

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 01/25/08; Decision Issued: 01/28/08; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8766; Outcome: No Relief – Agency Upheld in Full; **Administrative Review:** **HO Reconsideration Request received 02/08/08; Reconsideration Decision issued 02/12/08; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 02/08/08; EDR Ruling #2008-1953 issued 02/27/08; Outcome: HO's decision affirmed; Administrative Review: DHRM Ruling Request received 02/08/08; Outcome pending**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8766**

Hearing Date: January 25, 2008  
Decision Issued: January 28, 2008

**PROCEDURAL HISTORY**

On August 21, 2007, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

On August 28, 2007, 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 January 2, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 25, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
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?

### **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 Department of Social Services employs Grievant as a Children's Licensing Inspector. The purpose of Grievant's position is:

To reduce risks to children in [and] out of home care through enforcement of state licensing laws and regulations and violation of standards of practices.

She has been employed by the Agency of for approximately 21 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

One of Grievant's primary duties is to visit day care centers and compare those centers with the standard set forth in regulation to determine whether those centers are in compliance with regulation. Grievant must conduct field visits to various locations.

Grievant's Supervisor supervises six other inspectors.<sup>1</sup> Grievant sent an email to other licensing administrators throughout the State and asked what they believed was the average time necessary to conduct a thorough license inspection. The typical time to inspect a family day home was between two and four hours. The typical time to inspect the child development center was between three and six hours. The lowest time period to complete an inspection told to the Supervisor was 1.5 hours. The Supervisor

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<sup>1</sup> The Supervisor reviewed inspection reports for all of her inspectors, not just Grievant. There is no reason to believe the Supervisor was harassing or treating Grievant different from the other inspectors.

formerly worked as a Children's Licensing Inspector. The opinions she received from other licensing administrators were consistent with her experience when she was working in a position similar to Grievant's position.

Grievant uses a laptop to record information she observes as part of her inspections. When Grievant opens an inspection file for a particular day care provider, the laptop software automatically populates the date and time in the "Visit Start" field of the inspection report. The time written in the inspection report comes from the laptop's clock.

On May 8, 2007, Grievant started her visit at Provider GLC at 8:27 a.m. After finishing that inspection, Grievant drove approximately 0.53 miles to Provider GMS. Her drive took approximately 2 minutes. Grievant started her visit at Provider GMS at 8:48 a.m. Thus, Grievant devoted approximately 19 minutes to complete her first inspection at Provider GLC.

On May 29, 2007, Grievant started her visit at Provider MSB at 7:19 a.m. After finishing that inspection, Grievant drove approximately 0.43 miles to Provider CC. Her drive took approximately one minute. Grievant started her visit at Provider CC at approximately 7:57 a.m. Thus, Grievant devoted approximately 37 minutes to complete her first inspection at Provider MSB.

On June 19, 2007, Grievant started her first visit at Provider MB at 11:11 a.m. After finishing that inspection, Grievant went to Provider PS, located next door to Provider MB. Grievant started her visit at Provider MB at approximately 11:20 a.m. Thus, Grievant devoted approximately 9 minutes to complete her first inspection at Provider MB.

On June 20, 2007, Grievant started her first visit at Provider ACD at 8:17 a.m. After finishing that inspection, Grievant drove approximately 7.22 miles to Provider CK. Her drive took approximately 14 minutes. Grievant started her visit at Provider CK at approximately 8:47 a.m. Thus, Grievant devoted approximately 16 minutes to complete her first inspection at Provider ACD.

## **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."<sup>2</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."

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<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.”

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was responsible for conducting thorough inspections of day care providers. The minimum amount of time necessary to complete a thorough inspection of a day care center is at least 1.5 hours. The Agency identified four inspections conducted by Grievant where she devoted less than 1.5 hours to the inspections. It is not possible for Grievant to have adequately inspected these providers. Accordingly, the Agency has presented sufficient evidence to show that Grievant's work performance was inadequate or unsatisfactory work performance thereby justifying the issuance of a Group I Written Notice.

Grievant argues that the "Start Visit" time shown on the inspection forms does not reflect the actual time she started her inspections. Grievant did not present any testimony or records, such as calendars or notes, showing the times she believes she started her inspections for those eight providers. The Agency, however, presented evidence consisting of the testimony of the Supervisor and documents signed by all but one of the providers. The Supervisor testified that she contacted each of the providers and verified the approximate start times with those providers. Then, the Supervisor sent each provider a form indicating the time and date the Agency's record showed for Grievant's inspection of the provider. The form asked the provider to verify the date and time, if it was accurate or to provide the accurate date and starting time. All but one of the providers signed and returned the forms. Based on the evidence presented, the Agency's claim of when Grievant started her visits with the providers has been established.

Grievant argued that her practice was to arrive at a provider's location and begin taking notes on a note pad. After completing her handwritten notes, Grievant would turn on her laptop and open the inspection file on the computer. According to Grievant, the Start Visit time on the computer form would be many minutes after she actually began her inspection. Grievant's argument fails. If Grievant's practice was to take handwritten notes first, then she would have used that practice for both the first and the second providers in the day. For example, if the Start Visit time for the first provider was delayed by approximately 30 minutes to one hour while Grievant took notes, the Start Visit time for the second provider would also be delayed by whatever amount of time Grievant took notes while visiting the second provider in the day. In other words, the effect of Grievant's practice would be to delay the Start Visit times for each provider. Grievant's practice would not serve to reduce the Start Visit times between two providers (because each provider would have a note taking delay.)<sup>3</sup>

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<sup>3</sup> Grievant also testified that on some occasions she would open the files for two providers “at the same time.” The evidence presented does not support this assertion. The shortest time between two providers

*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>4</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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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in a day was nine minutes. The longest time was 37 minutes. Neither of these times is “at the same time.”

<sup>4</sup> *Va. Code § 2.2-3005.*

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>5</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>5</sup> 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: 8766-R**

Reconsideration Decision Issued: February 12, 2008

**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.

Grievant alleges that the Hearing Decision failed to mention testimony that Grievant was having problems with her computer. No credible evidence was presented to establish that the “computer problems” Grievant was having resulted in incorrect readings in the “Start Visit” portion of Grievant’s inspection report. Grievant’s assertion that “computer problems” resulted in incorrect times on her inspection reports is speculative.

Grievant contends that the Supervisor did not ask the child care providers how long Grievant stayed at their facilities. The lack of this information, however, does not affect the outcome of this case. The Agency established the length of time Grievant spent at the facilities by comparing the “Start Visit” dates and times appearing on Grievant’s computer. The Agency has presented sufficient evidence to show that Grievant did not devote sufficient time to her inspections for the date in question.

Grievant contends that Standard Procedure 301 does not establish any guidelines for the time frames for conducting an inspection. This argument fails. Grievant was issued a Group I Written Notice for inadequate or unsatisfactory job performance. It is not necessary to show a violation of written policy in order to establish a Group I Written Notice for inadequate or unsatisfactory job performance. The timeliness of work can be established by the experience and opinions of other employees knowledgeable of the required work duties.



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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer