

Issues: Group II Written Notice (failure to follow instructions), Group II Written Notice (failure to follow instructions), Termination and Retaliation; Hearing Date: 01/26/09; Decision Issued: 04/28/09; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 8979, 8980; Outcome: No Relief – Agency Upheld in Full; **Administrative Review**: AHO Reconsideration Request received 05/12/09; Reconsideration Decision issued 05/15/09; Outcome: Original decision affirmed; **Administrative Review**: EDR Ruling Request received 05/12/09; EDR Ruling #2009-2316 issued 06/11/09; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 05/12/09; Outcome pending.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8979 / 8980

Hearing Date: January 26, 2009
Decision Issued: April 28, 2009

PROCEDURAL HISTORY

On June 9, 2008, Grievant was issued a Group II Written Notice for failure to follow a supervisor's instructions and perform assigned work. On June 25, 2008, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instruction and perform assigned work.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested hearings. The EDR Director issued rulings 2009-2151 and 2152 to consolidate the grievances. On December 2, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 26, 2009, 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 Department of Motor Vehicles employed Grievant as an Audit Senior. She had been employed by another State Agency for six years until August of 2007 when she joined the Agency. Grievant was removed from employment effective June 25, 2008. The purpose of her position was:

Assists the Internal Audit Director in the planning, development and execution of the agency's internal audit plan, utilizing the integrated audit approach. The position also provides consulting services to management and user groups with regard to financial, compliance, operational efficiency, program effectiveness, application controls, data security, integrity controls of data processing operations, and management of automated systems. The position also mentors audit staff in all areas. Communicates control weaknesses and recommendations for corrections to management. Services provided by this position are conducted in a manner that relates positively with agency personnel and provides timely, useful services to management.

The omission of specific statements does not preclude management from assigning other specific duties if such duties are a logical assignment to the position.¹

One of the Measures of Core Responsibilities in Grievant's Employee Work Profile states:

Audits are performed within measurable timeframes (e.g. budget hours, drop dates) as agreed upon between auditor and audit director. Audits are performed in accordance with the IIA's Standards for the Professional Practice of Internal Auditing.²

As a Senior Auditor, Grievant was expected to work with minimal supervision.

When Grievant first joined the Agency, she received 16 hours of internal audit training. She was trained on the complete audit process. The Audit Director, Audit Manager and Field Audit Director provided this training to Grievant. Grievant was informed of the required time frames for completing audits. It appeared to them that Grievant understood what she was being taught. Grievant also received 64 hours of training from the State Internal Auditor.

The Audit Manager developed a standard audit program to help auditors plan out their work and identify when reviews were necessary. Grievant was provided a copy of this program.

On April 8, 2008, Grievant received a Notice of Improvement Needed/Substandard Performance containing an Improvement Plan stating:

1. You will be removed from the grants audit and a project evaluation will not be conducted for that assignment.
2. You are no longer expected to provide training or assistance of any kind to the staff auditor.
3. You will be given an additional 40 hours to re-read the Internal Audit manual and the IIA standards. As part of this review, you are expected to document your understanding and present it to your manager. The review and this assignment are budgeted for 40 hours total.
4. Your new assignment will be the purchasing audit. You will work on that audit exclusively under close supervision of your manager. The assignment will be conducted in accordance with the Internal Audit's policies and procedures and shall meet the IIA standards.³

¹ Agency Exhibit 3.

² Agency Exhibit 3.

³ Agency Exhibit 7.

The Audit Manager explained to Grievant that she should give examples of how the Audit Manual would be applied. The Audit Manager met with Grievant daily to discuss examples of Grievant's work and how to document those examples under the Audit Manual requirements. The Audit Manager explained to Grievant that she wanted to measure Grievant's understanding of the Audit Manual from examples provided by Grievant. The Audit Manager explained to Grievant that Grievant was not merely to repeat what she had read.

On April 18, 2008, Grievant and the Audit Manager agreed that Grievant's assignment regarding the Audit Manual would be due on April 21, 2008. On April 21, 2008, Grievant informed the Audit Manager that the assignment was not complete. Grievant turned in the assignment on April 22, 2008. Grievant presented a summary of the Audit Manual; she did not provide her understanding of the Audit Manual. In essence, Grievant simply repeated what she had read rather than providing examples of how the Audit Manual was to be applied.

On April 28, 2008, Grievant was assigned the task of preparing a narrative of the purchasing process for DMV. In a meeting with the Audit Manager and Audit Director, Grievant said she had sufficiently covered the purchasing process with the departments being audited. As a result, Grievant was assigned the due date of May 1, 2008 to present the narrative. Grievant timely submitted the narrative but it was incomplete. The Audit Manager provided Grievant with comments and told Grievant to "clear the comments" by May 7, 2008. Grievant failed to do so on time. She re-submitted her narrative on May 14, 2008. It remained incomplete. The narrative was not submitted in its entirety until June 6, 2008. The Audit Manager believed that the narrative continued to include errors.

On May 21, 2008, the Audit Director and Audit Manager met with Grievant and presented her with a memorandum stating, in part:

You have spent 139.5 hours on the purchasing audit as of May 20, 2008. This has been your sole assignment since April 22. While deadline and reviewed notes have been furnished to assist your successful performance of this audit, you have failed to take advantage of them. We have stressed to you on numerous occasions meeting a deadline is not just submitting work for review, but means the work is accurate and complete.

The majority of the hours have been spent gathering an understanding of the process you are auditing; however, you have failed to produce any complete and accurate documentation relating to that progress as of May 20, 2008.

This audit is scheduled for 300 hours and almost half of the hours have been used. The pace of the audit needs to pick up. All work submitted for review must be complete and accurate. If you experience problems or

have questions, you are to address them with the [Audit Director] or [Audit Manager] immediately. Your workpapers need to be properly formatted. On numerous occasions I have advised you [that] all workpapers need to be referenced, initialed, and [contain the] actual date of completion.⁴

As of June 9, 2008, Grievant had devoted 288 hours to the purchasing audit, yet she had not completed the planning phase.

On June 11, 2008, the Audit Manager sent Grievant an email stating:

You are being given due dates for steps in the audit process. Please note work must be submitted on time, accurate and complete format. It may be necessary for you to work overtime to ensure you meet the established due dates. You are an exempt employee which means you are required to work until the task/job is complete. Our goal is to have an audit program by June 19, 2008.

Below are the due dates.

Narratives (Previous submitted narratives consisted of inaccuracies and were incomplete). Due date 6/13/08 by 9:30 a.m.

Risk Assessment - Due date 6/17/08 by 9:30 a.m.

Audit Program -- Due date 6/19/08 by 9:30 a.m.

On June 19, 2008, Grievant sent the Audit Manager an email with the following attachment:

Audit Program Draft – Main Objectives

A. Objective: To ensure that adequate internal controls have been implemented to limit exposure to unauthorized or inappropriate transactions (Training/user access assigned/user access/terminated/assignment of access).

B. Objective: To ensure the required documents/supporting documentation is being maintained in files. (Procurement methods – file contents).

C. Objective: To ensure that transactions are processed in accordance with purchasing laws and applicable policies and procedures (Procurement methods/dollar range/processes – bidding/Purchase Orders).⁵

⁴ Agency Exhibit 9.

⁵ Agency Exhibit 12.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”⁶ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

June 9, 2008 Group II Written Notice

Failure to follow a supervisor’s instruction or perform assigned work is Group II offense.⁷ On April 8, 2008, Grievant was instructed by a supervisor to re-read the Audit Manual and document her understanding and present it to her manager. Grievant was repeatedly informed of how to perform this task. Instead of performing it as directed, Grievant disregarded her supervisor’s instructions and submitted a summary of the Audit Manual. Grievant was instructed to conduct the purchasing audit and given 300 hours to complete the task. She was informed that she was taking too long on May 21, 2008. She did not complete the purchasing audit. Grievant failed to follow a supervisor’s instructions thereby justifying the issuance of the June 9, 2008 Group II Written Notice.

June 25, 2008 Group II Written Notice

Grievant was instructed by a supervisor to have a completed audit program by June 19, 2008. The audit program was to include a completion of narratives and risk assessment. Instead of completing the audit program, Grievant submitted three paragraphs of objectives. The difference between what Grievant was expected to produce and what she actually produced on June 19, 2008 is so great that the Hearing Officer must conclude that Grievant failed to follow a supervisor’s instructions thereby justifying the issuance of a Group II Written Notice. Upon the accumulation of two active Group II Written Notices, an employee may be removed under the Standards of Conduct. Accordingly, Grievant’s removal must be upheld.

Grievant contends the time period for her audit should have been extended beyond the 300 hour requirement. This argument has not been proven. Based on the evidence presented it appears that the Agency gave Grievant enough time to complete the purchasing audit but she was unable to complete even significant parts of the audit within the time frame.

Mitigation

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

⁷ See Attachment A, Standards of Conduct, DHRM Policy 1.60.

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....”⁸ 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 actions.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁹ (2) suffered a materially adverse action¹⁰; 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 shows by a preponderance of the evidence that 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.¹¹

Grievant engaged in a protected activity when she contacted the State Waste Fraud and Abuse Hotline to file a complaint about the Audit Manager. Grievant suffered a materially adverse action because she received two Written Notices resulting in her removal from employment. Grievant had not established a connection between her protected activity and the materially adverse action she suffered. The Audit Manager testified she was not aware of Grievant’s Hotline allegations against her until she

⁸ Va. Code § 2.2-3005.

⁹ See Va. Code § 2.2-3004(A)(v) and (vi). 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.

¹⁰ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the “materially adverse” standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

¹¹ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

received a copy of the HR Director's May 19, 2008 memorandum¹² to Grievant responding to Grievant's complaints. Prior to this date, the Audit Manager had notified Grievant of her concerns about Grievant's work performance. Grievant had received a Notice of Improvement Needed/Substandard Performance. Grievant's responsibilities had been changed from the grants audit to the purchasing audit. Grievant's pattern of inadequate job performance had been established prior to the Audit Manager having learned of Grievant's complaint against her. The Audit Manager's behavior does not appear to have abruptly changed upon learning of Grievant's complaints. The Agency appears to have taken disciplinary action against Grievant because it believed Grievant engaged in behavior giving rise to disciplinary action and not as a pretext for retaliation.

Grievant contends her supervisor increased her workload in retaliation for reporting her supervisor's misconduct. The evidence showed, however, that Grievant was removed from the grants audit and given the purchasing audit so that she could focus on her job duties with greater access to the Audit Manager. The 300 hour expectation for the purchasing audit was set at least two years prior to Grievant taking over the audit. Grievant was no longer expected to provide training and assistance to a staff auditor. Grievant's duties do not appear to have been increased by the change of audits.

DECISION

For the reasons stated herein, the Agency's issuance on June 9, 2008 to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance on June 25, 2008 to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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

¹² The HR Director provided the Audit Manager with a copy of the memorandum. This revealed to the Audit Manager that Grievant had filed a complaint about her. Providing the Audit Manager with a copy of the HR Director's memorandum was unnecessary and exposed the Agency to a claim of retaliation. Although the HR Director's action was a poor employment practice, it does not appear that the HR Director intended to retaliate against Grievant by sending a copy of the HR Director's findings to the Audit Manager.

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
600 East Main St. STE 301
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.¹³

[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

¹³ 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: 8979 / 8980-R

Reconsideration Decision Issued: May 15, 2009

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 has not cited any statute, regulation or case law showing that the original Hearing Decision was contrary to law.

Grievant disputes the finding in the original Hearing Decision. She has not presented any newly discovered evidence.

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.

Carl Wilson Schmidt, Esq.
Hearing Officer