Information System (PMIS). PMIS is an on-line system use to maintain records for employees. Entries into the system were to be made by staff in the Human Resource department, not the Payroll department at the Agency.

On September 10, 2005, the Agency initiated a re-assignment of Grievant from the Human Resource Department to the Training and Staff Development Department of the Facility.<sup>1</sup> Although paperwork was completed on September 10, 2005, Grievant's duties did not actually change until October 10, 2005. Grievant's new position did not have any responsibility for making entries in PMIS. Another employee began entering information into the PMIS system.

On November 25, 2005, Agency managers realized the entries had not been made into PMIS. This caused the two employees to receive lower salaries than they were otherwise entitled.

On October 11, 2005, the Employee Services Manager<sup>2</sup> sent<sup>3</sup> Grievant an email stating:

As you may or may not know we have been producing the EWPs for new hire DSAs<sup>4</sup> while they are in training. [Ms. MM] has given me her electronic signature page and a EWP that was acceptable to all trainees. You will find those documents along with the list of new hires for the 9/10, 9/25, and 10/10 classes. I've discussed it with [Ms. E] and we would like for you to produce the EWPs.

All that needs to be done is change the name and work unit on page 1 to correspond with the information provided by [Mr. D]. You will need to print page 1-4 from the EWP and [Ms. MM's] electronic signature page. [Ms. E] will get the EWPs as she will have to sign them and get the employees to sign.

Although no deadline was specified for the task, Grievant knew that EWPs had to be completed within a 30 day period because she had reminded Agency managers that they had not completed an EWP for her when she moved to her new position in the Training and Staff Development Department.

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

<sup>2</sup> Grievant was within the Employee Services Manager's chain of command.

<sup>3</sup> The Employee Services Manager sent Ms. BP a copy of the email. Ms. BP reported to the Employee Services Manager.

<sup>4</sup> DSA refers to Direct Service Associate.

On October 19, 2005, Ms. PB<sup>5</sup> discussed the assignment with Grievant. Ms. BP later told Grievant she still needed to complete the task.

On October 25, 2005, the Training Manager began supervising Grievant. On December 5, 2005 at 2:40 p.m., the Training Manager told Grievant to clear immediately her desk of all other work and complete the EWP's for the DSAs and have the completed work on the Training Manager's desk by December 6, 2005.

Grievant did not complete the EWP's on December 5, 2005. She was not at work on December 6, 2005. On later date, another employee completed the work in approximately 35 minutes.

On November 29, 2005, Grievant suffered injuries in an automobile collision. She was out of work until December 5, 2005 when she returned to work for the day. She was unable to continue working and was out of work from December 6, 2005 until January 20, 2006.

In latter months of 2005, Grievant sought and received approval for educational leave to attend a class offered at a local community college. She completed the class in 2005 and wished to take another class in the Spring 2006 semester. Grievant requested approval to attend the class and obtain educational leave.

On January 20, 2006, the HR Director<sup>6</sup> met with Grievant and told Grievant that her request for education leave had not been approved because Grievant had not presented any documents showing she had been admitted into the education program. The HR Director told Grievant, "you know, [Grievant's first name] you can't go to school."

On Wednesday, January 25, 2006, Grievant walked to the Training Manager's office and looked through the door window. The Training Manager was talking on the telephone but observed Grievant. The Training Manager gestured to Grievant to hold on until she finished the telephone conversation. Grievant left the Facility and attended her class at a local community college. After the Training Manager finished her telephone conversation, she looked for Grievant but could not find her. The Training Manager went to Grievant's office and asked another employee of Grievant's location. The employee said that Grievant was no longer in the office and had left to attend class.

## **CONCLUSIONS OF POLICY**

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<sup>5</sup> Ms. PB became Grievant's supervisor on September 10, 2005 "on paper" but actually began supervising Grievant on October 10, 2005.

<sup>6</sup> Grievant was within the HR Director's chain of command.

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>7</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).

#### Group I Written Notice Issued January 25, 2006

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work 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 should be disciplined for failing to make entries into the PMIS system. The evidence showed, however, that Grievant’s job duties were in transition and she believed another employee was making entries into the PMIS system. Mr. R was indeed making entries into PMIS during the time period the Agency expected Grievant to make the salary entries for the two employee. The evidence is insufficient for the Hearing Officer to conclude that Grievant knew she retained responsibility for making entries into PMIS for the two employees. The Group I Written Notice must be reversed.

The Agency argues Grievant continued to receive the exception emails from VDOA but did not tell other employees so that responsibility for implementing the emails could be assigned to another employee. Although the Agency’s position is correct, the Agency did not take disciplinary action against Grievant failing to re-assign VDOA emails. The Agency took disciplinary action because Grievant did not enter the information into PMIS.

#### Group II Written Notice Issued January 24, 2006

“Failure to follow a supervisor’s instructions” is a Group II offense.<sup>8</sup> Grievant was instructed three times to complete the EWP’s for all Direct Service Associates in training. Grievant made no attempt to complete the assignment thereby failing to follow a supervisor’s instruction. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice for failure to follow a supervisor’s instructions.

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<sup>7</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>8</sup> DHRM § 1.60(V)(B)(2)(a).

Grievant was instructed by a supervisor on October 11, 2005 to complete EWP's. This task would not have taken Grievant much time to complete. Grievant ignored the instruction. Grievant was reminded of the instruction on October 19, 2005 and Grievant again ignored the instruction. Grievant was instructed on December 5, 2005 to clear her desk and complete the EWP's. Grievant did not clear her desk and begin working on the EWP's. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice.

Grievant contends the Training Manager gave her until December 6, 2005 to complete the task but Grievant was not at work on December 6, 2005. This argument fails because the Training Manager also instructed Grievant to clear her desk of other work and immediately begin working on the EWP's. Grievant disregarded that instruction.

#### Group II Written Notice Issued January 30, 2006

"Leaving the work site during work hours without permission" is a Group II offense.<sup>9</sup> On Wednesday, January 25, 2006, Grievant left the work site without obtaining her supervisor's permission. On the prior Friday, January 20, 2006, the Employee Services Manager specifically told Grievant "you can't go to school." Grievant knew or should have known she was not authorized to leave the Facility during work hours without first obtaining approval from a supervisor. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice for leaving the work site without permission.

Grievant argues she attempted to speak with the Training Manager and believed the Training Manager's gesture was an authorization to leave the Facility. This argument is not persuasive. The Training Manager was talking on the telephone and signaled to Grievant to wait a minute until she was finished talking on the telephone. If Grievant assumed the Training Manager was signaling an authorization to leave the Facility, Grievant made such an assumption at her own risk. If Grievant was uncertain as to what the Training Manager was communicating, Grievant should have waited until the Training Manager had ended her telephone conversation.

Based on the accumulation of two Group II Written Notices, the Agency has presented sufficient evidence to support its removal of Grievant from her employment.

#### Mitigation

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>10</sup> Under the

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<sup>9</sup> DHRM § 1.60(V)(B)(2)(c).

<sup>10</sup> *Va. Code § 2.2-3005.*

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.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievant of two Group II Written Notices of disciplinary action with removal 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>11</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>11</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: 8315-R**

Reconsideration Decision Issued: June 16, 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.

Grievant contends the hearing decision does not address whether the Group II Written Notice issued by the HR Director, “even notices and encompasses the alleged instructions of [the Training Manager] as a basis for the disciplinary action.” If the Hearing Officer assumes for the sake of argument that the Written Notice does not describe the Training Manager’s instruction as a basis for disciplinary action, the outcome of this case does not change.<sup>12</sup> The Written Notice clearly identifies the October 11, 2005 instruction to complete EWPs given by the Employee Services Manager, Ms. MR. Grievant did not comply with that instruction thereby justifying the issuance of a Group II Written Notice regardless of whether she was notified she failed to comply with the Training Manager’s instruction.

Grievant contends the hearing decision does not resolve several key factual contentions. Grievant lists eight facts such as the distinction between Grievant’s formal application for Educational Assistance as opposed to Educational Leave for coursework she was already taking. Grievant contends she was not required to obtain advance approval for each individual absence to attend class. Grievant points out that the Training Manager did not tell Grievant she could not attend the course. She adds that even if she was not allowed to take educational leave, she could have used personal leave or vacation time to cover her additional absences to attend her course. Grievant’s

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<sup>12</sup> The Written Notice states, “[o]n December 5, 2005, it was brought to our attention by the training coordinator that the EWPs for the DSAs had not been completed.”

argument fails because it is irrelevant whether she was seeking Educational Assistance or Educational Leave. Grievant was specifically told by the HR Director that she could not go to school. In order to vary from that instruction, Grievant would have had to obtain approval from the HR Director or the Training Manager. Although Grievant attempted to speak with the Training Manager who was on the telephone, Grievant did not wait until the Training Manager completed her call; instead, Grievant left the Facility without any authorization to do so. Grievant falsely asserts that she could have used personal leave to account for her absences. In light of the HR Director's instruction that Grievant could not go to school, Grievant was not authorized to disregard that instruction and use personal leave. Implicit in the HR Director's instruction is the message that no leave would be authorized to exit the Facility to attend class.

Grievant argues when Grievant was given the EWP assignment on October, 11, 2005 by the Employee Services Manager, Grievant was not given any deadline. Thus, she was not instructed to complete the task by any particular time. Grievant's argument fails. Although Grievant was not given a specific deadline, Grievant knew the EWPs had to be completed within 30 days. Grievant did not complete the EWPs within 30 days of the initial assignment. Indeed, there is no reason to believe she ever intended to complete the EWPs. Accordingly, Grievant failed to follow a supervisor's instruction to complete EWPs.

Grievant argues the Hearing Officer inappropriately negated the actual written instruction of the Training Manager, Ms R. The Training Manager told Grievant to have the task completed by December 6, 2005, but Grievant was not at work on December 6, 2005 for medical reasons. Grievant's argument fails because the Training Manager's instruction also was to immediately begin working on the assignment by clearing her desk of other work. Grievant did not immediately start on the assignment. If she had immediately begun working on the assignment, she would have had it completed before the end of the day on December 5, 2005 and, thus, whether she was at work on December 6, 2005 would have been insignificant. If the Hearing Officer disregards the Training Manager's instruction for the sake of argument, the outcome of his case does not change. The Agency has established that Grievant failed to comply with the original instruction given in October to complete the EWPs.

Grievant argues that following the reassignment of Ms. PB, no supervisor followed up with Grievant in November to assess or prioritize the status of the task. This argument fails because there is no reason to believe any supervisor was obligated to follow up with Grievant.

Grievant argues that the HR Director, Ms. JS, falsely testified during the hearing that she told Grievant "you know, [Grievant's first name] you can't go to school." Grievant presents a recording of the January 20, 2006 meeting and represents that the recording shows the HR Director did not prohibit Grievant from doing to school.

After listening to the recording, the Hearing Officer finds that (1) the recording is of poor quality, (2) it is not always clear who is speaking, (3) many of the words spoken

by the HR Director during that meeting cannot be discerned, and (4) to the extent words can be discerned from the recording, the fact that so many other words are indiscernible renders the context and meaning of the discernible words unreliable. Accordingly, the recording does not provide a basis upon which the Hearing Officer can determine whether the HR Director falsified her testimony during the hearing.

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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer