

Issue: Two Group I Written Notice (unsatisfactory work performance); Hearing Date: 06/16/06; Decision Issued: 07/12/06; Agency: VITA; AHO: Carl Wilson Schmidt, Esq.; Case No. 8361; Outcome: Agency upheld in full; **Administrative Review:** **HO Reconsideration Request received 07/27/06; Reconsideration Decision issued 08/02/06; Outcome: Original decision affirmed; Administrative Review:** **EDR Ruling Request received 07/27/06; EDR Ruling No. 2007-1413 issued 09/22/06; Outcome: HO's decision affirmed; Administrative Review:** **DHRM Ruling Request received 07/27/06; DHRM Ruling issued 12/22/06; Outcome: HO's decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8361**

Hearing Date: June 16, 2006  
Decision Issued: July 12, 2006

**PROCEDURAL HISTORY**

On March 24, 2006, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance. Grievant filed a grievance challenging this Written Notice on March 24, 2006. On April 7, 2006, Grievant was issued another Group I Written Notice of disciplinary action for unsatisfactory work performance. On April 13, 2006, Grievant timely filed a grievance to challenge the Agency's action. The outcomes of the Third Resolution Step were not satisfactory to the Grievant and she requested a hearing. On May 23, 2006, the Department of Employment Dispute Resolution assigned these appeals to the Hearing Officer. On June 16, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
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 Virginia Information Technologies Agency employs Grievant as an Information Technology Specialist III. Her working title is Programmer. The purpose of her positions is:

Participate and act in the capacity of a technical specialist in the design, development, implementation and documentation of internal VITA application systems with emphasis in telecommunications support. Provide technical support in the design of hardware, software, and telecommunications configurations to support the internal needs of the agency.<sup>1</sup>

One of Grievant's Core Responsibilities includes, "[s]ystems should adhere to internal MIS development standards and be completed within the specified time frame."<sup>2</sup>

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<sup>1</sup> Agency Exhibit 8. Grievant refused to sign the job description.

<sup>2</sup> Agency Exhibit 8.

Grievant began working in a classified position with the Agency in 1999.<sup>3</sup> No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Grievant had been away from work from July to December 2005. When she returned to work in December 2005, she was released by her medical provider to work full time at her customary work assignments.<sup>4</sup> In order to help return Grievant to her regular work duties, Agency managers decided to assign her a task the managers did not consider too difficult.

The Associate Director began supervising Grievant on January 24, 2006. On February 13, 2006, the Division Director, Associate Director and another employee met with Grievant to review her assignment. The Agency was in the process of improving its services rendered to its customers. Grievant was asked to design a program that would be a part of that process. She was assigned responsibility to review specifications and develop a program flow chart. She was expected to write the program code for the software. Then she was to test the program code to make sure it worked and deliver a completed program to the Associate Director in accordance with the specifications. The Associate Director and the two other managers believed the assignment could be completed in four work hours.<sup>5</sup> In order to give Grievant additional time, they decided to set the time limit at 12 work hours over a several week period. Once Grievant's work was completed, it would be incorporated into the work of other staff to finish the Agency's project. Grievant was advised she could seek help from several people who would serve as resources to her.

As of March 13, 2006, Grievant had not completed a program flow chart consistent with the written specifications. She failed to complete a written status report, reflecting the overall level of completion and expected completion date. She did not complete the assignment within the 12 hours. The amount of time she devoted to the project substantially exceeded 12 hours.<sup>6</sup>

In March 2006, the Associate Director met with Grievant to discuss the project and asked when she would have it completed. Grievant could not give an estimated time frame for completing the project. The Associate Director gave Grievant the option of removing her from the assignment and giving it to another employee or letting her complete the project by March 30, 2006. Grievant wanted to complete the project and agreed to the March 30, 2006 deadline, but the Associate Director set the deadline as March 31, 2006 to give Grievant an additional day. Grievant was presented with a "Written Notice – Corrective Actions" plan setting forth the corrective action required to

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<sup>3</sup> The Agency was formerly known as the Department of Information Technology.

<sup>4</sup> On January 9, 2006, Grievant's medical provider sought accommodation of a lateral transfer. Grievant Exhibit 1. The Agency granted her request prior to the facts giving rise to this grievance.

<sup>5</sup> Grievant disagreed with the 12 hour time frame. See, Grievant Exhibit 3.

<sup>6</sup> She devoted at least 26 work hours towards the assignment.

complete her assignment. The notice advised Grievant that, “your failure to complete this assignment within the target completion date may result in further disciplinary action.”<sup>7</sup> Grievant signed the document on March 24, 2006.

Grievant did not complete the assignment by March 31, 2006. When she submitted the assignment, the code did not work. Grievant’s assignment later was given to another employee who completed it within four work hours.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” DHRM § 1.60(V)(B).<sup>8</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).

“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.

#### Written Notice Issued March 24, 2006

Grievant was assigned responsibility for drafting a software program to accomplish a specific task as part of her customary job duties. She was expected to produce a working program and devote no more than 12 hours of her time to developing the program.<sup>9</sup> Grievant failed to deliver a working program and failed to complete the task within 12 work hours. Grievant’s work performance was not satisfactory to the Agency thereby justifying the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

#### Written Notice Issued April 7, 2006

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

<sup>8</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>9</sup> Agency managers are entrusted with responsibility to establish a reasonable time frame for employees to complete assignments. An employee’s failure to agree to the time frame does not excuse the employee’s failure to comply with the established time frame. In this instance, the Agency’s time frame was reasonable based on the Agency’s expertise and the fact that another employee completed Grievant’s assignment within four work hours.

Grievant was assigned responsibility for completing the software program by March 31, 2006 as part of her customary job duties. She failed to complete a working software program on or before March 31, 2006. Grievant was given the option of giving up the project. Once she decided to complete the project, she was advised she may face disciplinary action if she did not complete the project by March 31, 2006. Grievant's work performance was not satisfactory to the Agency. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group I Written Notice for inadequate or unsatisfactory job performance.

### Mitigation

*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 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."

Grievant contends the disciplinary actions should be mitigated because she was not given the proper training to complete the task. For example, Grievant requested training and her request was denied. The evidence showed, however, that the training Grievant requested would not have enabled her to perform the task. In addition, the Agency made other expert staff available to serve as a resource to Grievant, yet she failed to utilize those resources.

Based on the standard set forth in the *Rules for Conducting Grievance Hearings*, 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 on March 24, 2006 is **upheld**. The Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action on April 7, 2006 is **upheld**.

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<sup>10</sup> *Va. Code § 2.2-3005.*

## 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 all of your appeals to the other party and to the EDR Director. 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>

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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.

[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





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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8361-R**

Reconsideration Decision Issued: August 2, 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.

Grievance Form A

Grievant contends an issue before the Hearing Officer was whether the Agency failed to comply with the Americans with Disabilities Act. She believes the Agency should have transferred her to another position within the Agency.

The Agency Head qualifying the matter for hearing wrote, “This grievance is being sent to hearing due to receipt of a written notice, not failure to follow the ADA.” Below this statement is a check box seeking the “Employee’s response.” One of the available check boxes reads, “appeal the decision and request the Human Resources Office to forward the grievance to EDR.” Grievant did not check this box. Also appearing is “Date Received: \_\_\_\_” and a check box “I advance my grievance to hearing and am returning it to the Human Resource Office.” Neither of these items was completed by Grievant. On the face of the Form A, it appears that Grievant’s ADA issue did not qualify for hearing and, thus, was not properly before the Hearing Officer. On the other hand, since the blank for date received was not filled in and the box indicating Grievant wished to send the matter to hearing is not filled in, it is possible the Agency sent the form directly to EDR without providing Grievant with the opportunity to check one of the boxes. Since this scenario is a possibility, the Hearing Officer will address Grievant’s ADA claim on the merits.

## ADA Claim

The Governor's Executive Order on Equal Opportunity prohibits employment discrimination against otherwise qualified persons with disabilities.<sup>12</sup> Employees may not be discriminated against regarding many aspects of employment including, for example, hiring, transfer, demotion, layoff, termination, rehiring, and any other term, condition, or privilege of employment.<sup>13</sup>

The Agency must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability, unless the Agency can demonstrate that the accommodation would impose an undue hardship on the operation of its business.<sup>14</sup>

A qualified individual with a disability is one who "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."<sup>15</sup>

An individual is considered to have a disability if that individual either (1) has a physical or mental impairment which substantially limits one or more of his or her major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.<sup>16</sup> Under the first option, "[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity."<sup>17</sup> "Major life activities"<sup>18</sup> mean functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.<sup>19</sup> An individual must also show that the limitation on a major life activity is substantial.<sup>20</sup> "[T]o be substantially limited in performing manual

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<sup>12</sup> DHRM Policy 2.05.

<sup>13</sup> 42 U.S.C. § 12112. 29 CFR § 1630.4(b)(i). (Although no federal agency has been given authority to issue regulations interpreting the Americans with Disabilities Act, the EEOC has done so.)

<sup>14</sup> 42 U.S.C. § 12112(b)(5)(A); 29 CFR § 1630.9(b).

<sup>15</sup> 29 CFR § 1630.2(m).

<sup>16</sup> DHRM Policy 2.05. 42 U.S.C. § 12102(2).

<sup>17</sup> Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002).

<sup>18</sup> Other major life activities include, but are not limited to, sitting, standing, lifting, and reaching. 29 CFR § 1630.2(h)(Appendix).

<sup>19</sup> 45 CFR § 84.3(j)(2)(ii). Congress drafted the Americans with Disabilities Act definition of disability almost verbatim from Section 706(8)(B) of the Rehabilitation Act. Thus, referencing relevant sections of Title 45 of the Code of Federal Regulation is appropriate.

<sup>20</sup> 42 U.S.C. § 12102(2)(A).

tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term."<sup>21</sup> The existence of a disability must be determined on a case-by-case basis.<sup>22</sup>

The Hearing Officer will assume for the sake of argument that Grievant is a qualified individual with a disability. The Hearing Officer makes this assumption because this case can be resolved based on the Agency's accommodation.

Reasonable accommodation includes modification or adjustments to the work environment, or to the manner or circumstances under which the position is customarily performed that enables Grievant to perform the essential functions of her position.<sup>23</sup> Essential functions are the fundamental job duties of Grievant's position.<sup>24</sup> Reasonable accommodation may include but is not limited to:

- (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.<sup>25</sup>

Reasonable accommodation, however, "does not have to be the 'best' accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated."<sup>26</sup>

Grievant submitted to the Agency a letter dated January 9, 2006 from a medical provider seeking to be removed from reporting from Mr. GE. The Agency accommodated her request and had her begin to report to Mr. WR in January 2006. The Agency offered to physically relocate Grievant away from Mr. GE, but Grievant declined the offer. On February 13, 2006, another one of Grievant's medical providers sent the Agency Human Resource Officer (HRO) a letter asking that the Agency consider a transfer of Grievant within the organization. On February 14, 2006, a third medical provider for Grievant sent the HRO a letter regarding Grievant and asking the organization to "consider a transfer within your organization". In April 2006, the Agency

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<sup>21</sup> Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002).

<sup>22</sup> Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002).

<sup>23</sup> 29 CFR § 1630.2(o).

<sup>24</sup> 29 CFR § 1630.2(n).

<sup>25</sup> 29 CFR § 1630.2(o)(2).

<sup>26</sup> 29 CFR § 1630.9 Appendix.

shifted staff within the Business Systems Services so that Grievant could exchange her position with that of another employee so that Grievant would be under the supervision of Mr. BC. The Agency redefined the existing position description to give her the opportunity to use her existing skills and to learn new skills. The Agency offered to provide Grievant with additional training that she requested in order to accomplish the tasks of the new position. Grievant refused to sign the position description because of her concern that her job performance would be closely evaluated in the new position.

Although the accommodation given to Grievant may not be what Grievant considers to be the best, but it is adequate to meet the standard of reasonableness and meets Grievant's job-related needs. Grievant has not identified any vacant positions for which she could be appropriately placed while pursuing the business needs of the Agency. Providing reasonable accommodations does not require the Agency to create a new position tailored to Grievant's preferences. The Agency may create and modify positions based on its customary business needs.

In sum, the Agency has adequately considered Grievant's accommodation requests and considered her circumstances and balanced them against its business needs. Grievant has rejected the Agency's reasonable accommodation of an offer of transfer. The Agency has complied with State Policy and Federal law and there is no basis to grant relief to Grievant under the Americans with Disabilities Act.

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