

Issues: Group II Written Notice (failure to follow instructions), Group I Written Notice (unsatisfactory performance), Group I Written Notice (unsatisfactory performance), Termination (due to accumulation), Discrimination, Harassment, Retaliation; Hearing Date: 10/15/10; Decision Issued: 01/06/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9428, 9429, 9430, 9431; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 01/18/11; Reconsideration Decision issued 01/21/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 01/18/11; Outcome pending; Administrative Review: DHRM Ruling Request received 01/18/11; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9428 / 9429 / 9430 / 9431

Hearing Date: October 15, 2010
Decision Issued: January 6, 2011

PROCEDURAL HISTORY

On April 12, 2010, Grievant received a Group II Written Notice for failure to follow a supervisor's instructions. On April 19, 2010, Grievant was issued a Group I Written Notice for unsatisfactory work performance. On July 9, 2010, Grievant received a Group I Written Notice with removal for unsatisfactory work performance based on the accumulation of disciplinary action. Grievant filed grievances to challenge these actions. In addition, on May 15, 2010, Grievant filed a grievance alleging that the Supervisor discriminated against him and created a hostile work environment. He also alleged retaliation.

On September 10, 2010, the EDR Director issued ruling Numbers 2011-2766, 2011-2767, 2011-2768, and 2011-2769 consolidating the grievances as one hearing. On September 21, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 15, 2010, a hearing was held at the Agency's office. The Hearing Officer found just cause to extend the timeframe for issuing a decision based on the motion of a party.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
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 actions, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether the Agency discriminated 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. The burden of proof with respect to proving discrimination is on the Grievant. 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 Corrections employed Grievant as a Probation Officer at one of its facilities. He had been employed by the Agency for over 4 years. The purpose of his position was:

To provide comprehensive background reports to the Circuit Court Judges for use in final adjudications of criminal charges/convictions; to provide offenders placed on probation and/or parole with counseling, supervision, and referrals to community resources.¹

¹ Agency Exhibit 5.

Grievant had prior active disciplinary actions. On March 4, 2009, Grievant received a Group I Written Notice of disciplinary action for inappropriate language and threatening behavior towards a peer. On January 5, 2010, he received a Group I Written Notice for failure to comply with a supervisor's instructions.

In October 2008, the Agency began using a database entitled Coris in order to keep information regarding offenders. Information in the system was available to the judges who are making decisions regarding offender status. If incorrect information about an offender was left in the system, a judge could make an incorrect decision about how to treat an offender.²

Grievant received training regarding how to use the Agency's database. He attended a two-day class prior to the implementation of Coris. He received individualized training in April 2009. He received additional training in September and October 2009.

Grievant began reporting to the Supervisor in April 2009. On October 9, 2009, Grievant received an annual performance evaluation with an overall rating of "Contributor." He received a "Contributor" rating for his 2007 and 2008 evaluations.

On March 18, 2010, Grievant received a Notice of Improvement Needed/Substandard Performance and a written counseling notice. The notice stated:

VirginiaCoris was implemented in October 2008. Prior to the implementation of Coris, you are provided with basic Coris training. In addition, the office has held numerous training sessions which you attended.

In addition to the Regional training and the District training, you were afforded the opportunity of one-on-one training from [the Supervisor, Chief Probation Officer and Deputy Chief Probation Officer T], and other staff in the [Location] office. You are given notes, you took your own notes, and you have been referred to the Coris 'Help' page. On February 18, 2010, you submitted 5 files that were in need of violation reports in which you acknowledge that you were unable to complete, due to your inability to enter the information needed in Coris. These files were submitted to the clerical staff to assist you with entering dispositions, and conditions, so that you could complete the violation reports in a timely manner. When you are granted permission to submit these files for assistance, you were informed that in the future, you would be held responsible for entering your own information in Coris in a timely manner. You were also instructed that

² For a majority of the cases, a probation and parole officer is not present in court to correct errors in the Agency's files. If a violation report contains incorrect information, an offender's incarceration status could be affected inappropriately.

this would need to be done with little or no assistance from [the Supervisor] or other staff members.

The established date for this compliance is April 19, 2010. We will meet every Friday to assess your progress towards meeting your compliance date. After April 19, 2010, if you are unable to perform your job duties as a probation officer due to your inability to navigate proficiently in VirginiaCoris, you will be issued a group notice for Unsatisfactory Job Performance, under the Department of Corrections' Standards of Conduct.³

On April 2, 2010, the Governor's Chief of Staff sent an email addressed to State employees stating, in part:

In recognition of that service and the season, on behalf of the Governor I am pleased to offer state employees in executive branch offices two hours of recognition leave effective tomorrow, April 2, 2010. To the greatest extent possible, this leave should be used tomorrow afternoon. *** Agencies that operate alternate work schedules should treat this additional 2 hours as compensatory time. Essential employees who cannot leave early tomorrow will have until Friday April 30, 2010 to use the two hours of leave and should coordinate that with their respective Agency Head.⁴

On April 2, 2010, the Agency closed its office two hours early at 3 p.m. because the Governor granted two hours of recognition leave for Agency employees. Grievant was told by the Supervisor that the office would be closing at 3 p.m.⁵ At 3 p.m., Deputy Chief W observed that Grievant was still working and instructed Grievant to "power down" his computer and leave the office. Grievant disregarded that instruction and continued working.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."⁶ Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should

³ Agency Exhibit 6.

⁴ Agency Exhibit 3.

⁵ The Supervisor testified that she walked around the office at least three times to tell staff, including Grievant, that the office was closing two hours early and that employees should leave when the office closed.

⁶ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

warrant removal.”⁷ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁸

Group II Written Notice for failure to follow a supervisor's instructions.

Failure to follow a supervisor's instructions is a Group II offense.⁹ On April 2, 2010, the Supervisor instructed Grievant that the office was closing two hours early and that he should leave the office when it closed. Deputy Chief W also instructed Grievant to turn off his computer and leave the office. Grievant disregarded those instructions and continued working after the office closed. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

Grievant argued that he interpreted the memo from the Governor’s Chief of Staff to mean that he could leave early on April 2, 2010, or if he chose to do so, he could use the two hours of leave at another time but no later than April 30, 2010. The text of the email from the Chief of Staff does not support this interpretation.

Grievant argued that another employee was permitted to work past 3 p.m. and, thus, he was singled out for disciplinary action by the Agency. The evidence showed that the other employee’s work shift ended later than Grievant’s work shift. The other employee had permission to work past 3 p.m. and only worked six hours that day which was consistent with the number of hours worked by other staff. Grievant worked more than six hours on April 2, 2010.

Group I Written Notice for Unsatisfactory Job Performance Issued April 19, 2010.

“[I]nadequate or unsatisfactory job performance” is a Group I offense.¹⁰ After receiving a counseling notice and Notice of Substandard Performance on March 18, 2010, Grievant continued to struggle with accurately entering information into Coris. In one case, he failed to correctly interpret a Court Order and, thus, did not correctly enter the information into the Coris system. For another case, the Supervisor had to sit with Grievant for over an hour on April 9, 2010 to assist Grievant with entering information into Coris. The Supervisor had already discussed the case with Grievant and the prior week. The Supervisor returned approximately 7 cases to Grievant at least two times to correct errors made by Grievant. The Agency has presented sufficient evidence to show the Grievant's work performance was inadequate or unsatisfactory. The Group I Written Notice must be upheld.

⁷ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁸ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁹ See, DOC Operating Procedure 135.1(XI)(B)(1),

¹⁰ See, DOC Operating Procedure 135.1(X)(B)(4).

Group I Written Notice for Unsatisfactory Job Performance Issued July 9, 2010.

As part of the process of issuing Grievant a Group I Written Notice on April 19, 2010, Agency managers advised Grievant that he needed to show significant improvement with respect to reading and interpreting Court Orders as well as entering information into Coris. Grievant was advised that the Agency would continue to measure how many times his work was returned for corrections and revisions. Grievant's work performance did not improve on a consistent basis. Several offender violation reports had to be returned three or four times for correction. Information for a least three offenders was entered incorrectly in Coris. Offender C had a special condition issued by the court that was noted on the Court's Order that the offender would remain drug-free. Offender C tested positive for drugs in December 2009 but Grievant failed to initiate a Violation Report in accordance with the Court's directive until the matter was brought to his attention in June 2010. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

Grievant argued that the two Group I Written Notices were based on the Supervisor's changes which were often stylistic in nature. In other words, the Supervisor chose different words to convey the same information expressed by Grievant. Although many of the changes made by the Supervisor were stylistic in nature and merely reflected a different writing style, many of the cases were returned to Grievant because he had entered wrong information into Coris or failed to properly update changes of information regarding probationers. If the Hearing Officer disregards the Supervisor's corrections based on writing style, there remain sufficient errors to support the Agency's assertion that Grievant's work performance was inadequate or unsatisfactory.

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...."¹¹ 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.

¹¹ Va. Code § 2.2-3005.

Grievant contends the disciplinary action should be mitigated. Grievant presented evidence regarding his experience in his field and standing among professionals with whom he interacted on a daily basis. For example, several years ago, Grievant authored a book to help individuals transition from prison that is "packed with common sense information, worksheets, and check-lists that make it easy for anyone to comprehend, and even easier for formerly incarcerated persons to use."¹² In addition, a Senior Assistant Public Defender wrote that:

[Grievant] is a deeply caring individual who works hard for every client. He finds all potential services that can potentially benefit the lives of his probationers. He has created in bringing the best out of his clientele. He is willing to support those who work hard. He is also, however, quite capable of sending someone to the penitentiary should they fail to benefit from outside services. He is one of the fairest probation officers that I've ever dealt with.¹³

It is clear that Grievant was talented with respect to his interaction with clients and professionals working with probationers and parolees. His job responsibilities, however, included more than working with clients. The Agency expected Grievant to accurately maintain and utilize information regarding clients including entering information into the Agency's database. The Agency provided Grievant with adequate and ongoing training regarding how to use Coris. The Agency informed Grievant of his obligation to minimize the number of mistakes when processing case files. Grievant was unable to consistently utilize the Agency's database and maintain accurate and timely information about clients. Grievant's talents are not significant enough to exclude consideration of his weaknesses with respect to the processing of information.

Grievant argued that the Agency failed to consider his absences in January and May 2010 due to medical leave. Grievant's argument fails. Grievant was disciplined primarily for inaccuracies in the work he submitted.¹⁴

Grievant argued that he was held to a higher standard than other probation and parole officers. He asserted that other employees made mistakes yet they did not receive disciplinary action. The evidence showed, however, that although all probation and parole officers made mistakes, the number of mistakes made by Grievant was significantly higher than the number for other employees. For example, during the period from January 1 to July 1, 2010 employees made mistakes as follows:

¹² Agency Exhibit 4.

¹³ Agency Exhibit 4.

¹⁴ Grievant also argued that his caseload was higher than that of other probation officers. The evidence did not support this assertion. If the Hearing Officer assumes for the sake of argument that his claim is true, it does not affect the outcome of this case. Although a written notice mentions Grievant was slow to provide information, the thrust of the Agency's discipline resulted from its belief that the work Grievant submitted contained too many inaccuracies.

Employee B	4
Employee C	8
Employee Ma	15
Employee B	4
Employee D	15
Employee Ca	1
Employee Mo	33
Employee T	15
Grievant	55

Employee Mo was a relatively new employee¹⁵ who the Agency expected to make more mistakes than seasoned employees. The average number of mistakes made by Grievant's peers, including Employee Mo, was 10. The number of mistakes by Grievant was at least five times greater than the average for his coworkers. The Agency has presented sufficient evidence to show that there was a basis to take disciplinary action against Grievant but not against other employees making significantly fewer mistakes.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Accumulation of Disciplinary Action

Upon the accumulation of four Group I Written Notices, an employee may be removed by an agency. In this case, Grievant has accumulated four active Group I Written Notices and one Group II Written Notice. Accordingly, the Agency's decision to remove Grievant from employment must be upheld.

Discrimination

It is the policy of the Commonwealth to provide its employees with a workplace free from harassment and/or retaliation against employees who either complain of harassment or aide in the investigation of such a complaint. The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer on the basis of an individual's race, sex, color, national origin, religion, age, veteran status, political affiliation or disability.

¹⁵ She had been working for the Agency for approximately 13 months.

Workplace Harassment is 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, 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 alleged that the Supervisor discriminated against him and created a hostile work environment. He argued that the Supervisor would often post a note on his computer screen requesting that he come to her office immediately often regarding some trivial matter that could be addressed by a log entry in Coris or email. He argued that the Supervisor would sometimes call him into her office to address some trivial matters such as telling him that they were not going to file a report on a particular offender even though the information could have been logged into Coris instead. He argued that the Supervisor was sometimes rude. He argued that the Supervisor made inappropriate comments such as saying that three new female officers who had been with the department for less than a year were "leaps and bounds ahead of me". He argued that the Supervisor prevented him from asking other probation officers questions about Coris. He argued that while many female coworkers were allowed to display personal photographs in their offices, he was instructed to remove his two photographs. One photograph was of him petting a tiger and in the other he was feeding a tiger cub. He argued that the photos were good "icebreaker" tools with offenders.

The evidence showed that the Supervisor devoted additional time and attention to Grievant because she believed his work performance was inadequate and not because she intended to discriminate against him because of his gender. The Supervisor instructed Grievant not to seek assistance from other probation officers because she believed he had received adequate training on Coris and wanted to measure his success in entering information. In December 2009, a probation officer complained to the Supervisor that Grievant's requests for assistance interfered with her ability to complete her own work. The Supervisor instructed Grievant to remove his photos because she believed they were inappropriate and not as a form of gender discrimination.¹⁶ The evidence is not sufficient to conclude that the Supervisor or Agency discriminated against Grievant.

DECISION

For the reasons stated herein, the Agency's issuance on April 12, 2010 to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance on April 19, 2010 to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Agency's issuance on July 9, 2010 to the Grievant of a Group I

¹⁶ In addition, there is no evidence that the Agency took actions against Grievant as a pretext for discrimination.

Written Notice of disciplinary action is **upheld**. Grievant's removal based on the accumulation of disciplinary action is **upheld**. Grievant's request for relief from discrimination is **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 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.¹⁷

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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].

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: 9428 9429 9430 9431-R

Reconsideration Decision Issued: January 21, 2011

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.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. The requesting party simply restates the arguments and evidence presented at the hearing. 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