

Issues: Group II Written Notice (failure to follow instructions), and Group II Written Notice with termination (due to accumulation) (theft); Hearing Date: 11/14/07; Decision Issued: 11/19/07; Agency: DSS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8710, 8746; Outcome: No Relief, Agency Upheld in Full.

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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case Nos. 8710 & 8746

Hearing Date: November 14, 2007  
Decision Issued: November 19, 2007

**PROCEDURAL HISTORY**

The grievant was employed by the Department of Social Services (agency) as a Fiscal Technician. On April 18, 2007, the agency issued the grievant a Group II Written Notice for an alleged “[f]ailure to follow a supervisor’s instructions and insubordination.” On May 25, 2007, the grievant initiated a grievance challenging this disciplinary action. After the parties failed to resolve the May 25<sup>th</sup> grievance during the management resolution steps, the grievance was qualified for hearing and a hearing officer was appointed on September 14, 2007.

On July 20, 2007, the grievant initiated a second grievance challenging a Group II Written Notice issued on July 2, 2007, and her subsequent termination. The parties did not resolve the July 20<sup>th</sup> grievance during the management resolution steps, and on October 10, 2007, the agency head qualified the grievance for hearing. By letter dated October 17, 2007, the agency has asked that the July 20<sup>th</sup> grievance be consolidated with the May 25<sup>th</sup> grievance for hearing.

On October 22, 2007, EDR advised the parties that it had received the agency’s request and asked for any additional information from the parties. Neither party has provided any additional information, and the grievant did not object to consolidation of the grievances for hearing.

By decision of October 30, 2007,<sup>1</sup> without objection from either side, the Director of EDR ordered the two grievances consolidated for hearing. The hearing officer’s appointment to hear the second grievance was received November 7, 2007.

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1 Ruling Numbers 2008-1850.

The hearing on the May 25, 2007, grievance was initially scheduled for October 9, 2007. At the grievant's request, for good cause shown, the hearing was rescheduled for November 14, 2007. After the July 20, 2007, grievance was consolidated with the May 25, 2007, grievance, the parties agreed to retain the hearing date of November 14, 2007, for the consolidated grievance hearing.

The Grievant has an active Group I Written Notice.

### APPEARANCES

Grievant  
Advocate for Agency  
Representative for Agency  
One witnesses for Agency (the Agency Representative)

### ISSUES

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 actions against the Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence. GPM § 9.

### FINDINGS OF FACT

The Agency's evidence included exhibits from 1 to 8. All were introduced into the grievance record. The Grievant's evidence included exhibits from 1 to 4, all of which were admitted into the grievance record.

The Agency's witness, a Manager over the grievant, testified that the April 9, 2007, Group II Written Notice<sup>2</sup> was issued to the claimant because

- On April 6, 2007, the Grievant failed to follow her instruction on performing her tasks based on written business guidelines and a January 23, 2007, written guidance memorandum, and she repeated the task of using a copy of a screen to make adjustments when told 15 minutes prior to stop such process by the manager of the unit.
- On April 4, 2007, the Grievant refused to provide training when asked by a supervisor.
- On March 22, 2007, the Grievant worked 1.2 hours of overtime without prior approval from her supervisor, repeating the offense of a prior Group I Written Notice issued January 18, 2007, regarding reporting work time and leave.

The manager testified that job specific software had been acquired, and that prescribed procedures were required to maximize efficiency and minimize errors in payment processing. Some errors occurred because of the Grievant's failure to comply with the prescribed procedure.

The manager also testified that the July 2, 2007, Group II Written Notice<sup>3</sup> was issued to the claimant related to her acquisition documents she presented at her prior grievance hearing on June 12, 2007. The Grievant admitted that she obtained her supervisor's weekly time sheets from her supervisor's desk drawer. The manager testified that these records are confidential state records, and that the offense under the Standards of Conduct<sup>4</sup> was theft or unauthorized removal of state records, state property, or the property of another which is specifically categorized as a Group III offense.

The Grievant testified that she did her work well and diligently, and that the Written Notices are essentially in retaliation of her efforts to expose abuse of state time by her supervisor. The Grievant testified that her work inefficiencies were the result of computer problems, lack of adequate resources, and not her failure to follow prescribed work guidelines. She testified that her refusal to provide training was grounded in a lack of time to do the training plus her primary job responsibilities.<sup>5</sup> She also testified that she worked the offending overtime out of diligence, and that she could not get approval after work hours.

The Grievant's manager testified that the policy of requiring pre-approval for overtime is well-known, and the Grievant did not assert she was unaware of the policy requirement.

Regarding the alleged theft of state records (her supervisor's time sheets), the Grievant testified that her supervisor's desk drawer was not locked, and that she was justified in obtaining and presenting the records to show abuse of state time.

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2 Agency's Exhibits Nos. 1 and 2.

3 Agency's Exhibit No. 7.

4 Agency's Exhibit No. 6. Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, effective 9/16/93.

5 The supervisor in question did not testify.

## 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 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 claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.<sup>6</sup>

Management is reserved the exclusive right to manage the affairs and operations of state government. The grievance statute and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.

## CONCLUSIONS OF POLICY

From the evidence presented, I find that the Grievant engaged in the behavior described in the Written Notices, and that the behavior constituted misconduct. Further, I find that the Agency's discipline was consistent with law and policy, and that there are no factors that justify a reduction or removal of the disciplinary actions.

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>7</sup>

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<sup>6</sup> § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

<sup>7</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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>8</sup> The Agency’s witness credibly testified that each of the offenses contained in the April 9, 2007, Group II Written Notice occurred. Examined individually, each of the three offenses specified could support a separate Group II Written Notice. Combined as one, the single Group II Written Notice is a restrained, measured act of discipline. Accordingly, Grievant failed to comply with a Supervisor’s instruction thereby justifying the issuance of a Group II Written Notice.

While presenting stark disagreement with the Agency’s position, the Grievant’s testimony and evidence did not show credible justification or a reasonable excuse for the infractions noted in the April 9, 2007, Group II Written Notice. The evidence shows that the Grievant was guilty of the infractions presented by the Agency. The Grievant’s belief that the supervisor’s instructions were unreasonable, or grounded in retaliation, was not borne out by the evidence presented. The failure to obtain approval before working overtime was not rebutted by the Grievant. The circumstance of refusing to provide the computer software training requested by a supervisor might be considered questionable because the supervisor did not testify. However, the Grievant’s explanation of lack of time to comply with the supervisory direction lacked the specificity either to rebut the Agency’s position or to show lack of intent.<sup>9</sup>

With respect to the July 2, 2007, Group II Written Notice, the Grievant offered no justifiable excuse for her act of unilaterally entering her supervisor’s desk drawer and taking his time sheets. Under the Rules for Conducting Grievance Hearings, the Grievant could have requested production of documents pertaining to her prior grievance hearing. The Grievant’s actions constitute theft of state or personal property, and that offense could properly have been deemed a Group III offense. Thus, the Agency’s action in issuing a Group II Written Notice is a restrained, measured act of discipline.

*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>10</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

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<sup>8</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>9</sup> Any one of the three infractions noted would support a Group II Written Notice.

<sup>10</sup> *Va. Code § 2.2-3005.*

agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

While the Grievant may point to circumstantial evidence that the Agency witness and supervisor might have grounds to have a grudge against her because of her assertions of abuse of state time, based on the evidence presented I cannot find that any such grudge or bias, if it exists, negates the actual instances presented of unsatisfactory job performance. Because there is credible evidence to support the two Group II Written Notices, I find the Grievant has not shown that the disciplinary actions are grounded in retaliation.

Grievant contends the disciplinary action should be mitigated because it is too severe. Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In this case, the Agency's action in assessing two Group II offenses and termination is within the bounds of specific policy. The Agency's witness testified that she carefully weighed mitigation, and actually issued Group II Written Notices when Group III was appropriate. I find it is within the bounds of reasonableness for the Agency to terminate an employee with an active disciplinary record of two Group II Written Notices and one Group I. I find there are no factors that would make it unreasonable to impose the Agency's choice to remove Grievant.

### DECISION

For the reasons stated herein, the Hearing Officer upholds both Group II Written Notices and the termination.

### APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests

should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main Street, Suite 400, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

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Cecil H. Creasey, Jr.  
Hearing Officer