

Issues: Group II Written Notice (failure to report without notice), Group II Written Notice (unauthorized use of State property) and Termination; Hearing Date: 09/16/08; Decision Issued: 02/11/09; Agency: Virginia Department of Transportation; AHO: Carl Wilson Schmidt, Esq.; Case No. 8265, 8309; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 02/20/09; Reconsideration Decision issued 03/24/09; Outcome: Original decision affirmed; Administrative Review: EDR AR Request received 02/25/09; EDR Ruling #2009-2265 issued 06/05/09; Outcome: AHO’s decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8265 / 8309

Hearing Date: September 16, 2008
Decision Issued: February 11, 2009

PROCEDURAL HISTORY

On August 23, 2005, Grievant was issued a Group II Written Notice of disciplinary action for failure to report to work as scheduled without proper notice and failure to follow a supervisor's instruction.

On September 1, 2005, Grievant was issued a Group II Written Notice of disciplinary action for unauthorized use or misuse of State property and abuse of State time and resources. Grievant was removed from employment based on the accumulation of disciplinary action. On September 30, 2005, Grievant filed a grievance to challenge the Agency's action.

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. This grievance was originally assigned to another Hearing Officer on March 30, 2006. The case was suspended due to matters relating to Grievant's health. On June 13, 2008, the EDR Director issued Ruling 2008-2045 ruling that the grievance should be assigned to a hearing officer. On June 30, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 16, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee

ISSUES

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 the Agency discriminated or retaliated against Grievant.

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 employed Grievant as a Health Counselor II at one of its regional Facilities. She had been working for the Commonwealth for approximately ten years prior to her removal effective September 1, 2005. Grievant had prior active disciplinary action consisting of a Group I Written Notice issued on August 10, 2004 for disruptive behavior.

During a staff meeting held on January 13, 2005, Grievant and other staff were reminded that "[p]ersonal computers should only be used for work-related issues. Keep in mind that computer time and web-sites visited can be monitored."¹

¹ Agency Exhibit 3.

In order to attend training, the Agency required an employee to submit a training request form to his or her supervisor. If the supervisor approved the training, the form was sent to the Business Manger and to the Health Director for approval. Employees were authorized to attend training only after Agency managers had issued their approval. Grievant had been advised of this process by her supervisors. Agency Exhibit 12 shows that on at least 20 occasions Grievant filled out an inservice training request form, submitted the form for approval, and obtained management's approval for training.

On August 8, 2005 at 3:21 p.m., Grievant sent an email to the Acting Supervisor stating:

Please [advise] on the status of the "ISR" to attend the [training course] for coaches. The training is scheduled for 08/9 & 10/2005 at [Location]. [Acting Supervisor's first name], perhaps you are aware of the request status since [Ms. GC]² is out on bereavement leave.

On August 8, 2005 at 5:55 p.m.³, the Acting Supervisor replied:

[Grievant's first name], sorry but I don't know anything about this. What is ISR and GOTR??? Let me know. Thanks

Grievant did not report to work on August 9, 2005 as scheduled. Instead, she attended training held in another locality. The Acting Supervisor questioned other staff about Grievant's location and then concluded Grievant may have attended the training Grievant mentioned in her August 8, 2005 email. The Acting Supervisor had not authorized Grievant to attend the training. The Acting Supervisor forwarded Grievant's August 8, 2005 email to the Health Director and wrote, in part:

I received this e-mail from [Grievant] and responded to it. Today I was looking for her and questioned [Ms. CD] if she knew where she was. She did not. I then remembered the e-mail she had sent me, and checked to see if an inservice request was submitted and approved to go to this training. No one could find any. I checked on [Ms. GC's] desk and in her appointment book, but still could not find anything. I did talk with [Ms. GC] and she does not remember approving any request for this. I was asked by [Ms. GC] to check in her locked file cabinet for the inservice request folder to see if it was in there. She, as a rule, keeps copies of all staff's inservice requests. I got [another employee] to unlock the cabinet and we looked, but I could find nothing.⁴

² Ms. GC had been one of Grievant's supervisors but was not her supervisor on August 9, 2005.

³ Grievant did not have access to email from her home. It does not appear that Grievant read the Acting Supervisor's email prior to attending the training on August 9, 2005.

⁴ Agency Exhibit 1.

At approximately 5:32 p.m. on August 9, 2005, the Acting Supervisor spoke with Grievant by telephone and asked Grievant where she was that day. Grievant responded that she was in training. The Acting Supervisor informed Grievant that she did not know Grievant's whereabouts that day and instructed Grievant to report to the Acting Supervisor's office "first thing" in the morning on Wednesday August 10, 2005. Grievant's and the Acting Supervisor's offices were located on different floors.

Grievant reported to work at approximately 8 a.m. on August 10, 2005 but did not report to the Acting Supervisor's office downstairs. Instead, Grievant went to her office and began performing other duties. After waiting in her office for Grievant to appear, the Acting Supervisor attempted to locate Grievant. She called Grievant's office phone but got no answer. At approximately 8:30 a.m., the Acting Supervisor left her office and walked upstairs to find Grievant. When the Acting Supervisor located Grievant, Grievant said she had not reported to the Acting Supervisor's office because she had "things to catch up on." The Acting Supervisor, Grievant and the Business Manger went into the Business Manger's office. The Acting Supervisor told Grievant she had no documents authorizing Grievant to be out of the office on August 9, 2005 and requested Grievant to provide the necessary authorization for Grievant to attend the training. Grievant said she did not have anything to give the Acting Supervisor.

In June 2003, Grievant was assigned a newly purchased laptop computer for use as part of her job duties. On occasion, Grievant would obtain a digital camera from the Agency and return it a short time later. Several staff expressed concern to Agency managers that Grievant was abusing State time and misusing State property. The Agency retrieved the laptop from Grievant in June 2005 and sent it to the Agency's Information Technology Security Officer so that the computer's hard drive could be examined. The IT Security Officer discovered that Grievant had stored on her computer many items of a personal nature. For example, Grievant had approximately 366 digital photographs on her laptop.⁵ Sixty of the photos were business related. The remaining approximately 306 photos were of her personal vehicle, houses, and parties she attended. Grievant's laptop had several power point presentations, none of which related to her job duties. She also had personal documents on the laptop including memos regarding her children and school, personal financial information, personal insurance and accident information, papers for school assignments, etc.

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

⁵ Agency Exhibit 14 appears to show more than 306 non-business related photos. The Hearing Officer will utilize the number provided by the Business Manager which was 306 personal and 60 business related photos.

require correction in the interest of maintaining a productive and well-managed work force.”⁶ 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.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.”

“Failure to report to work as scheduled without proper notice to supervisor(s)” is a Group II offense. Grievant was aware of the Agency’s practice of submitting a written request for approval of training and taking that training only after approval was granted. Grievant knew she did not have permission to attend the training and, thus, sent the Acting Supervisor an email on August 8, 2005 inquiring about the training. Grievant assumed her attendance at the training would be permitted by the Acting Supervisor. She attended the training rather than performing work duties at her office on August 9, 2005. The Acting Supervisor expected Grievant to be in her office on August 9, 2005 and not at training. Grievant failed to report to work as scheduled without proper notice to her supervisor.

Grievant argued that Ms. GC had authorized Grievant to attend the training. Other than Grievant’s assertion, there is insufficient evidence to support this conclusion.⁷ Grievant presented a letter from the organization providing the training stating, “[Grievant] was referred to me by [Ms. GC].”⁸ Saying a supervisor referred an employee for training is not the same as having approval from a supervisor, the Business Manager, and Health Director to attend training. The weight of the evidence presented shows that Grievant was not authorized by Agency managers to attend the training. Indeed, in Grievant’s email to the Acting Supervisor, Grievant asks the Acting Supervisor to advise Grievant regarding the status of the training. This email is consistent with the Agency’s assertion that Grievant had not been authorized to attend the training.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense. Grievant was instructed by her Acting Supervisor to report to the Acting Supervisor’s office “first thing” in the morning on August 10, 2005. Instead, Grievant went to her own office on another floor and performed other duties without regard to the Acting Supervisor’s instruction.⁹

⁶ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁷ Grievant asserts that she spoke with the Public Health Nurse regarding the training. The Public Health Nurse, however, was one of Grievant’s peers and was not authorized to permit Grievant to attend training.

⁸ Grievant Exhibit D.

⁹ Grievant argued that Ms. GC was her supervisor. Grievant presented Grievant Exhibit C to support this conclusion. This exhibit shows an email from the Business Manager telling Grievant that the Business Manager does not have authority to approve Grievant’s leave requests but that Grievant’s supervisor, Ms. GC, had that authority. This evidence is insufficient to establish Ms. GC as Grievant’s supervisor on August 9, 2005. Ms. GC had been out of the office on leave prior to August 9, 2005 and

The Agency has presented sufficient evidence to support its issuance on August 23, 2005 to Grievant of a Group II Written Notice for failure to report to work as scheduled without proper notice and failure to follow a supervisor's instruction.

"Unauthorized use or misuse of state property or records" is a Group II offense. Grievant misused the laptop computer assigned to her. In light of the number of different documents and amount of personal documents she held on her laptop, Grievant misused the laptop computer for personal use. For example, over 80 percent of the digital photos she kept on her laptop were of a personal nature. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for misuse of State property.¹⁰

Grievant argued that other employees had access to her laptop and could have placed items on the laptop. This argument fails. Grievant received the laptop in June 2003 when it was new. She had exclusive possession of the laptop until it was retrieved from her in June 2005.

Accumulation of a second active Group II Written Notice "normally should result in discharge."¹¹ Grievant accumulated two active Group II Written Notices and, thus, the Agency's decision to remove her from employment must be upheld.

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..."¹² 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

remained so on August 10, 2005. Grievant was aware that the Acting Supervisor was Grievant's supervisor while Ms. GC was out on leave.

¹⁰ The Agency also alleged abuse of State time and resources. It is not necessary to address those allegations given that the Agency has established a misuse of State property.

¹¹ DHRM § 1.60(VII)(D)(2)(b).

¹² *Va. Code § 2.2-3005.*

Grievant alleged the Agency discriminated against her because of her race. No credible evidence was presented showing that the Agency took disciplinary action against her because of her race or for any improper purpose. The Agency disciplined Grievant because Agency managers believed Grievant acted contrary to the Standards of Conduct.

Grievant argued that the Agency retaliated against her for engaging in protected activity. Grievant engaged in protected activity because she filed a grievance to challenge her prior disciplinary action. She suffered a materially adverse action because she received two Group II Written Notices with removal. Grievant has not established any connection between her protected activity and the materially adverse action she suffered. The Agency did not retaliate against Grievant.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to report to work and failure to follow a supervisor's instructions is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice for unauthorized use and misuse of State property is **upheld**. Grievant's removal based on the accumulation of disciplinary action 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 14th St., 12th 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
600 East Main St. STE 301
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.¹³

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹³ 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: 8265 / 8309-R

Reconsideration Decision Issued: March 24, 2009

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.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material;
- and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant has not offered any newly discovered evidence. This case arose from discipline in 2005. Grievant has not established that any evidence was discovered from the date of the hearing. She had not established that she had performed due diligence to discover the evidence she claims as new. Grievant has not established that she has any evidence which is other than cumulative or impeaching. None of the proposed evidence offered by Grievant is material and none of it would likely produce a new outcome if the case were retried.

Grievant restates most of the arguments she made during the hearing. Neither Grievant's evidence nor arguments were persuasive. The Agency's evidence was sufficient to support the Agency's issuance of disciplinary action. For example, Grievant contends the laptop containing substantial non-business related information was used by several employees and not just Grievant. Grievant has confused two different laptops. The laptop used to justify disciplinary action was the one assigned solely to Grievant. It contained many pictures of Grievant and her family. It is unlikely that other employees would upload pictures of Grievant and her family to Grievant's laptop.

Grievant contends the Hearing Officer failed to consider some of her exhibits. Contrary to Grievant's assertion the Hearing Officer considered all of the Agency's and Grievant's exhibits offered and admitted as evidence during the hearing.

Grievant had a limited grasp of what were the issues for the hearing and which witnesses could provide relevant testimony. She asked to call over a hundred witnesses. Many of those witnesses only had knowledge of matters unrelated to the disciplinary action against Grievant and her claim for retaliation. For example, Grievant wanted to call witnesses relating to a dispute in Federal court. During the prehearing conference, the Hearing Officer assisted Grievant in reducing the number of witnesses to those most relevant to the issues in dispute. Witness orders were sent out for those witnesses.

Grievant complains that a prehearing conference was held without her. Grievant was informed of all prehearing conferences and invited to participate. Many prehearing conferences were held. Grievant's failure to participate in a prehearing conference is not a basis to alter the outcome of the original Hearing Decision.

Grievant asserts that the Hearing Officer did not force the Agency to produce certain documents. In fact, the Hearing Officer issued an order compelling the Agency to produce documents requested by Grievant. That order addressed the documents that were relevant to the grievance hearing.

Grievant contends the Hearing Officer failed to consider the relevant time frame of her claim of retaliation. In the original Hearing Decision, however, the Hearing Officer concluded that Grievant engaged in protected activity. The evidence was clear that the Agency did not take disciplinary action against Grievant because of her protected activities or for any other improper purpose.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the 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

Carl Wilson Schmidt, Esq.
Hearing Officer