Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 02/11/08; Decision Issued: 02/13/08; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8768; Outcome: No Relief – Agency Upheld In Full; **Administrative Review: AHO Reconsideration Request received 02/26/08; Reconsideration Decision issued 02/27/08; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 02/26/08; Outcome pending**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8768

Hearing Date: February 11, 2008
Decision Issued: February 13, 2008

PROCEDURAL HISTORY

On August 27, 2007, Grievant was issued a Group I Written Notice of disciplinary action for inadequate job performance.

On September 26, 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 10, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 11, 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 Program Support Technician at one of its Facilities.[1] She began working for the Agency on July 10, 2000. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The purpose of Grievant's position is:

> Serves as the initial DCSE program agent on all cases entering a District. Utilizing a variety of automated federal and state data systems, independently researches cases to resolve moderately difficult problems pertaining to clients; application requirements, case status, services required and other case specific information. Interprets and applies subscribed policies, procedures and technical knowledge to determine and implement required case actions. Conducts online locate activities on new cases while obtaining additional demographic, financial and legal documentation to correct and complete each case. Interviews applicants, receives and initiates telephone calls and correspondents to/from custodial parents, non-custodial parents, courts and other government agencies to provide/gather information and data to resolve case management problems and issues. Interprets court orders and creates

[1] Grievant was not permitted to work overtime.

> initial financial record. Assigns established cases to proper program unit. Reviews and makes adjustments to system interfaced error reports.[2]

One of Grievant's Core Responsibilities under her Employee Work Profile included, "Establishes/Reopens Cases on automated system." A measure for this core responsibility consisted of:

> In accordance with Federal guidelines and division policy establishes/reopens cases, including interface Open Error Reports, on the automated system within 2 days of receipt.

An Error Report consisted of a document of two or more pages describing discrepancies in information maintained by two different computer systems.[3] Grievant was responsible for researching each error to determine why the information contained in one computer system did not match the information contained in another computer system. After she completed her research, Grievant was responsible for entering the correct information in the appropriate computer system so that the computer systems would be current.

On May 10, 2007, Grievant received an Interim Evaluation stating, in part:

> Error Reports are seriously delinquent. Error Reports are to be brought up to date by June 30, 2007. Greater effort needs to be made in improving the number of cases opening within the two day time frame as 70% of cases reviewed did not meet the opening criteria.[4]

On July 16, 2007, Grievant received a Notice of Improvement Needed/Substandard Performance advising her that, "Error Reports dating back to January 2007 remained seriously delinquent". As part of an improvement plan, Grievant was advised that, "All outstanding error reports are to be completed and submitted on Friday of each week beginning Friday, July 20. This backlog must be completed in its entirety no later than 08/15/07."[5]

Grievant received 8 Error Reports in January 2007, 7 Error Reports in February 2007, 8 Error Reports in March 2007, 8 Error Reports in April 2007, 7 Error Reports in May 2007, 5 Error Reports in June 2007, 5 Error Reports in July 2007, and 6 Error Reports in August 2007.

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[2] Agency Exhibit 3.

[3] For example, an error report would be generated if a custodial parent applied for benefits through the Department of Social Services computer system but for some reason a case was not opened in the Division of Child Support Enforcement computer system.

[4] Agency Exhibit 5.

[5] Agency Exhibit 5.

As of August 20, 2007, Grievant had not completed Error Reports from the following dates: March 30, 2007, April 2, 2007, April 5, 2007, April 14, 2007, April 16, 2007, April 19, 2007, April 30, 2007, May 1, 2007, May 3, 2007, May 8, 2007, May 11, 2007, May 16, 2007, May 21, 2007, May 24, 2007, May 30, 2007, June 5, 2007, June 28, 2007, June 29, 2007, July 16, 2007, July 20, 2007, July 26, 2007, July 31, 2007, and August 1, 2007.

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."[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."

"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 completing Error Reports on a timely basis. She was obligated to reduce her backlog and have all of her Error Reports completed by August 15, 2007. As of August 20, 2007, Grievant had 23 Error Reports remaining uncompleted. Her work performance was not satisfactory to the Agency thereby justifying the issuance of a Group I Written Notice for inadequate or unsatisfactory work performance.

Grievant argued that she did not have adequate time to complete the Error Reports because she was constantly being pulled from her regular duties to fill in for other employees or to assist other employees. For example, Grievant would have to work at the front desk when the employee assigned to the front desk was absent due to illness or was away from the front desk for lunch breaks, etc.

Grievant's argument fails for three reasons. First, Grievant's regular work duties included an obligation to fill in for other employees in the office who were absent from work or taking breaks. Second, Grievant did not have any unusual or unexpected increases in her regular overall workload. Grievant argued that several years ago the Agency downsized and removed from employment a number of employees in Grievant's office thereby increasing the workload on Grievant and the remaining employees. The evidence showed, however, that the downsizing occurred because the functions of

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

several employees were outsourced. Neither Grievant nor the remaining employees received additional duties because of the reduction in employees. Third, the Agency conducted a thorough analysis of the time Grievant devoted to various work duties. Although not all of Grievant's time could be monitored[7], the study showed that over an eight month period Grievant had adequate time to complete the Error Reports assigned to her.[8]

Grievant argued that she was not given adequate training regarding how to complete Error Reports. This argument is untenable. Grievant received Case Initiation training on August 30, 2006. She also attended Case Initiation training on June 4, 2007 and June 5, 2007. Both of these sessions covered the report error in detail and provided her with a training manual. Grievant also had over one year of on-the-job experience with completing Error Reports.[9] There is no reason for the Hearing Officer to believe that additional training would have increased Grievant's timeliness.

Grievant argued that she was not given adequate assistance. The evidence showed, however, and several other employees were given several of Grievant's delinquent Error Reports and that those reports were timely completed by the other employees. In short, Grievant's regular caseload was reduced with the assistance of other employees.

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…."[10] 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-

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[7] The time Grievant spent working in the file room was not recorded by Grievant or Grievant's Supervisor. Although "tier calls" were received by the case initiation team, the number of calls and links of those calls was not monitored. The amount of time spent on these functions was not sufficiently material so as to prevent Grievant from completing her Error Reports.

[8] The Supervisor estimated that an employee could complete an Error Report in one hour on average. She based her estimate on her observation of employees completing Error Reports and her own experience in completing these reports. Although the length of time necessary to complete an individual Error Report may vary greatly depending upon the complexity of the report, the Supervisor's estimate appears to be the most accurate assessment of the time necessary to complete a report. Other witnesses testified regarding the length of time they believed was necessary to complete Error Reports. None of them could provide an estimate with any reasonable certainty.

[9] Grievant had responsibility for case initiation beginning in 2004. For a brief period of time, Grievant left her current office and went to work for another unit. She then returned to her current office and resumed her duties with respect to case initiation.

[10] *Va. Code § 2.2-3005.*

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.[11]

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 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
   830 East Main St. STE 400
   Richmond, VA 23219

[11] Several other employees who failed to bring current their delinquent Error Reports also received written notices.

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.[12]

[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

[12] 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: 8687-R

Reconsideration Decision Issued: February 27, 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.

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 contends, "I have a breakdown of the time my time which was not accepted in the hearing. No one requested a break down of my time before the hearing."

Grievant did not attach any such breakdown to her request for reconsideration. She has not established that the evidence was newly discovered since the date of the hearing decision. She has not established that she used due diligence to discover the possible new evidence. She has not established that the evidence is material. She has not established that the evidence is such that it would likely produce a new outcome if

the case were retried. Grievant is responsible for presenting her evidence at the hearing. Accordingly, Grievant has not presented newly discovered evidence that would affect the outcome of this case.

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