

Issues: Group II Written Notice (unsatisfactory performance and failure to follow instructions/policy), and Group II Written Notice with Suspension and Demotion (failure to follow instructions and workplace harassment); Hearing Date: 07/10/07; Decision Issued: 07/30/07; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 8550/8551; Outcome: No Relief – Agency Upheld in Full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8550 / 8551**

Hearing Date: July 10, 2007  
Decision Issued: July 30, 2007

**PROCEDURAL HISTORY**

On October 10, 2006, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory work performance, failure to follow a supervisor's instruction, and failure to follow established policy. On October 25, 2006, Grievant timely filed a grievance to challenge the Agency's action. On December 15, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failing to follow instructions and workplace harassment. She received a seven work day suspension, reduction of job duties, and a 5% disciplinary pay reduction. On January 10, 2007, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step for each grievance was not satisfactory to the Grievant and she requested a hearing. On May 16, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 10, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate

Witnesses

### **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 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 employs Grievant as an Office Services Supervisor. She has been employed by the Agency for approximately 18 years. The purpose of her position is:

Provides administrative and fiscal support and supervises administrative/clerical staff to ensure smooth office operations. Determines priorities, schedules and reviews work; trains, counsels and evaluates performance; evaluates and improves office productivity; interprets and implements state and local policies and procedures; assures compliance with program requirements; collects and analyzes

data; procures goods and services; ensures timesheets are completed; maintains lead records; maintains filing system; etc.<sup>1</sup>

Grievant received a Group II Written Notice with a five work day suspension on December 7, 2006 for workplace harassment, abuse of supervisory authority and state time, use of obscene or abusive language, and disruptive behavior.<sup>2</sup> Grievant did not appeal this Written Notice and its merits are not before the Hearing Officer.

The Agency wanted all of its managers and supervisors to complete online training regarding the Grievance Procedure. The course could be completed in approximately three hours and could be bookmarked if not completed in one sitting. On June 23, 2006, Grievant's Supervisor sent Grievant an email stating:

When you complete the Grievance training online, please provide me a copy of the completion results for the agency's records. This training must be completed by August 30, 2006.<sup>3</sup>

On August 14, 2006, Ms. R sent Grievant an email stating, in part:

According to the training database, you have not completed the required grievance training for managers/supervisors yet. Virginia law (Code § 2.2-3000) requires training for supervisors in the grievance procedure and conflict resolution. In order for VDH to comply with this mandate, all managers and supervisors must complete the online training program ....

On the following day, Grievant sent Ms. R an email stating, "I plan to take my training on Wednesday, Aug. 23, 2006."<sup>4</sup>

Grievant did not begin or complete the online grievance training program by August 30, 2006.

Grievant supervised three employees. Two of those employees were employed by a private employment agency but worked at the Agency's Facility. Ms. C was one of those two employees. Grievant was involved in the selection and hiring process for Ms. C, but the authority to hire or fire Ms. C rested with the Supervisor.

Beginning in August 2006 a conflict arose between Grievant and one of her subordinates, Ms. C. On August 4, 2006, Grievant sent an email to the Regional Manager of the employment agency expressing problems with Ms. C due to personality

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<sup>1</sup> Agency Exhibit 8.

<sup>2</sup> Agency Exhibit 9.

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

<sup>4</sup> Agency Exhibit 1.

conflicts. The conflict continued. Agency managers began investigating conflict between several employees including Grievant and Ms. C. Ms. C complained about Grievant and Grievant was aware that Ms. C. was participating in the investigation. On September 27, 2006, the Business Manager sent Grievant an email stating:

This will confirm our meeting a few minutes ago (with [the HRO] present) wherein you were instructed to immediately cease and desist any activity that could be interpreted as obstructing the current investigation, including talking with others or requesting any information from others related to it.

On October 25, 2006, Grievant called the Regional Manager for the employment agency to complain about Ms. C. The Regional Manager made an entry and her telephone log as follows:

[Grievant] called to let us know that [Ms. C] has, over the past two weeks, developed an insubordinate attitude. She has no respect for [Grievant] or her supervision or her coworkers. [Grievant] said there is an issue going on in her division right now but when that is taking care of she intends to end [Ms. C's] assignment. [Grievant] will let us know.

### **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, perform assigned work, or otherwise comply with established written policy” is a Group II offense.<sup>6</sup>

#### Group II Written Notice issued October 10, 2006

On June 23, 2006, Grievant's Supervisor instructed Grievant to complete online grievance training by August 30, 2006. Grievant had ample time to complete the training. Since the training was online and could be completed in parts, Grievant was in control of when she took the training. Grievant did not complete the training as

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<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).

instructed. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice.

The Agency contends Grievant failed to timely process a credit application and failed to ensure an adequate inventory of envelopes. Grievant contends she was unable to accomplish these tasks because she was unable to find suitable vendors in compliance with the requirements for Small Women and Minorities owned businesses. The Agency has been unable to rebut Grievant's assertion. Accordingly, the Agency has not established this allegation.

The Agency contends Grievant instructed a subordinate to hold all mail received during the week of September 18-22, 2006 while she was out of the office. Grievant denied giving such an instruction. Her denial was credible, accordingly, the Agency has not established this allegation.

Although not all of the Agency's allegations have been sustained, there remains sufficient evidence to support the Agency's issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

#### Group II Written Notice Issued December 15, 2006

On September 27, 2006, Grievant was instructed by a supervisor "to immediately cease and desist any activity that could be interpreted as obstructing the current investigation, including talking with others or requesting any information from others related to it." Ms. C was one of the individuals complaining about Grievant and participating in the investigation. Grievant knew or suspected that Ms. C was one of the individuals objecting to Grievant. On October 25, 2006 Grievant called Ms. C's employer and said that Ms. C had developed an insubordinate attitude and that once an issue was resolved in the division Grievant intended to end Ms. C's assignment. Grievant knew or should have known that Ms. C would likely have felt intimidated had she known Grievant intended to end her employment. Although the employment agency did not immediately tell Ms. C about Grievant's telephone call, had the employment agency done so, Grievant's purported decision to terminate Ms. C may have affected Ms. C's participation in the Agency's investigation. Grievant's behavior could easily have been construed by Ms. C as retaliation for Ms. C's participation in the Agency's investigation. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action.<sup>7</sup> A suspension of up to 10 workdays is appropriate upon the issuance of a Group II Written notice. Accordingly, Grievant's seven workday suspension is upheld.

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<sup>7</sup> The Agency alleged Grievant failed to comply with DHRM policy 2.30, *Workplace Harassment*. Workplace harassment only applies in situations where the employee's behavior was on "the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability." None of Grievant's behavior was motivated by these factors. Grievant did not engage in workplace harassment. Although the Agency did not establish workplace harassment, there remains sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argues that she did not intend to retaliate against Ms. C but intended to inform the employment agency of Ms. C's poor work performance. This argument fails. Grievant not only inform the employment agency of Ms. C's poor work performance, she also informed the employment agency that Grievant intended to end Ms. C's work at the Agency. Grievant should have brought her concerns to the Supervisor and let the Supervisor determine how to address any problems with Ms. C's performance.

#### Disciplinary Action with Pay Reduction

DHRM Policy 1.60 provides:

Disciplinary action also may include demotion or transfer in lieu of termination. In such cases, the agency must initiate a disciplinary salary action. With a disciplinary salary action, employees may be retained in their current positions and have their duties reduced or be moved to positions in the same or lower pay band with less job responsibilities. In either case, the employee's salary must be reduced by at least 5%. In no case may an employee's salary exceed the maximum of the pay band following a disciplinary salary action.

Effective December 18, 2006, Grievant's duties were reduced because she was removed as the supervisor of two employees. Her salary was reduced 5 percent in accordance with the Standards of Conduct. Instead of removing Grievant from employment based on the accumulation of two Group II Written Notices, the Agency reduced her duties and salary in accordance with State policy.

#### 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>8</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.

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<sup>8</sup> *Va. Code § 2.2-3005.*

Grievant contends the disciplinary action should be mitigated because of her excessive workload. For example, she contends she could not take the online grievance training because she had too many other things to do. Grievant's argument fails. When Grievant received an instruction from her Supervisor to complete the online training, she should have made that training a priority. If she was unable to complete tasks, those should have been tasks other than online training. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### Retaliation

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>9</sup> (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant engaged in a protected activity by filing a grievance against the Supervisor. Grievant suffered a materially adverse action because she was given disciplinary Written Notices. Grievant has not established any link between her protected activity and the materially adverse action she received. The Agency took disciplinary action against Grievant because Agency managers believed Grievant engaged in behavior giving rise to disciplinary action. The Agency did not take disciplinary action against Grievant in order to retaliate against her for filing a grievance.<sup>10</sup>

## **DECISION**

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<sup>9</sup> See Va. Code § 2.2-3004(A)(v). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>10</sup> When the Supervisor issued the October 10, 2006 Group II Written Notice, he did not know that Grievant had filed a grievance challenging his behavior.



For the reasons stated herein, the Agency's issuance on October 10, 2006 to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance on December 15, 2006 of a Group II Written Notice of disciplinary action with suspension, reduction in duties, and 5% pay reduction 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 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>

[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

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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.