

Issues: Group II Written Notice with termination (due to accumulation) (failure to follow supervisor's instructions, perform assigned work, comply with established policy), and misapplication of policy; Hearing Date: 08/10/06; Decision Issued: 09/25/06; Agency: Taxation; AHO: Carl Wilson Schmidt, Esq.; Case No. 8388; Outcomes: Agency upheld in full on the Group II and termination; Employee granted partial relief on the re-evaluation issue



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8388**

Hearing Date: August 10, 2006  
Decision Issued: September 25, 2006

**PROCEDURAL HISTORY**

On February 14, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy. Grievant was removed from employment based on the accumulation of active disciplinary action. Grievant was also removed from employment based on a three month re-evaluation.

On March 13, 2006, 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 he requested a hearing. On July 13, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 10, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Representative  
Witnesses

## **ISSUE**

1. Whether Grievant engaged in the behavior described in the Written Notice?
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 Grievant should be removed from employment following a three month re-evaluation?

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action and removal based on re-evaluation 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 Department of Taxation employed grievant as an Interstate Auditor. He worked for the Agency from June 1993 until his removal effective February 14, 2006. The purpose of his position was:

Researches, plans, and performs independent tax audits on businesses and individuals to ensure compliance and reduce the tax gap for the Commonwealth of Virginia in a manner consistent with the agency's mission, values and culture. Work is done remotely from the Central Office and covers all areas of the United States. Considerable overnight travel is required.<sup>1</sup>

---

<sup>1</sup> Agency Exhibit 3.

Grievant had prior active disciplinary action. On March 11, 2005, Grievant received a Group I Written Notice for failure to post audit hours to the "STARS" system, submit day log before the close of the month, and submit accurate reports.<sup>2</sup> Grievant was provided a Work Plan in March 2005. On August 15, 2005, Grievant received a Group II Written Notice for failure to follow supervisor's instructions as addressed in the March 2005 Work Plan.

On September 22, 2005 and September 23, 2005, Grievant was working for the Air National Guard and took military leave from his Agency job. One of his responsibilities was to record his work hours and assign audit hours to the appropriate taxpayer being audited. Grievant mistakenly<sup>3</sup> showed that he worked as an auditor on September 22, and 23, 2005. The Agency did not consider this error in its October 2005 annual performance evaluation because it did not learn of the error until after the evaluation had been given.

On October 4, 2005, Grievant received an annual performance evaluation with an overall rating of Below Contributor. Grievant was given a Work Plan, Work Plan Initiatives, and Operating Procedures. The Work Plan he was given was the same Work Plan he received in March 2005. Grievant was told that a re-evaluation meeting would be held in three months and that his performance needed to improve during the three month period. Instead of re-evaluating Grievant in December 2005, Agency Managers decided to extend the time frame a few weeks because several holidays fell within the three month period. Grievant agreed to the extension.<sup>4</sup>

On January 11, 2006,<sup>5</sup> Grievant met with his supervisor and the Interstate Audit Manager to evaluate Grievant's performance. At the conclusion of this meeting, the Supervisor and the Interstate Audit Manager agreed to conduct a more in-depth review of Grievant's work and to consult with the Audit Director. The Interstate Audit Manager asked Grievant to return to his home office and send by overnight mail several manual audit files. On February 8, 2006, the Audit Director subsequently met<sup>6</sup> with Grievant and independently assessed his work performance.

On February 14, 2006, the Interstate Audit Manager drafted a memorandum to the Audit Director in which she wrote, "[i]n light of [Grievant's] performance history, inability to perform the core responsibilities, and his own admission of not performing

---

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

<sup>3</sup> Grievant's actions were not fraudulent. He simply made a mistake.

<sup>4</sup> Grievant Exhibit 4.

<sup>5</sup> The date of the meeting was also described as occurring on January 10, 2006.

<sup>6</sup> The Interstate Audit Manager was also present during the meeting.

the work, I recommend an overall rating of “below contributor” for his re-evaluation. It is unfortunate that this very difficult decision will result in his termination of employment.”<sup>7</sup>

## 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).

### Written Notice

“Failure to follow a supervisor’s instructions ...” is a Group II offense.<sup>9</sup> Grievant was repeatedly instructed by a supervisor and in writing that he should “[c]onduct and complete all audit assignments in a timely manner.” As of January 11, 2006, Grievant had not completed any audits during the re-evaluation period. In the Work Plan Initiatives, Grievant was instructed to “[s]chedule at least 2 to 3 new audits each month.”<sup>10</sup> Grievant did not schedule at least two audits in October, November, or December, 2005. Grievant failed to follow a supervisor’s instruction thereby justifying the issuance of a Group II Written Notice.

Grievant contends he completed four audits during the re-evaluation period. He submitted four completed cases after the January 11, 2006 meeting. Even if these four cases are considered timely, Grievant did not complete an adequate number of cases. Grievant should have completed at least six audits. In an August 3, 2005 memo, the Supervisor informed Grievant that completing two or three cases was a reasonable goal for Grievant to attain.<sup>11</sup> In addition, Grievant’s Employee Work Profile states that he should conduct and complete “all audit assignments in a timely manner, with the expectation that most assignments will be completed within 6 to 9 months.”<sup>12</sup> Moreover, the Work Plan Initiatives given to Grievant on October 4, 2005 informed him to

---

<sup>7</sup> Agency Exhibit 4.

<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> DHRM § 1.60(V)(B)(2)(a).

<sup>10</sup> Agency Exhibit 3.

<sup>11</sup> Agency Exhibit 2.

<sup>12</sup> Grievant Exhibit 2.

“[c]omplete all audits within a 6 to 9 month time frame.”<sup>13</sup> Grievant was made aware that the timeliness of his work was essential.

Grievant has accumulated two active Group II Written Notices. His removal from employment is supported by the accumulation of disciplinary action.

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>14</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.

### Re-Evaluation

An employee who receives a rating of “Below Contributor” on his annual evaluation must be re-evaluated and have a performance re-evaluation plan developed. The employee’s supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three months and have it approved by the Agency manager serving as the reviewer.

The supervisor should develop an entire performance plan including, “Employee Development.” If the Core Responsibilities and measures of the original performance plan are appropriate, this information should be transferred to a separate evaluation form to be used for re-evaluation. The form should clearly indicate that it is a re-evaluation.

The supervisor must discuss with the employee the specific recommendations for meeting the minimum performance measures contained in the re-evaluation plan during the re-evaluation period. The employee’s reviewer, and then the employee, should review and sign the performance re-evaluation plan.

---

<sup>13</sup> Agency Exhibit 3.

<sup>14</sup> *Va. Code § 2.2-3005.*

If the employee receives a re-evaluation performance rating of “Below Contributor”, the Agency may remove the employee from employment.<sup>15</sup> The re-evaluation process does not prevent the Agency from taking disciplinary action based on the employee’s poor performance.

In this case, the Agency failed to comply with the requirements of DHRM Policy 1.40 setting forth the procedures for re-evaluation. The Agency failed to develop a performance re-evaluation plan that set forth performance measures for the following three months. Performance Measures are:

Qualitative and/or quantitative standards or measures against which each core responsibility, special assignment and agency/ departmental objective is assessed. Performance measures describe major duties, assignments and objectives in terms of complexity, accountability and results, and should be specific, measurable, attainable and relevant. These measures are referred to on the Employee Work Profile as Measures for Core Responsibilities, Measures for Special Assignments and Measures for Agency/Departmental Objectives.<sup>16</sup>

A central purpose of DHRM Policy 1.40 with respect to re-evaluation is to ensure that the employee knows (1) what work performance is expected of him or her and (2) knows the standard by which his or her work performance will be measured. In this instance, it is not clear whether Grievant’s work performance was measured by the terms of the Work Plan or by the terms of performance measures listed in his Employee Work Profile or by both. For example, the Agency presented a Performance Review discussing approximately 20 of Grievant’s audit cases. In a memorandum dated February 14, 2006, the Interstate Audit Manager discusses only 90 percent of Grievant’s Core Responsibilities listed in his EWP, yet Grievant was informed on October 4, 2005 that his obligation was to comply with the Work Plan, Work Plan Initiatives, and Operating Procedures. Had the Agency crafted a performance re-evaluation plan, it could have clarified the performance measures it intended to apply to Grievant.<sup>17</sup>

In some cases, a Work Plan may be so similar to an Employee’s Work Profile<sup>18</sup> that the Agency’s reliance solely on a Work Plan is harmless error. In this case,

---

<sup>15</sup> DHRM Policy 1.40, *Performance Planning and Evaluation*.

<sup>16</sup> DHRM Policy 1.40, *Performance Planning and Evaluation*.

<sup>17</sup> The Hearing Officer also questions to what extent Grievant’s inadequate work performance prior to the three month performance period influenced his Below Contributor rating for the three month period. For example, in her February 14, 2006 memorandum, the Interstate Audit Manager recommends an overall rating of Below Contributor for the re-evaluation period due to Grievant’s “performance history.”

<sup>18</sup> Or the Agency relies solely on the Work Plan to define the employee’s work responsibilities during the three month re-evaluation period and does not reference the Core Responsibilities of the employee’s EWP.

however, the depth and detail of the performance measures contained in Grievant's Employee Work Profile are significantly and materially more extensive than the terms of his Work Plan, Work Plan Initiatives, and Operating Procedures. The Hearing Officer finds the Agency's failure to comply with policy is not harmless error.

The Agency's failure to comply with the re-evaluation policy renders its re-evaluation of Grievant invalid. When an Agency fails to comply with policy, the Hearing Officer would order the Agency to repeat the process from the point the Agency first failed to comply with policy. Since Grievant's removal from employment is supported by the disciplinary action against him, the Agency cannot repeat the evaluation process by issuing a performance re-evaluation plan. Accordingly, there is no action the Agency must take with respect to its re-evaluation of Grievant.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**. The Agency's re-evaluation of Grievant's work performance is invalid. Because Grievant's removal is upheld, the Agency's obligation to re-evaluate Grievant is moot.

## 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>19</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>19</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.