

Issues: Two Group II Written Notices (failure to follow supervisory instructions);  
Hearing Date: 04/03/07; Decision Issued: 04/06/07; Agency: Virginia Department of  
Health; AHO: Carl Wilson Schmidt, Esq.; Case No. 8558; Outcome: Agency upheld  
in full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8558**

Hearing Date: April 3, 2007  
Decision Issued: April 6, 2007

**PROCEDURAL HISTORY**

On July 5, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. On July 10, 2006, Grievant was issued a second Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On July 12, 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 she requested a hearing. On March 5, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 3, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
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 Department of Health employs Grievant as an Office Services Specialist. She has worked for the Agency for approximately 14 years. The purpose of her position is:

Reviews and researches patient data reported on HIV/AIDS, STD and hepatitis morbidity reports and surveillance records submitted by providers statewide to ensure accurate statistics are reported to the CDC, Region III Infertility Prevention Program and public/private providers. Enters data into multiple databases. Maintains records of quality assurance activities and provides reports to morbidity and provider/lab errors. Creates and maintains files; retrieves records; compiles data; performs calculations; responds to inquiries; assists with distribution and records retention of laboratory screening reports, morbidity reports and surveillance records.<sup>1</sup>

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<sup>1</sup> Agency Exhibit 5.

In June and July 2006, Grievant reported to the Supervisor.<sup>2</sup> The Supervisor reported to the Manager. Grievant has prior active disciplinary action consisting of a Group I Written Notice issued on March 3, 2006.<sup>3</sup>

Grievant believed the Supervisor and the Agency were not treating her appropriately. She felt that comments made during her meetings with the Supervisor were not being repeated accurately during subsequent conversations. Grievant also felt that she should be entitled to bring a witness of her own choosing to sit with her during meetings with the Supervisor because the Supervisor would bring a witness to their meetings. Grievant felt that a way to avoid these problems was to tape record her conversations with the Supervisor.

On June 22, 2006, Grievant met with the Supervisor. Grievant took her portable tape recorder and recorded the conversation with the Supervisor.

On June 23, 2006 at approximately 7:45 a.m., the Supervisor informed Grievant that Grievant could not make an audio recording of all future conversations between the Supervisor and Grievant. Grievant said that as long as it was legal for the Supervisor to prevent Grievant from having a witness during their meeting, it was legal for Grievant to record their meetings. Grievant said that she would continue to record every conversation between Grievant and the Supervisor.

On June 23, 2006 at approximately 11:10 a.m., the Supervisor asked Grievant to meet regarding Grievant's request for an evaluation of her workspace. The Supervisor instructed Grievant to leave her tape recorder at her desk, but Grievant refused. Grievant stated she intended to tape record all meetings between the Grievant and the Supervisor. The Supervisor asked Grievant if she understood that she was failing to follow a direct supervisory instruction. Grievant responded "yes". Grievant began recording their conversation. The Supervisor asked Grievant if she realized that failing to follow a supervisor's instruction would lead to disciplinary action and Grievant responded "yes". The Supervisor cancelled the meeting.

At approximately 12:30 p.m., the Supervisor went to Grievant's desk and Grievant again tape recorded their conversation even though the Supervisor reminded Grievant that their conversations could not be tape recorded.

Agency managers decided to take disciplinary action against Grievant for failing to follow the Supervisor's instruction. The Supervisor drafted a "due process" memorandum dated June 27, 2006 outlining the allegations against Grievant and giving her an opportunity to respond. The Supervisor was not working on June 27, 2006 so the Manager presented the memorandum to Grievant. The Manager advised Grievant

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<sup>2</sup> Grievant began reporting to the Supervisor on August 11, 2005.

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

she could not record their conversation. Grievant used her tape recorder to record selected portions of the conversation.

On July 5, 2006 the Supervisor met with Grievant to issue a Group II Written Notice to Grievant.<sup>4</sup> When Grievant entered the Supervisor's office and sat down, she placed her tape recorder on the desk and began recording her meeting with the Supervisor. The Supervisor informed Grievant that taping of their conversation would not be permitted. Grievant responded that tape recording was legal and she continued to record the meeting.

On July 6, 2006, the Supervisor met with Grievant to give Grievant a "due process" memorandum regarding Grievant's failure to follow the Supervisor's instruction on July 5, 2006. Grievant recorded the July 6, 2006 meeting even though she was aware she was not permitted to record the conversation.

### 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>5</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).

"Failure to follow a supervisor's instructions" is a Group II offense.<sup>6</sup> On June 23, 2006, the Supervisor instructed Grievant that Grievant could not tape record their meetings. Grievant understood the instruction but chose to disregard it by tape recording the meeting. The Agency has presented sufficient evidence to support its issuance on July 5, 2006 of a Group II Written Notice for failure to follow a supervisor's instructions.

On July 5 and July 6, 2006, the Supervisor instructed Grievant that she could not tape record their conversations. Grievant understood the instruction but chose to disregard it by tape recording the meetings. The Agency has presented sufficient evidence to support its issuance on July 10, 2006 of a Group II Written Notice for failure to follow a supervisor's instructions.

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<sup>4</sup> The Manager was also present at the meeting.

<sup>5</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>6</sup> DHRM § 1.60(V)(B)(2)(a).

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>7</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because her actions were legal. She also argues her actions were necessary because the Agency would not let her have a witness of her own choosing during meetings with the Supervisor yet the Supervisor often had witnesses to their meetings. Grievant believes the Agency’s treatment of her was unfair.

Employees are expected to follow the instructions of their supervisors. Whether Grievant’s taping of conversations was legal has no bearing on whether Grievant was expected to follow her supervisor’s instruction. Although Grievant may believe it is unfair that she could not bring a witness to meetings while the Supervisor regularly brought witnesses, the Supervisor’s action was not contrary to State policy. Grievant has not presented any policy showing she was entitled to bring her own witness to attend routine meetings with the Supervisor.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.<sup>8</sup>

## DECISION

For the reasons stated herein, the Agency’s issuance on July 5, 2006 to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency’s issuance on July 10, 2006 of a Group II Written Notice of disciplinary action is **upheld**.

## APPEAL RIGHTS

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<sup>7</sup> Va. Code § 2.2-3005.

<sup>8</sup> Upon the issuance of a second active Group II Written Notice, the Agency could have removed Grievant from employment. The Agency mitigated the possible disciplinary action by not suspending or removing Grievant from employment.

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>9</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].

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<sup>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer