

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 05/06/10;  
Decision Issued: 05/17/10; Agency: Library of Virginia; AHO: Carl Wilson Schmidt,  
Esq.; Case No. 9311; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9311**

Hearing Date: May 6, 2010  
Decision Issued: May 17, 2010

**PROCEDURAL HISTORY**

On February 11, 2010, Grievant was issued a Group II Written Notice of disciplinary action for antagonistic behavior towards others, failure to follow directions, and insubordination to superiors.

On March 1, 2010, 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 he requested a hearing. On April 12, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 6, 2010, 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?

### **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 Library of Virginia employs Grievant as a Records Center Supervisor. He has been employed by the Agency since 2001. The purpose of this position is:

Lead records center personnel in their daily work ensuring proper processing and workflow are in use in the State Records Center to ensure efficient operations. Oversee daily building operations at the State Records Center. Promote the use of the State Records Center by state agencies and localities throughout the Commonwealth by on-site and off-site educational workshops.<sup>1</sup>

No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant worked at the Records Center which is a facility located away from the Agency's Central Office. He had six employees reporting to him with one of the employees scheduled to retire at the end of January 2010.

The Agency purchased database software called "Total Recall". It had been unable to implement the software and was continuing to use a database called "GAIN."

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<sup>1</sup> Agency Exhibit 7.

In November 2009, Agency managers decided it was time to implement the new software. The Agency Head scheduled a meeting to be held on December 9, 2009 to discuss the project.

On December 9, 2009, the Total Recall project meeting was held at the Records Center where Grievant worked. During the meeting, the Agency Head and managers indicated that the Agency Total Recall project was a top priority of the Agency and that employees should set aside blame for failing to implement the project on a timely basis. Grievant and his assistant, Ms. G, attended the meeting. The Agency Head indicated that no one person was being blamed for the failure to implement the software and that the Agency would not tolerate infighting and disrespectful behavior as the Agency moved forward with the project. Mr. M, Director of Collection Management, was placed in charge of the project. Grievant began reporting to Mr. M. Mr. M worked at the Central Office.

After the December 9, 2009 meeting, Ms. G, Grievant's Assistant, sent a document to the Agency Head expressing her thoughts about the problems and solutions regarding the TR project. Mr. M asked Ms. G why she did not share her thoughts during the December 9, 2009 meeting with the Agency Head and Ms. G replied that Grievant had told her not to share the document or discuss her thoughts during the meeting.<sup>2</sup>

On December 14, 2009, Grievant attended a meeting at the Central Office with the Agency Head and Mr. M. During the meeting, Grievant was informed of the need for cooperation among staff working on the Total Recall implementation project.

On December 15, 2009, Grievant and Ms. G attended a meeting at the Records Center with Mr. M. Mr. M told them that Ms. W, who worked in the Information Technology division, would take the lead for the installation of the software and that she would be the primary liaison with the software Vendor.

On January 8, 2010, Grievant met with Mr. M to discuss implementation of the database software and Ms. G's pending retirement. The Agency's computer server had failed over the Christmas Holiday time period and into the first week of January 2010. Mr. M assured Grievant that the computer failure was a catastrophic event and not an intentional ploy by staff of the Information Technology division to sabotage the project. Mr. M discussed with Grievant the need to involve the Technician, Mr. B. Mr. M wanted to involve the Technician because Ms. G would be retiring soon.

On January 12, 2010, Mr. M met with Grievant and other staff at the Records Center. Mr. M informed the group that the Technician would take Ms. G's place.

On Friday, January 22, 2010 at 1:10 p.m., Ms. W sent Grievant and Ms. G an email stating:

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<sup>2</sup> Ms. G later denied making the statement to Mr. M.

I spoke with [K] from [software vendor] today. Please call him on Monday after 9:30 so he can go through the box entry process with you to see exactly where the problems are occurring. Then we can figure out what needs to be changed.

Ms. W sent a copy of the email to Mr. C<sup>3</sup> and Mr. M.<sup>4</sup>

On Monday, January 25, 2010 at 8:29 a.m., Grievant sent an email to Ms. W., Ms. G., and K stating:

We are in the final few hours of [Ms. G's] employment here and we are closing out our monthly totals while she watches over [the Technician] and I; and while [another employee] observes. We will not be making any phone calls today to discuss Total Recall. We have said this numerous times before, we will not deal with the new software issues while we are closing out our month of business. I will contact [K] once we have completed our month end close out to discuss a time for this phone call.

Grievant sent a copy of the email to Mr. C and Mr. M.

Mr. M asked Grievant and several other managers to prepare an analysis of Strengths, Weaknesses, Opportunities, and Threats. Mr. M told Grievant to provide a comprehensive and honest assessment. On January 26, 2010, Grievant presented Mr. M with the requested analysis. Grievant listed several threats to his unit including that other employees did not want to help his unit and that the Human Resource Director held a grudge against Grievant from an earlier event and did not miss an opportunity to "put down" Grievant and his staff.

On January 26, 2010, the Technician was absent from the Total Recall team meeting. Grievant told Mr. M that his unit was shorthanded and he did not know if he could bring the Technician to the meeting. Mr. M told Grievant that Grievant should give Mr. M advanced warning if the Technician could not attend Total Recall meetings. Mr. M told Grievant to make sure that the Technician attended future meetings.

On January 28, 2010, Grievant and the Technician attended a Total Recall meeting.

On February 2, 2010, the Technician was absent from the Total Recall meeting held at the Records Center. Mr. M asked Grievant why the Technician was not at the meeting. Grievant said that his unit was too shorthanded for the Technician to attend.

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<sup>3</sup> Mr. C was the Director of Information Technology and a peer of Mr. M.

<sup>4</sup> Grievant argued that Ms. W also sent a copy of her email to K, an employee of the software vendor. Ms. W's email does not reflect that a copy was sent to K.

Mr. M discussed with Grievant about finding a way to involve the Technician in the Total Recall meetings. The Technician was sitting at the reception desk down the hall from the meeting.

On February 5, 2010, a Total Recall meeting was scheduled at the Central Office. As the meeting was about to begin, Mr. C asked Mr. M if the Technician was showing up to the meeting. Mr. M said that he assumed that the Technician would attend. Mr. C asked Grievant where the Technician was. Grievant responded "He is not here, is he?" This enraged Mr. C who knew that Grievant had been instructed repeatedly to ensure that the Technician attended the Total Recall meetings. Mr. C lost his temper, began cursing and left the meeting.<sup>5</sup> Grievant remained calm during Mr. C's outburst. Mr. C's behavior was so disruptive that Mr. M concluded that the meeting could not take place. The Technician had received an electronic notification from Mr. M to attend the meeting but overlooked that notice and failed to attend the meeting.

### 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."

Failure to follow a supervisor's instruction is a Group II offense.<sup>7</sup> Mr. M was Grievant's supervisor. Mr. M<sup>8</sup> repeatedly instructed Grievant to make sure that the Technician attended the Total Recall meetings.<sup>9</sup> On February 5, 2010, a Total Recall meeting was held at the Central Office. The Technician did not attend the meeting. Grievant did not take any action to remind the Technician of his obligation to attend the February 5, 2010 meeting.<sup>10</sup> Grievant simply showed up at the meeting and assumed

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<sup>5</sup> Mr. C received disciplinary action for his behavior on February 5, 2010.

<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.

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

<sup>8</sup> Mr. M's testimony was credible.

<sup>9</sup> Mr. C's outrage that the Technician did not attend the February 5, 2010 meeting supports the Agency's assertion that Mr. M made it clear to Grievant that Grievant was obligated to ensure that the Technician attended the Total Recall meetings. Mr. C had been present on several occasions when Mr. M instructed Grievant regarding the mandatory attendance of the Technician.

<sup>10</sup> Grievant had previously indicated to the Technician that it was important for the Technician to attend the Total Recall meetings.

that the Technician would arrive. The Agency has presented sufficient evidence to establish that Grievant failed to comply with a supervisor's instruction thereby justifying the issuance of a Group II Written Notice of disciplinary action.

Grievant argued that he lacked sufficient staff on February 5, 2010 to permit the Technician to attend the Total Recall meeting held at the Central Office. Grievant argued that if the Technician had attended the meeting, insufficient staff would have remained in the Records Center to provide services to customers needing immediate service. Although Grievant's assertion of the facts appears to be true, the evidence also showed that employees working for other units in the Records Center could have been available to cover for the Technician while the Technician attended the meeting. Grievant made no attempt to ask Mr. M to provide support from other employees under Mr. M's chain of command.

The Agency contends that Grievant engaged in inappropriate behavior by sending an email refusing to call K on Monday, January 25, 2010. When the email is considered as written and within the context in which it was sent, at most the email would demonstrate behavior giving rise to a written counseling or Group I Written Notice.

The Agency contends that Grievant engaged in inappropriate behavior when he included in his threat assessment negative comments about the Human Resource Director and other staff with the Agency. Grievant's comments constitute protected speech under *Va. Code 2.2-3000* which provides, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management."<sup>11</sup>

The Agency contends that Grievant engaged in insubordination. To establish insubordination an agency must show not merely that an employee failed to follow a supervisor's instruction but also that the employee demonstrated a disregard and refusal to accept the authority of a supervisor. In this case, the Agency has not established that Grievant was insubordinate.

Grievant argued that he retained discretion to permit the Technician to remain in the Records Center when the unit was shorthanded. Grievant presented an email from Mr. M dated January 26, 2010 in which Mr. M stated, "I thought that it would also be good to have [the Technician] and [another employee] attend **if at all possible**."<sup>12</sup> (Emphasis added). Although this email suggests that Grievant had some discretion, it is clear based upon the testimony of Mr. M that Mr. M left Grievant with insufficient discretion to permit Grievant to excuse the Technician from meetings without advance notice to Mr. M.

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<sup>11</sup> See EDR Director Ruling 2008-1964 and 2008-1970.

<sup>12</sup> Grievant Exhibit 36.

When the facts of this case are considered as a whole, there remains sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions regarding attendance by the Technician at the Total Recall meetings.

*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>13</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.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

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

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<sup>13</sup> *Va. Code § 2.2-3005.*



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>14</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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.