

Issues: Two Group II Written Notices (unsatisfactory performance and failure to follow policy) and Termination (due to accumulation); Hearing Date: 08/26/09; Decision Issued: 09/09/09; Agency: DVS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9159, 9160; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 09/21/09; Reconsideration Decision issued 11/02/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 09/21/09; EDR Ruling #2010-2442 issued 12/16/09; Outcome: Remanded to AHO; Remand Decision issued 01/04/10; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9159 / 9160

Hearing Date: August 26, 2009
Decision Issued: September 9, 2009

PROCEDURAL HISTORY

On April 29, 2009, Grievant was issued a Group II Written Notice with a ten-day suspension for unsatisfactory performance and failure to follow instructions and/or policy. On May 14, 2009, Grievant was issued a Group II Written Notice with removal for unsatisfactory performance and failure to follow instructions and/or policy.

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 a hearing. On July 17, 2009, the EDR Director issued Ruling 2010-2369 consolidating the two grievances for hearing. On August 5, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 26, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Veterans Services employed Grievant as a Purchasing Specialist at one of its Facilities.¹ The purpose of her position was:

This position will be responsible for procuring equipment, supplies, and services needed for the on-going purchasing needs of the center.²

Grievant's measures of core responsibilities included:

Researches and purchases goods and services in accordance with requested need and within the state's regulations, policies, and procedures. Provides the goods and services that meet the requestor's specifications and timeframes. Assists requestor's with their descriptions/requests of goods and services, provide them with purchasing options and solutions, and give them the necessary resources to make informed purchasing decisions.

¹ The Agency's staff at the Facility provide continuous care for their residents.

² Agency Exhibit 9.

Maintains orderly and accurate records to keep track of purchases, to ensure goods and services are provided as requested, and to respond to inquiries.

Uses assigned credit card to make all purchases possible within established guidelines.

Provides appropriate documentation to support all purchases especially those which are exceptions.³

On November 10, 2008, Grievant received a Notice of Improvement Needed/Substandard Performance setting forth performance deficiencies and an improvement plan, in part:

[Grievant] has not performed some of her EWP duties effectively, to include providing goods and services within the requestor's timelines and assisting requestors with their purchasing options and solutions.

[Grievant] will take ownership of ensuring goods and services arrive in a timely manner to meet the needs of our residents, while still complying with purchasing law, to include verbally communicating with the Administrator where crucial orders are awaiting her approval. She will take the initiative with the Administrator where critical orders are awaiting her approval. She will take the initiative to educate department managers on their options and the purchasing law. She will respond to all inquiries within 24 hours, and sooner where the inquiry impacts resident care. She will perform all duties of her EWP effectively and efficiently. If a significant improvement in these areas does not occur within 30 days, there will be disciplinary action.⁴

Grievant had prior active disciplinary action. On December 2, 2008, Grievant received a Group I Written Notice for failing to timely order and receive Gerichairs. Grievant failed to take the initiative to determine order status and communicate that status to appropriate staff. Grievant also failed to timely submit credit card reconciliations, logs and supporting documentation. Her September log was due October 24 but not received until October 28.

On January 6, 2009, Grievant received a Notice of Improvement Needed/Substandard Performance stating, in part:

Even after a Notice of Improvement dated 11/13/08 and a Written Notice dated 12/2/08, [Grievant] has not performed some of her EWP duties effectively, to include providing goods and services within the requestor's timelines and assisting requestors with their purchasing options and solutions. ***

³ Agency Exhibit 9.

⁴ Agency Exhibit 2.

[Grievant] will take ownership of ensuring goods and services arrive in a timely manner to meet the needs of our residents, while still complying with purchasing law, to include communicating with all affected parties.

She will take the initiative to educate department managers on their options and the purchasing law.

She will respond to all inquiries within 24 hours, and sooner where the inquiry impacts resident care.

She will perform all duties in her EWP effectively and efficiently. If a significant improvement in these areas does not occur within 30 days, there will be a second Written Notice.⁵

On January 22, 2009, Grievant received a Notice of Improvement Needed/Substandard Performance stating, in part:

Even after a Notice of Improvement dated 11/10/08, a Written Notice dated 12/2/08, and another Notice of Improvement dated 1/6/09, [Grievant] has still not performed some of her EWP duties effectively, to include providing goods and services within the requestors' timelines and assisting requestors with their purchasing options and solutions. ***

5) Accounts payable documentation. The [credit card] from last month still does not have [employee's name] signature on it. The deadlines for [credit card] are clearly published and were also one of the things in her written warning. She can not say that the administrative assistant has not gotten it back to her. It is [Grievant's] responsibility alone to get [employee's name] to sign it in a timely manner. [Employee's name] planned absences are noted in advance. We have al told her numerous times since September both verbally and in writing to verbally ask [employee's name] for what she needs and it is still a recurring problem even after a written warning. I expect all [credit card] deadlines to be met with 100% compliance. There are also some Pos that are outstanding that accounts payable must have in order to meet prompt pay deadlines, which is a regular occurrence. Once the blanket Pos run out it is [Grievant's] responsibility to generate a new one upon request. ***

Clearly she is not working [on] pending files that were set up for her based on the above. We discussed her maintaining the pending files to include filing pending items and following up on their status. Nothing should be in the pending files for more than the time it takes for an order to arrive. If there is a PR and the items were ordered timely, then she should have a PO and be getting a receiving document timely. If not, it is [Grievant's] responsibility to follow up with the vendor and the ordering employee to correct the problem in a timely manner. If the pending files were being

⁵ Agency Exhibit 4.

worked on, the above problems would not have occurred. Not only that, but we are at a significant risk as a facility if pending items are not consistently being followed up on. ***

[Grievant] will take ownership of ensuring goods and services arrive in a timely manner to meet the needs of our residents, while still complying with purchasing law, to include communicating with all affected parties.

She will take the initiative to educate department managers on their options and the purchasing law.

She will respond to all inquiries within 24 hours, and sooner where the inquiry impacts resident care.

She will perform all duties in her EWP effectively and efficiently. If a significant improvement in these areas does not occur within 30 days, there will be a second Written Notice.⁶

In January 2009, Grievant was shown by the Supervisor how to set up pending files so that pending orders could be tracked. The Agency had a part time employee who was proficient in filing systems and monitoring pending files to mentor Grievant regarding pending files.

Grievant completed the requirements to be certified as a Virginia Contracting Associate on March 12, 2009.

In the first part of March 2009, the Environmental Services Director asked Grievant to purchase bibs for residents at the Facility.⁷ On April 27, 2009, the Environmental Services Director noticed that bibs that she has requested Grievant to purchase had been requested in mid-March but had not yet arrived. The Agency opened the eVA computer system and observed that the bibs were not ordered by Grievant until April 24, 2009. Bibs are items that the Facility routinely requires replacement.

Grievant was obligated to show that all purchases made on her credit card were supported by invoices or other appropriate documentation. Grievant was to submit a credit card log reconciliation showing the items purchased along with the supporting records. One due date for submitting the reconciliation log was April 24, 2009.⁸ She submitted the log on April 30, 2009. It was incomplete and missing invoices for a least four purchases. For the seven monthly reconciliations beginning in October 2008, four of the seven were submitted late and all had missing documentation.

⁶ Agency Exhibit 5.

⁷ The bibs usually arrive about two weeks after they are ordered.

⁸ The due date is established under the Virginia Department of Accounts procedures.

A review of the contents of Grievant's desk on April 27, 2009 showed several hundred pages of order filings that had not been organized into pending files. Several of the purchase order forms were dated from weeks to months earlier. By failing to place these documents in an appropriate pending order filing system, Grievant could not track easily the status of the orders.

Grievant was given a unique logon identification and password to access the Agency's computer system and the internet. The Agency reviewed Grievant's computer activity from March 31, 2009 through April 29, 2009. The majority of her internet usage was of a personal nature. As of April 28, 2009, there was over 1500 temporary internet files. Very few of those files were work related.

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."⁹ 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."

Failure to follow a supervisor's instructions is a Group II offense. Grievant was instructed by a supervisor to monitor the need for items needing replacement and timely order them. Grievant failed to timely order bibs needed for the Facility. Grievant was instructed by a supervisor to timely submit credit card logs. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an Agency may suspend an employee for up to ten workdays. Accordingly, Grievant's ten workday suspension must be upheld.

DHRM Policy 1.75 governs use of the Internet and Electronic Communication Systems provides:

Agency-provided computer systems that allow access to the Internet and electronic communication systems are the property of the Commonwealth and are provided to facilitate the effective and efficient conduct of State business. Users are permitted access to the Internet and electronic communication systems to assist in the performance of their jobs. Each agency or institution of the Commonwealth may adopt its own policy setting forth with specificity the work-related purposes for which such equipment and access are provided.

Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's Internet access or

⁹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

electronic communication systems is permitted; however, personal use is prohibited if it:

- interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
- adversely affects the efficient operation of the computer system;
- violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law or guideline as set forth by local, State or Federal law. (See Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001.)

NOTE: Users employing the Commonwealth's Internet or electronic communication systems for personal use must present their communications in such a way as to be clear that the communication is personal and is not a communication of the agency or the Commonwealth.

Grievant's personal use of the internet was neither incidental nor occasional. The Agency presented several hundred pages containing over a thousand temporary files reflecting Grievant's use of her computer. Files relating to her personal use represented the vast majority of temporary files on her computer. The Agency's assertion that Grievant's use of the internet affected her work productivity is supported by the evidence. Grievant's inability to perform her job related to her inattentiveness. By devoting time to personal use of the internet, Grievant was distracted from her work duties. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for violation of DHRM Policy 1.75. Upon the accumulation of two active Group II Written Notices, an Agency may remove an employee under the Standards of Conduct. Given that Grievant has accumulated two active Group II Written Notices, her removal must be upheld.

Grievant presented evidence that every time she accessed a website it may have contained more than one image and, thus, the number of temporary files collected by the Agency overstates her actual use of the internet. To the extent this occurred, however, those images would have the same time record of being accessed. If the Hearing Officer assumes that temporary images with the same date and time should be treated as one instance of personal use, there remain a sufficient number of instances of personal use to show that Grievant's use was much more than occasional and incidental.

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

¹⁰ *Va. Code § 2.2-3005.*

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.

The Supervisor testified that she did not object to Grievant listening to music from her computer. The Supervisor did not realize that "bandwidth issues" could arise from listening to music. It appears that Grievant regularly accessed YouTube videos. It is not clear that the Supervisor knew Grievant was playing YouTube videos and listening to the music from those videos as opposed to simply listening to an internet radio station without video content. No evidence was presented showing that the Supervisor authorized Grievant to watch YouTube videos or even listen to online music without videos. To the extent the Supervisor was at fault, she was at fault for not informing Grievant that she was violating State policy and that Grievant should discontinue her behavior. These factors are not mitigating circumstances that would make the Agency's punishment exceed the limits of reasonableness. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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
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.¹¹

[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

¹¹ 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: 9159 / 9160-R

Reconsideration Decision Issued: November 2, 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 disputes several findings of fact by the Hearing Officer. The findings of fact are made after assessing credibility. Grievant has not presented any information or arguments regarding those facts that she did not present or could have presented during the hearing. Grievant has not presented any incorrect legal conclusions or new evidence. There is no basis to reconsider the original hearing decision. 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

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In re:

Case No: 9159 / 9160-R2

Reconsideration Decision Issued: January 4, 2010

SECOND RECONSIDERATION DECISION

EDR Ruling 2010-2442 states:

The grievant argues that the hearing officer's finding that "[n]o evidence was presented showing that [the] Supervisor authorized Grievant to watch YouTube videos or even listen to online music without videos" was in error because at hearing the Supervisor gave testimony to the contrary. During her testimony and upon cross-examination, the Supervisor admitted that she knew that the grievant utilized YouTube to listen to online music during work hours and that she did not correct such behavior because she did not view the grievant listening to online music as "detracting from productivity." Thus, it is unclear how the hearing officer reached his conclusion that "[n]o evidence was presented showing that the Supervisor authorized Grievant to watch YouTube videos or even listen to online music without videos."

Moreover, if the Supervisor were aware of the grievant's use of the computer to listen to music and did not object to such use, the question arises as to whether the grievant had adequate notice of the applicable rule as to internet usage. According to the *Rules for Conducting Grievance Hearings*, one example of a potentially mitigating circumstance is an employee's lack of notice of a rule, the agency's interpretation of a rule, and/or the possible consequences of failing to follow a rule. The hearing officer may also consider the particular circumstances present in a specific case in determining whether the discipline exceeds the bounds of reasonableness. Accordingly, this decision is remanded for further consideration and/or clarification consistent with this decision.¹²

¹² Footnotes are omitted.

The Supervisor did not admit that she knew Grievant was accessing YouTube videos to listen to music prior to the taking of disciplinary action. At the time of the hearing, the Supervisor knew Grievant had been listening to YouTube videos because the Agency had accessed Grievant's computer and determined her computer usage. The evidence showed that, prior to the disciplinary action, the Supervisor knew Grievant was listening to music online but she did not know Grievant was accessing YouTube to listen to that music. The amount of bandwidth consumed from video files is different from the amount of bandwidth consumed listening to online music without video. Although the Supervisor knew Grievant was listening to music, merely knowing this information does not constitute permission to listen to music online. Grievant did not seek permission from the Supervisor or anyone else to listen to YouTube videos online; she simply began doing so.

Grievant had adequate notice of the Agency's internet usage policies. DHRM Policy 1.75 is available on the DHRM website and accessible by all employees. On September 10, 2008, Grievant signed an Information Security Agreement authorizing her to access the Agency's information systems to perform authorized job functions. Grievant knew or should have known that her usage of the Agency's computer system was contrary to the Agency's rule for internet usage.

There is no basis to mitigate the disciplinary action against Grievant.

APPEAL RIGHTS

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

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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