Issue: Group II Written Notice (failure to follow supervisory instructions and perform assigned work); Hearing Date: 11/30/06; Decision Issued: 12/01/06; Agency: DRS; AHO: David J. Latham, Esq.; Case No. 8458; Outcome: Agency upheld in full; **Administrative Review: EDR Ruling Request received 12/13/06; EDR Ruling No. 2007-1513 issued 01/25/07; Outcome: HO's decision affirmed; Administrative Review: DHRM Ruling Request received 12/13/06; DHRM Ruling issued 05/04/07; Outcome: HO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8458

Hearing Date: November 30, 2006
Decision Issued: December 1, 2006

APPEARANCES

Grievant
Program Manager
Advocate for Agency

ISSUES

Did grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice for failure to follow supervisor's instructions and failure to perform assigned work.[1] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[2] The Department of

[1] Agency Exhibit 1. Group II Written Notice, issued August 23, 2006.
[2] Agency Exhibit 2. *Grievance Form A*, filed September 6, 2006.

Rehabilitative Services (hereinafter referred to as "agency") has employed grievant for 12 years as an administrative and program specialist.[3] She has been previously employed by another state agency for six years.

Grievant's current supervisor began employment with the agency in March 2006.[4] On March 9, 2006, grievant was absent from work. Grievant had not previously notified her supervisor that she wanted to take leave. Grievant called a coworker to report that that she was not felling well and would be out sick. Grievant also left a voicemail message for her supervisor; however, he did not receive the message. The supervisor sent an e-mail to grievant directing her to contact him directly in the future.[5] Grievant was upset and took offense at this e-mail. She has consistently notified her supervisor of absences and thought her supervisor was unfairly chastising her by sending the e-mail. The supervisor was new to his position and thought that perhaps grievant was unaware that he expected his employees to contact him directly when they called in sick.

During the spring of 2006, the supervisor received numerous complaints from agency consumers that grievant was rude, short, and unfriendly.[6] He spoke with grievant on repeated occasions about these complaints but she did not acknowledge that she had acted inappropriately. The supervisor also observed in staff meetings that grievant sometimes verbally attacked other employees accusing them of some wrongdoing.[7] The supervisor verbally counseled grievant about this on multiple occasions. On some occasions, grievant would walk away from her supervisor before the supervisor had concluded, even after he loudly asked her to stay.[8] Grievant started keeping her office door closed for long periods of time. By May 2006, the supervisor concluded that grievant was a candidate for counseling through the Employee Assistance Program (EAP). He referred grievant to the program on a voluntary basis but grievant did not contact EAP.[9] By the end of July, grievant's behavior continued to be a concern and the supervisor consulted with Human Resources. The agency decided that grievant should be required to receive EAP counseling.

On July 25, 2006, the supervisor advised grievant in writing and in person that, as a result of continuing behavioral problems, she would be required to attend four sessions with an EAP professional and that the agency would pay for the sessions.[10] Grievant was upset and would not read or sign the memorandum given to her; she made up her mind that she just would not do it. She left the

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[3] Agency Exhibit 7. *Employee Work Profile Work Description*, January 13, 2006.
[4] He has previously worked in a supervisory capacity for 19 years in county government, and prior to that was employed by another state agency for 14 years.
[5] Agency Exhibit 6. E-mail from supervisor to grievant, March 9, 2006.
[6] Agency Exhibit 6. Supervisor's counseling notes, April 5 through July 12, 2006.
[7] Agency Exhibit 6. Supervisor's counseling note, May 11, 2006.
[8] Grievant has a hearing deficit. The supervisor spoke loudly enough to assure that grievant heard him direct her to remain until he concluded the discussions.
[9] Agency Exhibit 6. Counseling memorandum from supervisor to grievant, May 16, 2006.
[10] Agency Exhibit 3. Memorandum from supervisor to grievant, July 25, 2006.

supervisor's office, went to her own office, finished some work, and then sent an e-mail to the supervisor telling him that she was leaving the office and going home. She did not request permission to leave the work site and did not receive approval to leave. She sent her supervisor an e-mail request for annual leave at 3:25 p.m. but the supervisor did not approve the request until two days later.[11] She left the office at 3:45 p.m. Grievant's regular work hours are 7:15 a.m. to 4:15 p.m. Prior to July 25, 2006, grievant had been consistent in giving verbal notification to her supervisor when she left the office.

The following day, July 26, 2006, grievant was still upset about being directed to attend EAP counseling. She decided to stay home and left a voicemail for her supervisor stating that she was taking personal leave; she also sent him an e-mail stating the same thing. She did not request permission for the leave nor did she receive approval until July 27, 2006.[12] Grievant e-mailed the assistant commissioner explaining her position regarding EAP. She complained that her supervisor was "out of control, and someone other than myself need (sic) to put a stop to his unreasonable and abusive actions."[13]

State policy provides that "Employees must request and receive approval from their supervisors to take annual leave. If an employee could not have anticipated the need for a leave of absence, the employee should request approval as soon as possible after the leave begins. In reviewing the request for approval, the agency should consider all relevant matters, including: the circumstance necessitating leave, whether the employee should have anticipated the need, and the promptness with which the employee contacted the agency."[14] State policy also states that Family/Personal Leave may be taken at the discretion of the employee "**provided** the employee gives reasonable notice and his/her supervisor approves the absence." (Emphasis added).[15]

On Friday afternoon, July 28, 2006, the supervisor e-mailed grievant requesting her assistance in preparing for a committee meeting to be held Monday, July 31, 2006.[16] Over the years, grievant had performed this responsibility many times for previous committee meetings. Seven people (including grievant and her supervisor) attended the meeting; two additional people participated by telephone. He asked her to obtain lunch menus from a nearby restaurant, arrange for food and drinks for morning and afternoon breaks, prepare statistics on open cases and, prepare a presentation on financial and hourly computations. Grievant responded (also by e-mail) that the supervisor's

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[11] Grievant Exhibit 6. Leave Activity Reporting (LAR) Form for July 25, 2006. [NOTE: The agency permits employees to request leave by electronically submitting a LAR form to their supervisor.]

[12] Grievant Exhibit 6. LAR Form for July 26, 2006.

[13] Agency Exhibit 3. E-mail from grievant to assistant commissioner, July 26, 2006.

[14] Department of Human Resource Management (DHRM) Policy 4.10, *Annual Leave*, revised September 10, 2004.

[15] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, revised November 25, 2005.

[16] Agency Exhibit 3. E-mail from supervisor to grievant, July 28, 2006.

request was more than she could accomplish in the few hours left on Friday afternoon. The supervisor answered her e-mail and agreed that he had asked for a lot; he stated that he would make arrangements for breakfast and break refreshments. He also said he would prepare the statistics if grievant would run the regular reports. He did not tell grievant that he would contact the restaurant but he did so. Grievant, not knowing that the supervisor was handling this task, also contacted the restaurant and relayed the information to the supervisor.[17] All of the communication between grievant and her supervisor took place by e-mail, even though their offices are in relatively close proximity to each other.

At the meeting on July 31, 2006, grievant acted as recording secretary and took notes of what transpired.[18] From these, she prepared a formal, typed record of the meeting and submitted it to her supervisor for review.[19] The supervisor made revisions to the minutes and returned the document to grievant with instructions to mail them to committee members.[20] Grievant responded to the supervisor that he had omitted things from the minutes and that she did not want her name on the minutes if the supervisor's changes remained.[21] Over the next three days, a series of acerbic e-mails was exchanged between grievant and her supervisor. Ultimately, on August 10, 2006, the supervisor revised the meeting minutes himself and sent them out over his own name.

Grievant has twice previously been disciplined for failure to follow supervisory instructions. On each occasion she was given a Group I Written Notice.[22] The supervisor consulted with Human Resources and the Assistant Commissioner prior to issuing the disciplinary action on August 23, 2006.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in

[17] Agency Exhibit 3. E-mail from grievant to supervisor, July 28, 2006.
[18] Grievant Exhibit 13. Meeting notes written by grievant, July 31, 2006.
[19] Grievant Exhibit 10. First typed meeting minutes, July 31, 2006.
[20] Agency Exhibit 5. E-mail from supervisor to grievant, August 4, 2006.
[21] Agency Exhibit 5. E-mail from grievant to supervisor, August 7, 2006.
[22] Agency Exhibit 8. Group I Written Notices, issued June 6, 2000, and September 28, 2000. [NOTE: While both of these disciplinary actions are now inactive and may be not be used for accumulative purposes, they are nonetheless admissible in this hearing as evidence of a pattern of prior similar conduct for which corrective action was necessary.]

and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as a claim of harassment, the grievant must present her evidence first and prove her claim by a preponderance of the evidence.[23]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B of Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that a second active Group II Written Notice normally should warrant removal from employment.[24] Failure to follow a supervisor's instructions and failure to perform assigned work are two examples of a Group II offense.

It is undisputed that on July 25, 2006, grievant left the work site without permission before the end of her workday – a Group II offense. It is also undisputed that grievant failed to report to work as scheduled on July 26, 2006 – also a Group II offense. Grievant argues that because her supervisor subsequently approved her leave requests for those two days, she should not be disciplined. This argument is not persuasive because grievant confuses two separate issues – payment for leave taken and, discipline for failure to follow established written policy. First, the supervisor agreed to approve payment for

[23] § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.
[24] Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

grievant's half hour of annual leave on July 25th because he knew that she was upset when she left early that day. Retroactive approval for payment of leave time is a supervisor's prerogative. However, the disciplinary action was taken, in part, because grievant failed to follow proper procedure by seeking and obtaining approval from a supervisor *before* leaving the work site. Grievant could easily have obtained such approval by asking her supervisor (or his supervisor) since she knew that they were in the Assistant Commissioner's office.

Similarly, when grievant left a message stating that she was taking personal leave on July 26th, she failed to directly contact her supervisor in order to obtain his permission for the leave. It was the failure to obtain permission that precipitated disciplinary action. While the supervisor subsequently granted approval for payment of the leave, he did so because he considered the relevant issues mentioned in the leave policy. Viz., he recognized that grievant was upset, could not have anticipated the need for leave, and that she promptly contacted the agency early in the morning. For these reasons, he compassionately agreed to approve payment for the day of leave. Approval of payment, however, does not negate the fact that grievant again failed to follow the required procedure of obtaining permission *before* taking leave.

Grievant argues that she did not have to request prior approval because she had an "emergency." In fact, there was no "emergency;" grievant was simply upset because she did not like what the agency wanted her to do, i.e., attend EAP counseling. Disagreement with a work requirement does not constitute an "emergency."

Grievant's written communications suggest that she has lost sight of the fact that she is an employee and not the supervisor. In one e-mail to her supervisor, she stated, "This is not something that I wish to have any further discussion about."[25] While couched in polite language, grievant's message is that she (not the supervisor) will decide when discussion about an issue will end. In another e-mail, grievant defiantly tells her supervisor, "This is not a conversation I will continue with you, verbally or via e-mail."[26] Again, grievant tells her employer that she will decide when discussion of a topic will end. These statements, whether oral or written, are insubordinate.

They are consistent with grievant's behavior in walking away from discussions with her supervisor when he specifically told her that the conversation is not finished and that she should stay. Likewise, grievant's refusal to make changes to the meeting notes was insubordinate. Certainly, grievant was within her rights to decline signing her name to revisions she did not agree with. However, once the supervisor directed her to make the revisions he wanted, grievant's job was to type the minutes as she was directed to. Grievant's insubordinate behavior is a Group II offense. While grievant was not

[25] Grievant Exhibit 7. Email from grievant to supervisor, August 31, 2006.
[26] Agency Exhibit 5. Email from grievant to supervisor, August 9, 2006.

disciplined for some of these instances, she could have been. Further, although some of these incidents are not the subject of the instant disciplinary action, they serve to illustrate that grievant's behavior is unacceptable in this employment relationship. Grievant's EWP work description specifically states that she is to provide support "as required by the manager," and that she is to type "written material, as requested by the Manager."[27]

Grievant asserts that the supervisor's e-mails requesting her to revise the meeting minutes constituted harassment.[28] To establish a claim for harassment, grievant must prove that: (i) the conduct was unwelcome; (ii) the harassment was based on a protected classification; (iii) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (iv) there is some basis for imposing liability on the employer. Grievant has failed to satisfy this test for proving harassment. While she may not have liked what the employer wanted her to do, grievant did not show that the request was made based on any protected classification. More importantly, there is no evidence that the supervisor's reasonable request was either harassing or sufficiently severe to be considered abusive.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice or, a Written Notice and up to ten days suspension. The policy provides for reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has long service and otherwise satisfactory job performance. In addition, during the spring of 2006, the agency did not promptly take corrective action to address grievant's insubordinate behavior (walking away from supervisor during discussions).[29] This could have given grievant a false sense of security. Further, rather than directly confronting the growing distance between himself and grievant, the supervisor permitted the gulf to widen by acquiescing to grievant shutting her door most of the time and communicating almost exclusively by e-mail rather than face-to-face. This acquiescence to grievant's increasingly isolationist behavior may have reinforced her apparent view that she had gained leverage

[27] Agency Exhibit 7. EWP Work Description, January 13, 2006.
[28] Agency Exhibit 5. E-mail from grievant to supervisor, August 9, 2006.
[29] One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior. Management should issue a written notice as soon as possible after an employee's commission of an offense. One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in taking corrective action promptly is to prevent a recurrence of the offense.

over the supervisor. That would explain why grievant may have felt that she could with impunity take leave without obtaining advance permission, refuse to type minutes as directed by a supervisor, and tell a supervisor when discussions were at an end.

However, there are also aggravating circumstances. Grievant has twice before been disciplined for similar behavior. In addition, during the spring of 2006, the supervisor repeatedly verbally counseled her about unacceptable behavior. Accordingly, the aggravating circumstances counterbalance the mitigating circumstances. Therefore, the discipline in this case is within the limits of reasonableness.[30]

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice effective August 23, 2006 is hereby UPHELD.

In view of the discussion regarding mitigating factors, it is RECOMMENDED that Human Resources consider whether appropriate training, mediation, and/or team building is warranted in order to improve and normalize the employment relationship between grievant and her supervisor.

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. Address your request to:

Director

[30] *Cf.* Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[31] 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.[32] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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/David J. Latham

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David J. Latham, Esq.
Hearing Officer

[31] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[32] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Rehabilitative Services
May 4, 2007

The grievant has appealed the hearing officer's decision in Grievance Case No. 8458. The grievant is challenging the decision because she contends that it is not consistent with various Department of Human Resource Management's (DHRM) policies and procedures. For the reasons stated below, DHRM will not disturb the hearing decision. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Department of Rehabilitative Services (DRS) employed the grievant as an administrative and program specialist. Among other things, the duties of the position included arranging for meetings, taking minutes at meetings, and performing other assigned duties.

On August 23, 2006, DRS officials issued to her a Group II Written Notice for failure to follow supervisor's instructions and failure to perform assigned work. After having taken minutes at a meeting, she was instructed by her supervisor to make certain modifications in the minutes so they would more accurately reflect the proceedings of the meeting. She refused to do so because she did not agree with the changes and felt that she would have to sign them. After several attempts to have her modify the minutes and her refusing to do so each time, the supervisor made the changes. She grieved the disciplinary action, and when she was not granted relief during the management steps she requested that her case be heard by a hearing officer. In his decision, the hearing officer upheld the disciplinary action. In addition, the hearing officer concluded that the grievant did not show, by the preponderance of the evidence, that due to mitigating circumstances, the disciplinary action should have been reduced.

The relevant policies include the Department of Human Resource Management's Policy No.1.60, which states it is the Commonwealth's objective to promote the well-

being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. The examples are not all-inclusive.

In the instant case, indisputable evidence supports that the grievant committed a violation of the Standards of Conduct Policy, No. 1.60, when she failed to follow the supervisor's instructions and failed to perform the assigned work. Based on that evidence, the hearing officer upheld the disciplinary action.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenges must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the grievant raised concerns that the discipline was not consistent with law and policy. To support her contentions, she identified a number of policies that either the agency and/or hearing officer violated. However, through our review of her arguments to support that there were violations, we have determined that only one of her arguments justify a review by the Department of Human Resource Management and will be addressed below. Rather, the grievant opines that the hearing officer did not assess properly the data before him. Whether or not the hearing officer did a proper assessment of the evidence is not within the authority of this Agency to determine. A hearing officer is authorized to make a finding of fact as to the material issues in the case and to determine the grievance based on the evidence. It was within his authority to decide the case and this Agency is not in a position to second-guess his decision.

The grievant state that the hearing officer erred by admitting into evidence two inactive written notices introduced by the agency, which she asserts is a violation of DHRM policy. In his decision the hearing officer wrote, "While both of these disciplinary actions are now inactive and may not be used for accumulative purposes,

they are nonetheless admissible in this hearing as evidence of a pattern of prior similar conduct for which corrective action was necessary." The DHRM concurs with the hearing officer's assessment. This Agency has long held that while such inactive written notices may not be used for accumulative purposes, they may be used to demonstrate a pattern of behavior. In addition, there is no evidence that the disciplinary action taken against the grievant was cumulative in nature.

Thus, we have no basis to interfere with this decision.

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Ernest G. Spratley, Manager
Employment Equity Services