Issues: Group II (Failure to follow instructions and unsatisfactory performance), and Termination (due to accumulation); Hearing Date: 05/12/08; Decision Issued: 06/13/08; Agency: DOLI; AHO: Carl Wilson Schmidt, Esq.; Case No. 8843; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: HO Reconsideration Request received 06/27/08; Reconsideration Decision issued 07/17/08; Outcome: Original decision affirmed; Judicial Review: Appealed to Norfolk Circuit Court on 08/08/08; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8843

Hearing Date: May 12, 2008
Decision Issued: June 13, 2008

PROCEDURAL HISTORY

On December 20, 2007, Grievant was issued a Group II Written Notice of disciplinary action with removal for unsatisfactory performance, failure to follow supervisory instructions, and falsification of official documents.[1]

On January 16, 2008, 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 April 7, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 12, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

[1] The Agency did not proceed with evidence relating to falsification of any documents. There is no reason to believe the Grievant falsified any documents.

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 Labor and Industry employed Grievant as a Safety Consultant at one of its Facilities. The purpose of her position was to:

> Recognize unsafe work conditions and practices making remedial recommendations for correction of such practices. Provide technical information on occupational safety to employers and employees and assist in developing workplace safety programs.[2]

Grievant's position was Non-Exempt under the FLSA. She began working for the Agency on June 25, 2002. She was removed from employment effective December 20, 2007. Grievant had prior active disciplinary action. On September 14, 2007, Grievant received a Group II Written Notice.[3]

[2] Agency Exhibit 8.

[3] Agency Exhibit 4.

On August 28, 2006, the Consultation Program Manager sent Grievant a letter stating, in part:

> This memorandum serves to document our discussion of Wednesday, August 23, 2006 concerning your performance. It is my intention to consider this discussion and memo as another extension of the Notice of Improvement Needed provided to you earlier this year.
>
> As I've explained to you on multiple occasions, our program's documentation is critical to our abilities to continue to receive federal grant funding. The timely completion of case file documentation has been a recurring issue throughout your tenure with Consultant Services and I've attempted to resolve these concerns since the Notice of Improvement Needed was initially presented to you in March 2006 and then again during our meeting on June 21 …. In spite of repeated requests for Form 50s, and other case file documentation, you continue to experience significant delays in submitting these documents. ***
>
> We also discussed several concerns related to your work habits and scheduling issues. I want to reinforce my expectation that you will work the schedule we've previously established in your personnel file, which is 7:45 a.m. to 4:30 p.m. As I shared with you last week, I'm willing to consider other scheduling options and I'm also willing to authorize occasional scheduling adjustments provided those requests are directed to me in advance.[4]

Grievant was responsible for visiting businesses, observing and obtaining information from those businesses, and then completing forms reflecting the information generated by those visits. For example, Grievant used her computer to enter information in an electronic form called, Form 20. She was responsible for uploading that electronic form into the NCR.[5] The NCR served as the Agency's computer database.[6] Once the form was in the NCR database, Grievant was to open the form and check it for accuracy. Once she had verify that the form was accurate, Grievant was to print the form to a printer located in the office of the Consultation Program Manager at another Agency Facility and then save the form as a final draft in the database. Grievant was then expected to send an email to the Consultation Program Manager with the form number that Grievant had sent to the printer located in the Consultation Program Manager's office. The Consultation Program Manager would

[4] Agency Exhibit 9.

[5] Grievant utilize a password to enter her Agency computer account. When she uploaded forms to the NCR, this transaction was recorded in a computer directory. The directory showed Grievant's initials and the form number.

[6] Information sent to the NCR was held in an Agency computer server separate from Grievant's personal computer on which she entered information into the electronic forms.

remove the printed form from his printer, review it for accuracy, and place it in a permanent folder if the form did not require correction.[7] The email Grievant was expected to send to the Consultation Program Manager was intended to make him aware that Grievant had sent a form to the printer in his office.[8]

Grievant was responsible for submitting similar forms to the Consultation Program Manager. These forms included the Form 30 and Form 50. Grievant was familiar with the process for submitting these forms. She was obligated to submit the forms within a certain timeframes. For example, Grievant's Employee Work Profile states:

> Form 20's shall be completed and presented to the Program Office within five working days from receipt of the assignment with the requested visit date recorded in block 17.[9]

For several years, the Agency had concerns about Grievant's ability to timely and accurately complete electronic forms. The Agency had notified Grievant of its concerns about her work performance.

On September 14, 2007, the Consultation Program Manager instructed Grievant to meet several performance goals including:

> All Consultation Visit related paperwork will be submitted by the set times outlined: Assignments will be sent to be Consultation Program Manager for review and not self assigned with a form 20.
>
> Following assignment by the consultation program manager, the client shall be notified and an amicable date set for the visit and the form 20 is completed, submitted to the NCR, checked for errors and printed to the NCR printer HPVKx1 in the Consultation Program Office within 5 days of the receipt of the assignment letter.
>
> Following the visit, the form 30 is completed, submitted to the NCR, check for errors and printed to the NCR printer HPVKx1 in the Consultation Program Office within 5 days of the closing conference.

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[7] The printer held electronic documents in its buffer until printed. If the printer was out of paper or ink, it would hold the document in its buffer until the printer was reactivated.

[8] In May 2007, the Consultation Program Manager notified all consultants, including Grievant, of their obligation to send an email to him every time they sent reports to the printer in his office.

[9] The Consultation Program Manager assessed Grievant's timeliness for submitting Form 20s by using calendar days, not "working days", as stated in Grievant's Employee Work Profile. The Consultation Program Manager testified that even if Grievant's work performance was assessed using working days, Grievant's omission of Form 20s would remain untimely.

> The visit report must be completed within 20 days following the closing conference and submitted via e-mail to the Consultation Program Manager, the Signed agreements and any other field notes shall be mailed to the Consultation Program manager at that time. The consultant will assure them that complete survey reports are prepared in accordance with the CPPM and VOSH policy. ***[10]

The timeliness of Grievant's reports is important to the Agency because the Agency's overall timeliness is reviewed on a quarterly basis by the Federal Government. The Agency's receipt of Federal funding could be affected by untimeliness.

After an approximately 60 day period, the Agency calculated Grievant's timeliness and concluded Grievant submitted her Form 20s and Form 30s on average about 5 days late and also submitted other forms late. The Agency chose to take disciplinary action against Grievant because of her untimeliness.

Grievant's established work schedule was from 7:45 a.m. to 4:30 p.m., Monday through Friday. Her lunch break was to last 45 minutes. She was entitled to take a 15 minute break either in the morning or afternoon at her discretion. On September 27, 2007, October 24, 2007, and October 30, 2007, Grievant performed her regular duties on behalf of the Agency outside her regular schedule.

For example, on September 27, 2007 at 11:18 a.m. the Consultation Program Manager sent Grievant an email regarding Grievant's current work load. Grievant replied to the Consultation Program Manager that evening by saying, "Currently it is 5:40 p.m. on the 27th and [I am] already obligated to perform the survey scheduled for the 28th …." On September 27, 2007 at 6:23 p.m., Grievant also replied to an email sent by the Consultation Program Manager on September 24, 2007.

On October 24, 2007 at 6:14 p.m., Grievant sent the Consultation Program Manager an email containing a "List of Hazards" and stating, "WARNING THE SYSTEM HAS BEEN REACTING VERY SQUIRRLEY." At 6:22 p.m., Grievant sent the Consultation Program Manager an email containing a report for KE. At 7:41 p.m., Grievant sent the Consultation Program Manager an email containing a "List of Hazards." At 7:49 p.m., Grievant sent the Consultation Program Manager an email containing a report for BM. At 8 p.m., Grievant sent the Consultation Program Manager an email containing a report for CP. At 8:32 p.m., Grievant sent an email to the Consultation Program Manager containing a "List of Hazards" for CC. At 8:38 p.m., Grievant sent the Consultation Program Manager an email containing a report for CC. At 8:47 p.m., Grievant sent an email containing in "List of Hazards" for PE. At 8:51 p.m., Grievant sent the Consultation Program Manager an email containing a report for PE. At 9:01 p.m., Grievant sent the Consultation Program Manager an email containing at a "List of Hazards" for NA. At 9:07 p.m., Grievant sent the Consultation Program

[10] The Agency did not produce as an exhibit the original September 14, 2007 written instruction. The terms of the instruction were written in a due process memorandum to Grievant.

Manager an email containing a report for NA. At 9:15 p.m., Grievant sent the Consultation Program Manager an email containing a report for PR. At 9:24 p.m., Grievant sent the Consultation Program Manager an email containing a report for VB.

On October 30, 2007 at 4:08 p.m., the Consultation Program Manager sent Grievant an email asking, "When can I expect this report as it was due to me 10/16/2007." At 6:11 p.m., Grievant replied, "Tonight!" At 7:33 p.m., Grievant sent the Consultation Program Manager an email containing a "List of Hazards", re-certification, and Form 30 for RC. At 7:38 p.m., Grievant sent an email to the Consultation Program Manager containing a report for RC. At 8 p.m., Grievant sent the Consultation Program Manager an email containing a "List of Hazards" for ME. At 8:04 p.m., Grievant sent an email to the Consultation Program Manager containing a report for ME. At 8:35 p.m., Grievant sent the Consultation Program Manager an email stating "[Mr. B] cannot be accessed in the "Written Report" screen. No citations were issued by me through [Ms. B]. [Name] needs to spend time with [name] to make the appropriate abatement for the citations issued. ***"

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."[11] 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 follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense.

The Agency contends Grievant failed to comply with the Consultation Program Manager's instruction to print reports on a timely basis. Grievant contends that she timely processed her reports but the Agency's automated system did not work consistently thereby misstating her timeliness. Grievant has presented credible evidence showing that the Agency's electronic form processing system was unreliable for calculating when she entered information into the NCR and printed it. Thus, the Agency's calculations of her processing times are not completely reliable. For example, Agency Exhibit 7 shows a directory listing all of the electronic documents uploaded to the NCR. Only once a document was uploaded into the NCR could that document be sent to the printer located in the Consultation Program Manager's office or to two other Agency printers. Weekly Project Time Report number ------967 was printed in the Consultation Program Manager's office printer on September 21, 2007 at 10:22 a.m.

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

The date and time appearing on the form was generated at the time of printing. The directory for the NCR does not show that Grievant uploaded this report to the NCR even though she must have done so in order to print it. Another example is Weekly Project Time Report number ------114 was printed in the Consultation Program Manager's office printer on October 10, 2007 at 3:59 p.m. It does not appear in the directory even though it could not have been printed without first having been in that directory. Grievant presented several other examples and when these examples are considered as a whole, they materially undermine the Agency's ability to show that its computer system accurately recorded Grievant's performance.[12]

DHRM Policy 1.25, Hours of Work, states that employees are expected to:

- adhere to their assigned work schedules
- take breaks and lunches is authorized
- notify management as soon as possible if they are unable to hear to schedules, such as later arrivals or early departures, and
- work overtime hours when required by management.

This policy also states:

> A non-exempt employee under the Fair Labor Standards Act may work overtime hours only as authorized in advance by his or her supervisor or manager.

The Consultation Program Manager sent Grievant a letter dated August 28, 2006 stating:

> I want to reinforce my expectation that you will work the schedule we've previously established in your personnel file, which is 7:45 a.m. to 4:30 p.m.

On September 27, 2007, October 24, 2007, and October 30, 2007, Grievant worked past her scheduled end time of 4:30 p.m. On October 24, 2007, it appears that Grievant worked at least three additional hours. She sent work-related emails beginning at 6:14 p.m. and ending at 9:24 p.m. On October 30, 2007, it appears that Grievant worked at least two additional hours. She sent work-related emails beginning at 6:11 p.m. and ending at 8.35 p.m.

As a nonexempt employee, Grievant's work outside of her regular hours placed the Agency at risk of having to pay overtime work for which it had neither planned nor budgeted. The Consultation Program Manager specifically instructed Grievant not to

[12] Grievant was obligated to send an email to the Consultation Program Manager each time she intended to print a form. It is not clear that she did so in every instance. However, the evidence is insufficient for the Hearing Officer to conclude that Grievant failed to send emails for those forms which she contended she timely submitted yet the Agency failed to properly print or record her submission.

work outside of her regular schedule without his permission. Grievant worked hours beyond her regular work schedule contrary to a supervisor's instructions and DHRM Policy 1.25. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instruction that was in accordance with established written policy.

Group II Written Notices are cumulative. A second active Group II Written Notice normally should result in removal. With the Written Notice giving rise to this disciplinary action, Grievant has received to Group II Written notices. Accordingly, the Agency's removal 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…."[13] 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.[14]

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with 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:

[13] *Va. Code § 2.2-3005.*

[14] It is likely that Grievant worked additional hours in order to meet the Agency's expectations regarding her timeliness. By doing so, however, she acted contrary to a supervisor's instruction. Nothing in the *EDR Rules* would establish this as a mitigating circumstance.

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

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.[15]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

[15] 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: 8843-R

Reconsideration Decision Issued: July 17, 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.

In August 2006, the Consultation Program Manager instructed Grievant in writing as follows:

> We also discussed several concerns related to your work habits and scheduling issues. I want to reinforce my expectation that you will work the schedule we've previously established in your personnel file, which is 7:45 a.m. to 4:30 p.m. As I shared with you last week, I'm willing to consider other scheduling options and I'm also willing to authorize

> occasional scheduling adjustments provided those requests are directed to me in advance.[16]

Grievant contends there was no evidence presented by the Agency showing that Grievant worked more than 40 hours in a given week. This argument fails. The Consultation Program Manager instructed Grievant not to deviate from her assigned work schedule. Grievant clearly violated that instruction. Although it is likely that Grievant worked more than 40 hours in a week, it is not necessary for the Agency to show she worked more than 40 hours in a week. The Agency has shown that Grievant worked outside of her approved work schedule contrary to the express instruction of the Consultation Program Manager.

Grievant argues the Consultation Program Manager knew or should have known that Grievant was working a flex schedule but because he failed to timely protest he assented to her change in schedule. This argument fails. In August 2006, the Consultation Program Manager stated his expectations for Grievant's work performance. To the extent she deviated from that expectation, she did so at her own risk.[17]

Grievant argues that the disciplinary action should be mitigated because the Agency did not prevail on one of its reasons for disciplining Grievant, namely the Agency's allegation that Grievant was untimely in processing her work. Grievant seeks to reopen the hearing to take additional evidence regarding how the Agency would have disciplined other employees if they had worked "flex hours". The EDR Rules for Conducting Grievance Hearings do not authorize mitigation of disciplinary action simply because the Agency has not presented sufficient evidence to support all of its theories for discipline. If an agency has several reasons[18] to issue a Written Notice and it is able to present sufficient evidence of at least one of those reasons, the agency has met its burden of proof. There is no basis to reopen the hearing to determine what the Agency might have done. The Agency's response to the Grievant's request for reconsideration, shows it continues to believe Grievant should be removed from employment. Determining how the Agency would have disciplined under the facts as defined by the Hearing Officer (and not by the Agency), would be speculative.

Grievant contends the Agency acted out of an improper motive when disciplining Grievant. She cites as evidence of this the inconsistencies between the NCR directory and Grievant's actions of submitting documents into the directory that were missing from the directory. How these discrepancies occurred was not established during the

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[16] Agency Exhibit 9.

[17] Grievant argues the Consultation Program Manager knew she was working hours outside of her assigned schedule in order to complete her work on a timely basis. If the Hearing Officer assumes this is true, it does not affect the outcome of this case. The Consultation Program Manager's knowledge that Grievant was working outside of her assigned schedule does not serve as approval for Grievant's action.

[18] It is not unusual for agencies to combine several separate employee behaviors/offenses into a single Written Notice.

hearing. No credible evidence was presented to show that the Consultation Program Manager intentionally altered the directory. Grievant's assertion that he did so is speculative.

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