

Issues: Group II Written Notice (Other Issue), Group III Written Notice (Other Issue) and Termination (due to accumulation); Hearing Date: 04/29/09; Decision Issued: 05/01/09; Agency: CNU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9057; Outcome: Partial Relief. **Administrative Review**: **AHO Reconsideration Request received 05/19/09; Reconsideration denied – request untimely; Administrative Review: DHRM Ruling Request received 05/19/09; Ruling denied – request untimely.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9057**

Hearing Date: April 29, 2009  
Decision Issued: May 1, 2009

**PROCEDURAL HISTORY**

On January 21, 2009, Grievant was issued a Group II Written Notice of disciplinary action with removal for lack of time sheet approvals. On January 21, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for approving additional expenditures under a contract that had expired and failing to properly document a contract awarded for temporary services for the Dining Services division.

On January 23, 2009, 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 March 27, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 29, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
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:

Christopher Newport University employed Grievant as an Assistant Director in one of its Divisions until her removal effective January 21, 2009. The purpose of her position was:

Independently coordinate and formulate contracts for a variety of highly specialized and complex services in compliance with regulatory and statutory requirements. Develop specifications and solicitations for specialized and technical goods and services. Communicates with University Vice-Presidents, and other high-level administrators, faculty, and staff members to determine technical specifications and appropriate contractual terms and conditions needed to procure services and provide legal protection to the University and the Commonwealth. Remains knowledgeable on current laws, policies, and procedures; advises University staff as appropriate. Serve as assistant to the Director of Material Management, supervising the operation of the Office of

Procurement Services in the Director's absence. Directly supervise the Purchasing staff.<sup>1</sup>

One of Grievant's Measures of Core Responsibilities included:

Ensures all procurements are processed in accordance with State and University policy and procedures.<sup>2</sup>

Grievant obtained certification as a Virginia Contracting Officer. She was aware of her obligation under State procurement policy to maintain necessary documentation to justify and defend procurements.

Grievant had prior active disciplinary action. On June 13, 2008, Grievant received a Group II Written Notice for failure to follow a supervisor's instructions.

Initially, the Agency had a document based leave requesting process. Grievant was responsible for approving the leave requests of her subordinates and for forwarding the necessary documents to the business office so that accurate employee leave records could be kept. When the Agency changed its leave process from a document based system to an electronic leave system, the Director removed Grievant's responsibility for approving subordinate leave records. It is not clear that the Director informed her that she would no longer have responsibility for leave record approval. Grievant went to the Human Resource office and questioned whether she was supposed to continue approving leave. The electronic forms began being sent to Grievant, but Grievant did not realize she was supposed to approve the leave. She had not been informed by the Director that she was to begin approving electronic leave requests. Grievant began receiving emails from her subordinates. Grievant did not believe she was supposed to approve the emails, she believed they were sending her copies of their requests to keep her informed. As a result, the leave of Grievant's subordinates was not approved and sent to the business office for a nine month period. This resulted in the subordinates believing they had larger leave balances than they had actually accumulated.

The Agency entered into a contract for food services in 1999. The contract expired in 2006 without opportunity for renewal. In 2008, the vendor sent invoices for food services ordered by Agency employees. Grievant had given her password to the Agency's computer database to a subordinate, Ms. C.<sup>3</sup> Ms. C logged on to the computer database under Grievant's name and authorized payments to the vendor of approximately seventy thousand and nine thousand dollars. Although the computer

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<sup>1</sup> Hearing Officer Exhibit 2.

<sup>2</sup> Hearing Officer Exhibit 2.

<sup>3</sup> The Agency did not take disciplinary action against Grievant for disclosing her password to another employee.

database suggested Grievant had approved the transactions, Ms. C had approved them. Grievant was not aware of the transactions.

In 2008, Grievant was responsible for procurement regarding Temporary Services 44. She was to make sure that all documents relating to the procurement were placed in a permanent file to serve as justification for the procurement. An audit revealed that Grievant's file was missing numerous significant documents. These included a: VBO Notice, Newspaper Advertisement, Solicitation Justification, Committee Rankings, Pre-Bid Opening Registers, Intent to Award, Award Notice Posting, and Contract Administrator Designation.

## **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."<sup>11</sup> 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."

### Group II Written Notice

The Agency contends Grievant should receive a Group II Written Notice for failing to timely approve the leave requests of her subordinates. Because leave requests were not approved for nine months, those subordinates believed they had more available leave than they actually had. One employee had to cancel a scheduled vacation and reimburse the Agency for excessive leave taken. The disciplinary action against Grievant must be reversed. It is clear that Grievant learned that the leave approval responsibility was taken away from her. It is not clear that Grievant knew or should have known that she was responsible for approving the leave of her subordinates after that responsibility was taken away from her. Grievant began receiving emails from her subordinates regarding leave but Grievant believed she was being copied on those leave requests. When the Director sent an email to Grievant and the other employees in the division, the Director would instruct the employees to submit their leave documentation. Grievant believed the Director was asking those other employees to submit their leave forms directly to the Director and not to Grievant. Grievant's perception was reasonable. Based on the evidence presented, the Agency has not met its burden of proof to show that Grievant engaged in inappropriate behavior. The matter appears to be a miscommunication among staff at the Agency.

### Group III Written Notice

The Agency contends Grievant should receive a Group III Written Notice for failing to place documents in permanent files regarding procurements. The Agency argues that Grievant's failure to properly file documents could have exposed the Agency

to heightened scrutiny and legal liability. The evidence in this case, does not support the conclusion that the failure to take documents from a working file and place them into a permanent file is sufficient to elevate the disciplinary action to a Group III offense. The Agency has not demonstrated that Grievant's actions were of the type that could severely impact Agency operations.

Failure to follow established written policy is a Group II offense. Under the regulations governing procurement transactions, Grievant was obligated to comply with Sections 3.8 and 10.3. Section 3.8 provides:

Documentation of Files. A complete file should be maintained in one place for each purchase transaction, containing all the information necessary to understand the why, who, what, when, where and how of the transaction. (see 10.3).

Section 10.3 states:

A complete file should be maintained in one place for each purchase transaction, containing all the information necessary to understand the why, who, what, when, where, and how of the transaction. Generally, records are open to the public in accordance with the Virginia Freedom of Information Act and should be made available for review after the award was made. See guidance for record review and exemptions in 3.17. A record must be established for a procurement transaction which has reached the solicitation stage. It must contain as a minimum, as applicable, the description of requirement, sources solicited, a copy of the Virginia Business Opportunities (VBO) receipt, cancellation notices, the method of evaluation and award, a signed copy of the contract, and favorable or critical feedback to the contractor and buyer. All continuous or term contracts shall be assigned an administrator, modifications or change orders, vendor complaint forms, cure letters, usage data such as release orders or obligation registers, and any other actions relating to the procurement.<sup>4</sup>

Grievant was responsible for maintaining files regarding certain procurements. She failed to maintain in those files all of the documents required by State procurement policy. Grievant was a certified procurement officer and knew of her responsibilities to maintain appropriate files. Accordingly, Grievant failed to comply with the written policy governing procurement files. The Agency has presented sufficient evidence to uphold the issuance of a Group II Written Notice.

Grievant denies all of the documents claimed by the Agency to be missing were actually missing from the file. She admits, however, that the Solicitation Justification and the Award Notice Posting were missing. A Solicitation Justification explains why the

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<sup>4</sup> Hearing Officer Exhibit 4.

Agency is justified in using competitive negotiation instead of competitive bidding. The Aware Notice Posting informs the University and Vendor community that services were awarded to a particular vendor. If the Hearing Officer assumes for the sake of argument that only those two documents were missing, the outcome of this case remains the same. Those two documents are sufficiently significant to the Agency's operations such their omission from the file justifies disciplinary action.

### Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an employee may be removed from the Agency. In this case, Grievant had a prior active Group II Written Notice. With the Group II Written Notice arising as the result of this disciplinary action, Grievant has accumulated two Group II Written Notices and, thus, Grievant's removal must be upheld.

### Mitigation

*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>5</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.

Grievant argues that her subordinates also made procurement mistakes that were discovered in an internal audit of the Division. Because those employees were not disciplined, Grievant contends the Agency inconsistently disciplined its employees. The evidence showed that Grievant's subordinates who made mistakes were given verbal counseling and not disciplinary action. This does not form a basis for the Hearing Officer to conclude that the Agency inconsistently disciplined its employees. Grievant's position was that of Assistant Director. Her responsibilities and expected breadth of knowledge exceeded those of her subordinates. Accordingly, it was appropriate for the Agency to hold Grievant to higher standard. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

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<sup>5</sup> *Va. Code § 2.2-3005.*

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action regarding approval of leave is **rescinded**. The Group III Written Notice is **reduced** to a Group II Written Notice for failure to establish policy. 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 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

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.<sup>6</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>6</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: 9057-R**

Reconsideration Decision Issued: May 20, 2009

**RECONSIDERATION DECISION**

The Original Hearing Decision in this grievance was dated May 1, 2009. The decision stated:

You may file an administrative review request within 15 calendar days from the date the decision was issued

The Original Hearing Decision further states that:

Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued.

Grievant's request for reconsideration was received by the Hearing Officer on May 19, 2009.<sup>7</sup> This time period exceeds 15 calendar days. Grievant's request is untimely. The Hearing Officer lacks authority to extend the time period for appeal established by the Grievance Procedure Manual. Accordingly, Grievant's request for reconsideration is **denied** as untimely.

**APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

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<sup>7</sup> The request was dated May 15, 2009 and mailed on May 18, 2009.

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

May 27, 2009

RE: **Grievance of Grievant v. Christopher Newport University**  
**Case No. 9057**

Dear Grievant:

The agency head of the Department of Human Resource Management has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

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.

In each instance where a request is made to a reviewer for an administrative review, the request must be in writing and received by the reviewer within 15 calendar days of the date the decision was issued. The evidence supports that the decision was issued on May 1, 2009. Your request was received by this Agency on May 19, 2009. This period exceeds the 15 day calendar days. We have no authority to extend the time period for an appeal established by the grievance procedure. Therefore, we must respectfully decline to honor your request to conduct the review because the request is untimely.

Sincerely,

Assistant Director  
Office of Equal Employment Services