

Issues: Group II Written Notice (failure to follow instructions), Hostile Work Environment, Arbitrary/Capricious Performance Evaluation; Hearing Date: 05/03/10; Decision Issued: 05/07/10; Agency: DCE; AHO: Carl Wilson Schmidt, Esq.; Case No. 9277; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9277**

Hearing Date: May 3, 2010  
Decision Issued: May 7, 2010

**PROCEDURAL HISTORY**

On December 2, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow supervisory instructions and satisfactorily perform assigned work in a timely manner.

On December 30, 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 February 22, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the timeframe for conducting this grievance because of a medical emergency relating to a party. On May 3, 2010, 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?
5. Whether the Agency created a hostile work environment for Grievant?
6. Whether Grievant's annual evaluation was arbitrary or capricious?

### **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. Grievant has the burden of proving that the Agency created a hostile work environment and that the Agency's evaluation of her was arbitrary or capricious. 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 Correctional Education employed Grievant as the Director of Curriculum & Instructions/English & Social Studies. The purpose of her position was:

To develop, implement, and supervise academic curriculum for youth schools. To manage programs and projects to support and enhance the implementation of these curriculum. To serve as an instructional leader by directing the implementation of this curriculum through instructional staff development activities, as well as technical assistance and direction with regard to educational program content. To procure instructional materials and textbooks of high quality for teacher and student use.<sup>1</sup>

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<sup>1</sup> Agency Exhibit 3.

Grievant initially reported to Mr. L, the Deputy Superintendent for Academic Programs. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Benchmark assessments are subject tests given to students as part of a system for monitoring student progress at regular, logical intervals. The tests are given every 4.5 weeks with an objective of helping prepare students to take and pass the Standards of Learning exam required of all students in the Commonwealth. Students are given a total of eight benchmark assessments during each school year. The Agency was responsible for obtaining benchmark assessments for each of the eight 4.5 week periods except that the seventh test was provided by the Virginia Department of Education.

In 2006, the Agency considered having Grievant draft benchmark assessments. Instead, it decided to obtain the benchmark assessments from a private vendor. In 2008, the Agency decided to have its professional staff develop benchmark assessments for its students.

In 2008, the Deputy Superintendent, Mr. L, inform staff including Grievant that the Agency would produce its own benchmark tests. The Deputy Superintendent asked Grievant to do benchmark tests for the subjects of English and Social Studies. The benchmarks were to be completed in March 2009.

Grievant was not obligated to draft original questions without assistance. She was able to rely on several sources of information. There were many examples of appropriate questions which Grievant could use to develop questions for each benchmark test. For example, student textbooks had questions at the end of each chapter, prior SOL tests were released by the Virginia Department of Education, other local school systems had developed benchmark questions, and questions from private companies were available to Grievant . Grievant had a computer with Internet access in her office and had access to many sources to assist her in developing questions.

In March 2009, the Deputy Superintendent concluded that adequate progress had been made on completing the benchmark assessments. He met with Grievant on March 9, 2009 to discuss the benchmarks for English and Social Studies. Later in March 2009, the Deputy Superintendent instructed Grievant to begin working on the benchmark assessments and not to perform any other projects until April 30, 2009. By April 20, 2009, Grievant had not produced any acceptable test questions.

On April 20, 2009, the Deputy Superintendent sent Grievant a letter stating:

As you may recall on March 9, 2009, we discussed you having the responsibility of developing the benchmark assessments for English and Social Studies. Later during the month of March, we asked that you begin the work and not to participate in any other projects until April 30, 2009, devoting all of your time to benchmark development. I also asked that you

research past benchmarks administered here, release test questions from the State of Virginia and other Internet sources to come up with a draft of questions that we can use. After this process, we are having a team of teachers, led by an Assistant Principal, to review the questions and to produce a final product by June 15, 2009. As of Friday, April 17, you were not able to show acceptable progress on this subject. I have asked [Ms. N] and [Mr. T] to meet with you and to try to refocus the department efforts on the project. [Mr. T] and the [Ms. N] have worked two hours on the project this morning and made substantial progress.

I am requesting that you inform us if you are unable to move forward with this project. It is essential that we stay within our deadlines. We will check your progress again on Friday, April 24, 2009.<sup>2</sup>

Grievant had not produced acceptable benchmark assessments by April 24, 2009. The Deputy Superintendent advised Grievant that she was to have the benchmark assessments completed by June 15, 2009 because the Agency wished to present the final benchmarks to the school principals before the beginning of the school year in September. The Agency wanted teachers and principals to review the questions and provide feedback.

On May 11, 2009, Grievant was on leave from the Agency due to illness. She returned to work on July 5, 2009.<sup>3</sup> When Grievant returned, Grievant's duties with respect to developing benchmark assessments for English were removed. Grievant was to focus solely on developing benchmark assessments for Social Studies.<sup>4</sup>

On August 6, 2009, Grievant no longer reported to the Deputy Superintendent. Instead, she began reporting to Ms. N, the Supervisor. Grievant was given August 26, 2009 as the new date for completion of benchmark assessments for Social Studies. Grievant did not produce acceptable benchmark assessments for Social Studies by August 26, 2009. The Supervisor instructed Grievant to complete benchmark assessments by September 24, 2009. Grievant did not complete benchmark assessments acceptable to the Agency by September 24, 2009.

On September 18, 2009, Grievant received a Notice of Improvement Needed/Substandard Performance regarding her work duties. Included with the Notice was a Performance Improvement Plan.

On October 6, 2009, Grievant received an annual evaluation with an overall rating of "Below Contributor". For the Core Responsibility of "Curriculum &

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<sup>2</sup> Agency Exhibit 8.

<sup>3</sup> The Agency did not consider Grievant to be at fault for failing to meet the June 15, 2009 deadline.

<sup>4</sup> Grievant was also to make one school visit.

Instructions/Core Content Specialist - English & Social Studies" Grievant received a rating of Below Contributor. Grievant's Supervisor at the time, Ms. S, wrote:

[Grievant] does not demonstrate the ability to plan, organize and complete assigned projects in the shortest, most efficient manner. For example, she was assigned the task of developing benchmark assessments for English and social studies in September 2008 for the 2009\2010 school year. In February, due to a lack of progress, she was relieved of all of the duties and asked to focus on completing the project by May 2009. As of October 1, 2009, less than 30% of the assessments were completed.

For the Core Responsibility of "Records Management", Grievant received a rating of Below Contributor. The Supervisor wrote:

[Grievant] has not demonstrated the ability to maintain an accurate inventory of all English and social studies curriculum materials and supplemental materials in the youth schools. During the closing of [High School], she was not able to assist with the process by identifying the materials that needed to be reallocated to other youth schools.

For the Core Responsibility of "Technical Assistance", Grievant received a rating of Below Contributor. The Supervisor wrote:

[Grievant] has not demonstrated the ability to clearly pinpoint areas of needed improvement and provide the English and social studies teachers with the technical assistance to enhance their instructional performance to improve student achievement.<sup>5</sup>

The Agency did not conduct a reevaluation of Grievant's work performance during the subsequent 90 day period because Grievant transferred to another position within the Agency.

## 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>6</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."

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<sup>5</sup> Agency Exhibit 3.

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

Failure to follow a supervisor's instructions is a Group II offense.<sup>7</sup> The Deputy Superintendent, a supervisor, instructed Grievant to complete benchmark assessments for English and Social Studies by March 2009. When she was unable to accomplish that task, the Deputy Superintendent extended the deadline to the end of April 2009. In July 2009, the Agency removed Grievant's responsibility for creating benchmark assessments in English in order to assist her in completing her assignment with respect to Social Studies. Grievant began reporting to the Supervisor and was instructed by the Supervisor to complete benchmark assessments by August 26, 2009. Grievant failed to meet that deadline. Grievant was instructed to complete the benchmark assessments by September 24, 2009. Grievant failed to meet that deadline. The evidence is overwhelming that Grievant was instructed by two supervisors to complete benchmark assessments and that she failed to comply with those instructions. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action.

Grievant argued that the Agency's managers instructed other employees not to speak with Grievant or provide her with assistance. If the Hearing Officer assumes for the sake of argument that Grievant's assertion is true, the outcome of this case is not changed. Grievant's assignment did not require the assistance of other employees to complete. It was largely a self-directed assignment. Grievant was capable of locating the necessary resources and drafting the appropriate questions on her own.

*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>8</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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant contends that the Agency created a hostile work environment for her. Workplace harassment is defined under DHRM Policy 2.30<sup>9</sup> as:

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<sup>7</sup> See, Attachment A, DHRM Policy 1.60.

<sup>8</sup> *Va. Code § 2.2-3005.*

<sup>9</sup> This policy was subsequently amended in February 2010. Only the policy in force at the time of Grievant's allegations governs the outcome of this case.

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

Grievant has not presented any evidence showing that the Agency took action against her because of a protected status such as on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. Grievant alleged that Agency managers were frequently critical of her work and constantly questioning when she would have work assignments completed. Although the questioning by managers was beyond Grievant's personal tolerance level<sup>10</sup>, nothing in the evidence presented showed that the behavior of Agency managers was inappropriate or excessive when measured by a "reasonable person" working in State government.<sup>11</sup>

State agencies may not conduct arbitrary or capricious performance evaluations of their employees. Arbitrary or capricious is defined as "[i]n disregard of the facts or without a reasoned basis." GPM § 9. If a Hearing Officer concludes an evaluation is arbitrary or capricious, the Hearing Officer's authority is limited to ordering the agency to re-evaluate the employee. GPM § 5.9(a)(5). The question is not whether the Hearing Officer agrees with the evaluation, but rather whether the evaluator can present sufficient facts upon which to form an opinion regarding the employee's job performance.

Grievant argued that her October 2009 annual evaluation was arbitrary and capricious and should be redone. She presented little evidence to support this assertion. The Supervisor testified regarding the facts upon which she based the evaluation. In essence, the Supervisor restated what she had written in the comment section of the evaluation. The Agency presented Grievant with a Notice of Improvement Needed/Substandard Performance prior to the annual evaluation as required by State policy. Based on the evidence presented, it does not appear that the Agency disregarded any material facts or misinterpreted any material facts. Grievant has not presented sufficient facts to show that the Agency's opinion regarding her work performance was arbitrary or capricious or otherwise contrary to State policy.

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<sup>10</sup> Grievant experienced an elevated stress level that forced her to be absent from work for several weeks.

<sup>11</sup> Managers are expected to monitor employee performance. When an employee is not performing well, it is not unusual for a manager to devote more attention to that employee. Grievant was performing poorly and it resulted in additional monitoring by managers. The monitoring by Agency managers was not so excessive as to create a mitigating circumstance.



Grievant initially sought as part of her grievance to be returned to her former position. During the hearing, Grievant withdrew her request to be reinstated to her former position.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's requests for relief are **denied**.

## 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>12</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>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.