Issues: Group II Written Notice (failure to report, unsatisfactory performance, failure to follow instructions, abuse of State time, and insubordination), Group III Written Notice (failure to report, unsatisfactory performance, failure to follow instructions, abuse of State time, and insubordination), and Termination; Hearing Date: 02/02/11; Decision Issued: 05/13/11; Agency: DEQ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9458, 9490; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 05/28/11; EDR Ruling No. 2011-3002 issued 07/25/11; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 05/28/11; DHRM Ruling issued 08/10/11; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9458 / 9490

Hearing Date: February 2, 2011
Decision Issued: May 13, 2011

PROCEDURAL HISTORY

On May 24, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to report to work without notice, unsatisfactory performance, failure to follow instructions and/or policy, abuse of State time, and insubordination. On September 24, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to report to work without notice, unsatisfactory performance, failure to follow instructions and/or policy, abuse of state time, and insubordination.

On June 18, 2010, Grievant timely filed a grievance to challenge the Agency's issuance of a Group II Written Notice. On October 20, 2010, Grievant timely filed a grievance to challenge the Agency's issuance of a Group III Written Notice. The outcome of the Third Resolution Steps were not satisfactory to the Grievant and she requested hearings. On October 28, 2010, the EDR Director issued Ruling No. 2011-2813, 2011-2814 consolidating the two grievances for a single hearing. On December 28, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision due to the unavailability of a party. On February 2, 2011, a hearing was held at the Agency's office.

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 action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

5. Whether the Agency retaliated 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. 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 Environmental Quality employed Grievant as a Water Permit Writer prior to her removal effective September 24, 2010. Grievant began working for the Agency in July 2002 as a Hazardous Waste Inspector. She later became a Pretreatment Coordinator. In December 2008, she was transferred to the Water Permits Unit where she began reporting to the Manager. She received an overall rating of Contributor for her 2009 annual performance evaluation.

Grievant faced numerous medical challenges. In May 2009, Grievant took a leave of absence for back surgery. She returned to work in August 2009. In April 2010, Doctor L wrote:

> This letter is dictated on behalf of my patient, [Grievant]. She has multiple musculoskeletal problems which require medical treatment and physical therapy. She has made a fine recovery, overall, after her cervical surgery this past summer. However, she continues to have other impairments and residual impairments from her neck problem, which makes it difficult to perform work tasks as efficiently as she has in the past.
>
> She is still able to complete her work tasks, but may take slightly longer than usual to perform them. Her speed of work completion will increase as her rehabilitation and recovery continue.
>
> I recommended at this time that she have a 30 minute maximum sitting time. Please allow about 5 minutes every 30 minutes to change position and stand or walk briefly. She can probably accomplish some work tasks in the standing mode as well.
>
> Please allow flexible schedule to allow her to see her medically necessary physician appointments as well as her physical therapy. Physical therapy should allow strengthening her neck and shoulder; allow increase endurance and better performance in her work capacity.[1]

Grievant had vision problems which she did not realize until May 2010. She began wearing different glasses in June 2010 to resolve the problems.

On January 29, 2010, the Chief Deputy sent Grievant a counseling memorandum stating:

> This formal counseling memo addresses your behaviors, which include the inappropriate emails that you recently sent, and your unsatisfactory interactions with PRO management regarding your work schedule and duties.
>
> First, let me state that we have always been willing to work with you, and the Agency has gone above and beyond to accommodate your requests that included: purchasing furniture, equipment, and an ergonomic worksite assessment, and allowing you to adjust your work schedule during the week to accommodate doctor visits.
>
> Your emails are excessive, factually incorrect and carry a tone that borders on insubordination. You have monopolized too much of

[1] Grievant Exhibit 7. On January 10, 2011, Doctor L wrote that Grievant could work eight hours per day with no lifting of more than 10 pounds per day.

management's time, which is taking away from the work that should be completed.

You say in your email that the agency is requiring you to work a 9 hour day. It concerns me that you would make this statement after we were very clear in our November meeting as to the requirements upon your return to work. It was repeated on numerous occasions that all full-time employees must work 40 hours a week.

You stated that you may need more breaks than the two 15 minute breaks the Agency provides and your lunch hour. [Human Resource Director] stated that you can build in more breaks by extending your workday, as long as you put in an 8 hour day. Plainly put, your workday may be longer to accommodate additional breaks but you are only required to work 8 hours a day. That's very different than your statement that you are being forced to work nine hours per day. This is a total misrepresentation of what we talked about and agreed upon in that meeting.

You do not have the discretion to decide what your work hours will be in a given week. You called in sick on January 2, 2010, which caused you to miss a very important meeting. Management took your reason for missing work at face value. You then proceeded to come to work at the end of the day, without permission, and work two hours. This is not acceptable. You called in sick and made no effort to communicate a change in your condition to management. You did not have approval to make up two hours that day.

Your manager instructed you to provide your timecard to show eight hours coded to sick leave and you ignored his instructions; you then inappropriately emailed [Deputy Regional Director], the office manager and the leave coordinator. Again, this is unacceptable behavior.

***

I have a growing concern that you may not be able to meet the requirements of your job duties, based on your statements to [Deputy Regional Director] that your previous managers … allowed you to make up time on weekends when you were not capable of working during the week. This is not an option. You are required to work a 40 hour work week within a Monday through Friday schedule. Your work hours will be the standard 8:15 to 5:00 unless you submit a different schedule to [Manager] that he finds acceptable, and you will not deviate from that schedule without prior permission from [Manager]. It is not a reasonable accommodation to allow you to set your own schedule and work weekends. I have no knowledge of what your previous supervisors allowed you to do but you report to different management and we did not

> allow any employee to set their own schedule. If you are unable or unwilling to work a 40 hour work week as outlined above, you will need to talk to Human Resources on other options available to you.
>
> In summary, you need to accept that you report to new management and you must follow the rules like all other employees. If these types of behaviors continue, management will have no choice but to consider disciplinary actions.[2]

The Agency is funded from several sources including permit fees and federal funds. The Agency uses a Time Reporting System (sometimes referred to as OTL) to ensure that its expenditures are properly allocated among its sources of funding. The Agency must comply with federal regulations, State regulations and generally accepted accounting principles to ensure that costs allowable under one program are not paid by another program.

New employees receive training regarding the Agency's Time Reporting System. The Agency has a person working in its Central Office who specializes in answering questions about the Time Reporting System.

To complete a timecard, an employee must enter the Project Code and Task Number into an electronic form. After completing the form, the employee emails the timecard to a supervisor for review. The supervisor is responsible for verifying that the employee entered the correct information.

There is a comment section as part of the leave submission form. An employee and manager have discretion regarding what information to put in to that field unless instructed otherwise by his or her supervisor.

On February 9, 2009, the Manager sent an email to several employees including Grievant stating:

> Over the years, I have had staff who were subjected to formal audits in which the auditors reviewed timesheets. You'd be amazed at how seriously auditors regard timesheets submitted by electronic means (a potential federal felony charge), so you can understand how this can be a thorny, sensitive issue. So to avoid ever being subjected to falsification of document claims, my advice to you is to wait until after the close of each leave period to submit your OTL timesheet. That way, your timesheet reflects actual, rather than forecasted charge time. An exception to this would be if you are about to take planned leave that will extend beyond the close of the leave period, in which case it's okay to submit your OTL in advance of taking that leave.[3]

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[2] Agency Exhibit 1.

[3] Grievant Exhibit 16.

On March 29, 2010 at 11:25 a.m., Grievant sent the Manager a timecard for the period of March 10, 2010 through March 24, 2010.[4] The Manager rejected the timecard and sent Grievant an email at 4:40 p.m. stating:

> This time card has been denied approval for the following reason:
> Project 10,000 task 1.0 is not commensurate with the program duties associated with your position. It is also unclear what is meant by "t-shirt" and why this time should be charged for payment.

At 5:02 p.m., Grievant resubmitted the timecard without making the necessary change. At 5:27 p.m., the Manager rejected the timecard and sent Grievant an email stating:

> Re-submittal is not consistent with the cited 12/23/09 email. See previous rejection indicating Project 10,000 task 1.0 is not commensurate with the program duties associated with this position.

On March 31, 2010 at 3:26 p.m., Grievant resubmitted the timecard. She canceled that timecard on April 1, 2010 at 8:47 a.m. On April 1, 2010 at 8:47 a.m., Grievant resubmitted a timecard that was approved by the Manager at 2:38 p.m.

On April 9, 2010 at 2:17 p.m., Grievant submitted a timecard for the time period March 25, 2010 through April 9, 2010. On April 12, 2010 at 8:37 a.m. the Manager rejected the timecard and sent Grievant an email stating:

> The time charged on 3/26/10 to Project 51226 task 1.05 is inappropriate if you were on doctor's orders (In response to any workmen's comp claim) not to work that day.

On April 23, 2010 at 1:43 p.m., Grievant submitted a timecard for the time period April 10, 2010 to April 24, 2010. At 4:02 p.m., the timecard was rejected by the Manager who wrote:

> 4/21 does not reflect 1 hr sick leave taken. Comment RE local limits review appears to be in error as it cites a Saturday date (4/17).

On April 23, 2010 at 4:56 p.m., Grievant sent the Manager a timecard that did not include a change to show one hour of sick leave taken on April 21, 2010. Grievant wrote a comment stating:

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[4] This case is especially difficult because of the nature of the documentation presented by the Agency. It is difficult to determine what actions were taken on specific dates. Some documentation for some of the dates time cards were submitted is missing.

> 4/16 – Local limits, review of questions from DD. 04/20- ECM and pretreatment file work. The one hour of sick leave was entered on 4/21/10 instead of over 4/20/10. This was fixed. A typo for review of local limits was changed from 04/17 to 04/16.

The Manager rejected the timecard.

On April 23, 2010 at 5:42 p.m., Grievant sent the Manager a timecard for the time period April 10, 2010 through April 24, 2010. On April 26, 2010 at 5:15 p.m., the Manager rejected the timecard and wrote:

> 4/13 does not reflect personal sick leave taken per your 4/13 email.

On May 6, 2010 at 2:03 p.m., Grievant sent the Manager a timecard for which she claimed for the first time one hour of personal sick leave on April 12, 2010. The Manager instructed Grievant to submit by the close of business on May 10, 2010 email documentation for the leave claimed on April 12, 2010. Grievant submitted a timecard in which she made the comment:

> 4/13 – 1 hour of SL requested and not approved by [Manager]. Worked until 6:50 p.m. that day. Do not believe that time should be claimed; however, I was threatened with punitive action unless timecard was submitted by 05/06. I had initially thought meeting at CO would resolve the issue; however, additional meetings may be required. 4/16 – Local limits, review of questions from DD. 04/20- ECM and pretreatment file work. The one hour of sick leave was entered on 4/20/10 instead of 4/21/10. This was fixed. The typo for review of local limits was changed from 04/17 to 04/16.

On April 26, 2010 at 12:36 p.m., Grievant sent the Manager an email stating, in part:

> I am honestly trying to be patient, hoping that this situation which includes the multiple rejection of my time cards will improve over time. My patient waiting approach does not seem to be affected. I do realize that I make mistakes. They are not purposeful and are sometimes related to the screen which does not allow the later portion of the pay period to display with the related tasks. However, this back-and-forth is significantly taking time away from tasks that could be productive and related to my EWP. Multiple references have been made to how I use my time. This is one area that we could … increase efficiency, which would be beneficial to both of us.

On April 26, 2010 at 1:55 p.m., the Manager responded, in part:

> I agree with you that the need to repeatedly reject your OTL submittals is time-consuming and frustrating – for both of us. I understand that from time to time, staff may make mistakes. However, you are not performing at the same level as your peers. Each of your peers has a strong track record of performing at a 98 – 100% acceptance rate with their first OTL submittal. Since the beginning of this Performance Period, my records show that you have had to revise your original submittal eight (8) times out of 11. Many of these revisions required multiple subsequent revisions before being approved. Your track record for making approvable OTL submittals (33%) is therefore not acceptable and warrants additional scrutiny. My advice to you is that you need to move beyond making excuses and begin demonstrating consistent satisfactory performance so that I can develop a level of trust that your OTL submittals can be viewed as reliable.[5]

On May 24, 2010, Grievant received a Group II Written Notice of disciplinary action. The Manager wrote, in part:

> You continually ignored my instructions on submitting your timecard for the April 10 through April 24 timecard and you kept changing your leave with each timecard submittal. Management has had to spend too much time dealing with this routine function that every agency employee must complete. Your incorrect submittal of timecards could be considered falsification and will not be tolerated. If you fail to complete a timecard within agency timeframe and you continue to submit erroneous timecards, you will be further disciplined, up to and including termination.

On May 24, 2010 at 4:40 p.m., Grievant sent the Manager a timecard for the time period May 10, 2010 through May 24, 2010. Grievant claimed 45 hours of personal sick leave. On May 25, 2010 at 6:12 p.m., the Manager sent Grievant an email stating that her timecard for the time period May 10 through May 20, 2010 had not been approved because, "Your available personal sick leave balance is insufficient to cover the sick leave time claimed." On May 26, 2010 at 12:04 p.m., Grievant responded:

> To allow the timecard to be improved in an expedited manner, the communication including your determination of the exact hours of discrepancy would be helpful. My personal tracking shows that I have the available time; however, I could have an hour. If the sick leave is not available, the system will automatically pull from FP.

On May 26, 2010 at 2:01 p.m., the Manager sent Grievant an email stating:

> You are ultimately responsible for maintaining an accurate accounting of your available leave. I take it from your note that you have not undertaken

[5] Agency Exhibit 3.

> efforts to confirm the accuracy of your personal tracking sheet. The approved timesheets in OTL are an available resource for you to use to confirm specific dates of past claims. I would ask that you first initiate confirmation efforts before I set aside my time to do so on your behalf. If after completing confirmation efforts you still believe you have available time, let me know, and we will evaluate our next step. Keep in mind, according to HRO, it appears your leave for the previous leave periods (April 10 - 24 and April 25 – May 9) has not yet been keyed into Payline. I think you will find your time claimed to exceed our available balance by substantially more than an hour.
>
> While system "chaining" may occur, submitting timesheets claiming leave that does not exist (because it exceeds available balances) is not acceptable, nor does it reflect adherents to the expectation for submitting accurate timecards.

On May 26, 2010 at 6:19 p.m., Grievant submitted a timecard claiming 40 hours of personal sick leave. On May 26, 2010 at 6:30 p.m., Grievant sent the Manager an email stating:

> I believe that my email message was misinterpreted. My message was to let you know that verification of my leave indicates that I do have available time. I was hoping for your assistance to perhaps understand the scope of your notification since it was unclear to me. I wanted to minimize my use of state time to audit my entire leave trail for the year.
>
> I change the OTL card to use two hours under FL and comp time earned to ensure that there was enough of a buffer. Payline shows 41 hours available. My timecard shows 40 hours of sick leave used.

On May 27, 2010 at 12:59 p.m., the Manager sent Grievant an email stating:

> It is clear you do not fully read nor heed my email (to confirm your leave balances by pulling approved OTL's and leave periods not yet keyed into Payline). As a result, your second OTL submittal continues to make claims of leave you do not have, and will be rejected again. Prior to re-submittal, you are instructed to: a) pull each of the last eight approved OTL timecards, starting with the leave record beginning January 10, 2010 (corresponding with the crediting of 2010 personal sick leave block of time) and ending May 9, 2010; b) confirm your available sick leave balance; and c) make subsequent adjustments to your OTL to facilitate timely re-submittal of approvable personal sick leave claims that are within your available balance.

> You are also directed to follow existing DHRM Policies that clearly state it is the employee's responsibility to maintain an accurate accounting of available leave and to report time promptly and accurately.
>
> Keep in mind, continued unsatisfactory performance may place you in jeopardy of additional disciplinary action, including dismissal.

On May 27, 2010 at 3:22 p.m., Grievant submitted a timecard for the time period May 10, 2010 through May 24, 2010 which did not reflect any change in hours from the timecard she submitted on May 26, 2010 at 6:19 p.m. Grievant sent an email to the Manager regarding timecard dates May 10, 2010 to May 24, 2010 stating:

> Stats Training at CO on 05/11 & 05/12. SL following attendance at 2 day DEQ class. Changed time for Friday, May 14, 2010. See email from HR directing that my timecard is approved. I spent the majority of yesterday verifying my time and do not feel that additional time spent on this exercise is the best use of time.

On May 27, 2010 at 4:01 p.m., Grievant canceled her timecard submission. On May 27, 2010 at 5:12 p.m., Grievant submitted a timecard claiming 37 hours of personal sick leave and five hours of other leave. Grievant wrote:

> Stats Training at CO on 05/11 & 05/12. SL following attendance at 2 day DEQ class. Changed time for Friday, May 14, 2010. See email from HR directing that my timecard is approved. Changed 05/21 to 3 hours of FP. It is noteworthy that 56 hours of sick leave is due to worker's comp issue and/or inadequate accommodations during training.

On June 1, 2010 at 10:12 a.m., Grievant sent an email to Ms. W who worked in the Human Resource division. Grievant stated that she had leave balances available of 37 hours of sick leave, 31 hours of family personal leave, and one half hour of compensatory leave. Ms. W responded 30 minutes later that Grievant had leave balances as of May 10, 2010, of 35.5 hours of sick personal leave, 35.5 hours of family personal leave, one half hour of compensatory leave, and eight hours of recognition leave. Ms. W noted that the balances were based on leave keyed from Grievant's OTL entries and did not include her annual leave accrual or any leave taken for the pay period May 10 through May 24, 2010.

On June 1, 2010 at 10:39 a.m., Grievant submitted a timecard to the Manager for the pay period May 10, 2010 through May 24, 2010 in which Grievant claimed 35.5 hours of personal leave and 6.5 hours of other leave.

On June 1, 2010, [Regional Director] sent Grievant a memorandum stating in part:

I have learned that you previously requested and discussed additional workplace accommodations with [Human Resource Officer] and [Manager]. My understanding is that you have requested accommodations pertaining to your work hours/schedule, transferring to another position at DEQ, installation of voice activated software, and safety footwear.

DEQ has approved the following accommodations pertaining to your work hour/schedule:

1. You may flex your normal workday hours of 8:30 a.m. – 5:30 p.m. by up to one hour within the same day up to two days a week, when needed.
2. You may start work no later than 7:30 a.m. and work no later than 6 p.m. each day. If you decide on your own to work past your normal work hours, it will not be considered part of your workday. Therefore, if you decide on your own to work past your normal work hours, you cannot enter this unapproved additional time in to OTL as part of your hours worked.
3. You must submit a request for a modified work schedule at least 24 hours in advance, except for last-minute emergencies.
4. You may use your 15 minute breaks in five-minute increments in order to minimize sitting more than 30 minutes at one time.
5. You must submit your OTL timecard on time and correctly by the agency established deadline for each pay period. You must not report work hours on your OTL timecards that are different from what has been approved above or any changes to the above that your supervisor has approved in advance.

At this time, DEQ is not able to make a determination regarding your accommodation request for a lighter weight safety boot due to medical issues. … in order for the Agency to make a determination regarding this accommodation request, you will need to provide your supervisor with a doctor's note prescribing the footwear specifications that would satisfy your medical need. If your doctor determines that your current safety boots do not meet his/her prescribed specifications and boot replacement is warranted, to assist in our evaluation, please identify a safety boot model satisfying the doctor prescribed boot specifications that is both readily available and can be procured for under $125. Alternatively, you may be required to cover any costs that exceed $125, in accordance with Agency policy. DEQ will not approve your accommodation request to install voice-activated software on your work computer and transfer to another position within the agency at this time.

On June 2, 2010 at 2:44 p.m., the Human Resource Director sent Grievant an email stating, in part:

> My second concern is your continual lack of respect for your manager and your failure to follow his simple instructions. As stated by [Manager], it is your responsibility to submit a correct timecard and know your leave balances, however, you continue to monopolize everyone's time by not taking responsibility for ensuring your timecards are accurate prior to submittal. You already received a Group II Written Notice for this same type of behavior. If you are determined to continue down the path of ignoring management's instructions, you will be further disciplined up to and including termination. We have done everything possible to make your return to work as seamless and successful as possible but we do not have the time or resources to continually address your inappropriate behavior.
>
> I would also like to remind you that some of your comments on your timecards are not appropriate for this forum. A personal diary or notebook would be better suited for your notes.[6]

On June 2, 2010 at 3:47 p.m., Grievant canceled the timecard she submitted on June 1, 2010 at 10:37 a.m.

On June 3, 2010 at 7:41 p.m., Grievant sent an email to the Manager regarding timecard dates May 10, 2010 to May 24, 2010 stating:

> Stats Training at CO on 05/11 & 05/12. SL following attendance at 2 day DEQ class. Changed time for Friday, May 14, 2010. See email from HR directing that my timecard is approved. Changed hours after confirmation with HR.

On June 4, 2010 at 8:33 a.m., the Manager rejected Grievant's time submittal because her request for May 14, 2010 did not reflect eight hours leave requested and approved of that day.

On June 7, 2010 at 5:09 p.m., Grievant sent the Manager an email regarding the timecard dates of May 10, 2010 to May 24, 2010 stating:

> Stats Training at CO on 05/11 & 05/12. SL following attendance at 2 day DEQ class. Changed time for Friday, May 14, 2010. See email from HR directing that my timecard is approved. Changed hours after confirmation with HR. I depleted my sick leave during this pay period and chose to balance the amount out on May 14. I think that accepting this timecard would be reasonable.

[6] Grievant Exhibit 34.

On June 7, 2010 at 5:34 p.m. Grievant sent the Manager an email regarding the timecard dates of May 10, 2010 to May 24, 2010 stating:

> Stats Training at CO on 05/11 & 05/12. SL following attendance at 2 day DEQ class. Changed time for Friday, May 14, 2010. See email from HR directing that my timecard is approved. Changed hours after confirmation with HR. Following multiple reviews, [Manager] discovered another error. Accidentally put 3 hours in the wrong box.

On June 9, 2010 at 7:03 p.m., the Manager approved Grievant's timecard and told Grievant that her comment "See email from HR directing that my timecard is approved" was not an appropriate comment.

On June 22, 2010 at 8:21 a.m., Grievant sent the Manager an email stating:

> I have a medical appointment tonight at 6:15 p.m. I have to register prior to the test. Since I arrived today at 8:10 a.m., I would like to leave at 5:15 p.m. today.

On June 22 at 10 a.m., the Manager replied:

> My understanding of the 6/1/10 "Request for Workplace Accommodations" memo presented to you from [Regional Director] is that schedule modification requests from you are to be submitted no less than 24 hours in advance, except for emergencies. You have not presented this as an emergency.
>
> However, I am willing to make an exception for this case and approve this particular request on the condition that you will review and abide by the 6/1/10 memo for subsequent requests. Otherwise, future requests for schedule modification exceptions will be subject to rejection.[7]

On August 5, 2010 at 2:25 p.m., the Manager approved Grievant's timecard for the dates July 10 to July 24, 2010.

On August 9, 2010, Grievant informed the Manager that she worked from home for one hour, arrived at the office at 1:43 p.m., worked until 8:16 p.m. Grievant wrote to the Manager, "I count that I worked seven hours that day. Unless I hear otherwise, I plan to submit my timecard for 1 hour of annual leave for Thursday, July 29."

On August 20, 2010 at 5:31 p.m., Grievant sent the Manager an email regarding the timecard dates of July 25, 2010 to August 9, 2010 stating:

[7] Grievant Exhibit 35.

> My supervisor created OTL comments at the time of OTL card rejection. These comments merit a response. On 7/29/10, I sent an email noting that I had a migraine. Later that morning, I sent emails, including one to the Regional Director. The Regional Director appeared to know that I was not in the office. Status updates were provided during the day. I returned from a dentist appointment at approximately 1:45 p.m. I received a voicemail from the Regional Director at 5:52 p.m. that day requesting that if I was still in the office to stop by. I stopped by his office at 6:15 p.m. and remained in his office until 7:15 p.m. that day. I updated the regional pretreatment work load and distributed a spreadsheet after 8 p.m. Despite numerous attempts to speak with my supervisor, communicate via email, or phone, I received no response until the timecard was rejected 13 days later. The delay in submitting this card was to achieve a negotiated response as the "memo" appears to allow. This meeting was held on 08/20/10 with the conclusion that the only work-related activities occurred from 1:45 to 6:30 during which I took a half an hour break. These details would not be included in the OTL except as a reasonable defense to create issues that could be solved with a reasonable manager.

On August 27, 2010 at 9:31 a.m., the Manager approved Grievant's timecard for the dates of July 25 to August 9, 2010. The Manager wrote, "[Grievant] has been previously counseled regarding employee comments on her timecards. Many of the comments on this timecard are not appropriate for this forum."

Grievant asked to be permitted to telework. The Agency's practice was to permit employees to telework only if the employees could work independently and had a favorable work history. Because Grievant had received a Written Notice, she was not eligible for telework on a full-time basis. Nevertheless, in the Spring of 2010, the Human Resource Director recommended that Grievant be permitted to telework one day per week. On June 29, 2010, the Human Resource Director sent the Regional Director an email stating:

> I understand that [Grievant] is not a good candidate under the AWL program – she is not a good performer. However, it may be to our benefit that we allow her to work two days a week with specific measures and outcomes that she would have to meet with [the Manager] when she returned to work the following day. If she doesn't complete the work as agreed, the telework option would be taken away from her. I'm just concerned about ADA in our unwillingness to consider this request. Of course, it's absolutely up to you guys on how you want to proceed.[8]

CONCLUSIONS OF POLICY

[8] Grievant Exhibit 37.

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."

Group II Written Notice Issued May 24, 2010

When an employee fails to comply with an express instruction from a supervisor, the employee may be issued a Group II Written Notice of disciplinary action. This case raises the question of whether an employee may be disciplined for failing to comply with an implicit instruction from a supervisor. The Hearing Officer concludes that an employee may receive a Group II Written Notice for failing to comply with a supervisor's implicit instruction.

The Agency contends that Grievant should receive a Group II Written Notice for failure to follow the Manager's instruction to submit accurate time cards. One of Grievant's general job duties was to submit timecards to identify the time she worked and the leave she had taken. When Grievant initially failed to submit an accurate timecard, she failed to satisfy one of her job duties thereby justifying the issuance of a Group I Written Notice for unsatisfactory job performance. Once the Manager rejected the timecard, however, the Manager's rejection served as an implicit instruction to Grievant to correct the error identified by the Manager and to resubmit the timecard to reflect the correction. This implicit instruction arose based on the pattern of interaction between the Manager and Grievant. When the Manager rejected a timecard and identified an error, he expected Grievant to correct the error on her timecard and resubmit it to the Manager. When Grievant learned that her timecard was rejected, she understood that the Manager was instructing her to correct the error and resubmit the timecard. Although the Manager did not expressly instruct Grievant to resubmit corrected timecards, his rejections served as implicit instructions for Grievant to correct the errors identified by the Manager and resubmit corrected timecards.

On March 29, 2010 at 4:40 p.m., the Manager rejected Grievant's timecard for the dates March 10, 2010 through March 24, 2010. At 5:02 p.m., Grievant resubmitted the timecard without making the necessary change. At 5:27 p.m., the Manager again rejected the timecard.

On April 23, 2010 at 4:02 p.m., the Manager rejected Grievant's timecard for the dates April 10, 2010 to April 24, 2010. On April 23, 2010 at 4:56 p.m., Grievant resubmitted the timecard without making the necessary change.

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

The Agency has presented sufficient evidence to support the issuance on May 24, 2010 of a Group II Written Notice of disciplinary action.

The Agency contends that Grievant's work performance was unsatisfactory due to her excessive error rate and the need for multiple submittals to satisfactorily address previous identified errors. Part of Grievant's work duties included submitting accurate timecards. Grievant repeatedly failed to submit accurate initial timecards. The number of errors made by Grievant exceeded the number of errors made by her coworkers. The Manager testified that most employees were able to correct their timecards by the second submittal. Grievant, on the other hand, often took four to six times to correct her timecard. The Agency has established that Grievant's work performance was unsatisfactory. Unsatisfactory work performance is a Group I offense.

The Agency contends that Grievant abused State time due to inappropriate OTL claims, and the need for excessive supervisory oversight. Abuse of State time is a Group I offense. An employee has not abused State time simply because the employee requires additional management scrutiny due to poor performance. Even if the Hearing Officer assumes for the sake of argument that Grievant abused State time, her behavior would not be sufficient to support the issuance of a Group II Written Notice.

The Agency contends that Grievant failed to report to work without notice. Insufficient evidence was presented to support this allegation.

The Agency contends that Grievant was insubordinate due to inappropriate OTL comments made prior to the issuance on May 24, 2010 of the Group II Written Notice. Insubordination involves a disregard of or contempt for a supervisor's right to manage an employee. Insubordination involves a disregard of a supervisor's authority. Disagreeing with a supervisor is not insubordination. Grievant's comments were not insubordinate simply because the Manager found her comments to be annoying. Grievant did not make any comments directly criticizing the Manager's authority.

The Agency contends that Grievant had false or conflicting records and misused State records due to withholding leave claims and conflicting submittals covering the same leave time. No credible evidence was presented to show the Grievant intended to falsify any leave records. She may not have understood how the Agency wanted her to classify her time, but no credible evidence was presented to show that Grievant had the intent to falsify her records. No credible evidence was presented to show that Grievant misused any of the Agency's records.

Group III Written Notice issued September 24, 2010

The Agency contends Grievant failed to follow instructions to submit accurate time reporting claims, failed to follow the Manager's written instructions regarding her work schedule and work schedule accommodations, and failed to follow PRO management written instructions to provide information necessary to investigate her time reporting claims.

When the Manager rejected a timecard submitted by Grievant, the Manager was implicitly instructing Grievant to resubmit a timecard to correct the error he had identified. The Manager rejected Grievant's timecard for the dates of May 10, 2010 through May 24, 2010. On May 27, 2010 at 3:22 p.m., Grievant submitted a timecard for the time period May 10, 2010 through May 24, 2010 which did not reflect any change from the timecard she submitted on May 26, 2010 at 6:19 p.m.

The Manager instructed Grievant not to use the comments section of the timecard to include "inappropriate comments". He was concerned that other Agency employees involved in the processing of time records would see Grievant's comments challenging or criticizing the Manager's identification of errors made by Grievant. On June 2, 2010, the Human Resource Director affirmed the Manager's instruction and suggested an alternative. The Human Resource director wrote:

> I would also like to remind you that some of your comments on your timecards are not appropriate for this forum. A personal diary or notebook would be better suited for your notes.

When Grievant challenged the Manager's statements regarding errors he believed she made, Grievant's words were protected under Va. Code § 2.2-3000 as an attempt by an employee to freely discuss her concerns with Agency management. Although Grievant's words were protected, the Agency retained the right to govern where Grievant could express her concerns. The Agency had the right to prohibit Grievant from using the comments section on the timecard to express her frustration with the Manager. Grievant disregarded the Manager's instruction regarding the location of her comments. Grievant continued to use the comments section to challenge the Manager's decisions to reject her timecards. In particular, on August 20, 2010, Grievant wrote that the Manager's comments "merit a response". She added, "These details would not be included in the OTL except as a reasonable defense to create issues that could be solved with a reasonable manager."

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. Upon the accumulation of the second Group II Written Notice of disciplinary action, agency may remove an employee. Accordingly, Grievant's removal must be upheld.

No credible evidence was presented to show the Grievant failed to follow the Manager's written instructions regarding her work schedule and work schedule accommodations. No credible evidence was presented to show that Grievant failed to follow PRO management written instructions to provide information necessary to investigate her time reporting claims.

The Agency contends that Grievant abused State time due to inappropriate time reporting claims, the unnecessary expenditure of support staff resources and time, and the need for excessive supervisory oversight. Abuse of State time does not include

circumstances in which an employee requires additional management scrutiny. The fact that an employee may be a difficult employee to manage does not mean that that employee is abusing State time. The fact that managers feel compelled to devote more of their time to supervising an employee does not mean that the employee is abusing State time under the Standards of Conduct.

The Agency contends that Grievant failed to report without notice in accordance with DHRM Employee Handbook and the DEQ Leave Approval Policy 2-1. No credible evidence was presented to support this allegation. The Agency did not identify any specific dates for which Grievant failed to report. The Agency presented evidence that on July 29, 2010, Grievant informed the Manager that she had a migraine headache and she was "going to check email and possibly work on a report." Grievant left her office workstation but her absence was not communicated to the Manager until 1:54 p.m. by email. The Agency contends that Grievant was absent from her work station without adequate or clear notification and that her behavior reflected poor communication, inadequate performance, and failure to report without notice. To the extent Grievant's behavior constituted misconduct, mitigating circumstances existed. Grievant was "pretty incapacitated" and "communicating [was] very difficult".

The Agency contends that Grievant was insubordinate due to her behavior in repeatedly ignoring management instructions, her decisions to take certain actions that were knowingly and willingly counter to management instructions given to her, and inappropriate timecard and email comments. No credible evidence was presented by the agency to support this allegation. Insubordination involves a disregard of or contempt for a supervisor's right to manage an employee. The Agency has established that Grievant was a difficult employee to manage. It has not shown that she disregarded the Manager's right to manage

The Agency contends that Grievant, "False or conflicting, and misuse of state records due to knowingly withholding leave claims, knowingly claiming leave that did not exist, and conflicting submittals covering the same leave period." No credible evidence was presented to show that Grievant falsified State records, knowingly withheld leave claims, knowingly claimed leave that did not exist. Grievant submitted conflicting submittals the same time period. She made errors that amounted to unsatisfactory work performance, a Group I offense.

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…."[10] 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

[10] Va. Code § 2.2-3005.

agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated. For example, she contends that had the Agency provided her with reasonable accommodations to her disabilities, she would have been able to perform her job adequately. Grievant's argument fails. The evidence showed that the Agency provided Grievant with reasonable accommodation. Grievant's disabilities affected her ability to perform certain physical activities. The disciplinary action against her, however, did not arise because of her failure to perform physical activity. Grievant argued that her disability affected her ability to read the computer screen. She testified, however, that she received corrective lenses prior to the time period for the issuance of the second Written Notice. Even with corrective lenses, she continued to make mistakes when submitting timecards. If the Agency had permitted Grievant to telework, there is no reason to believe her behavior would have changed regarding the submission of time- cards. There is no basis to reduce the disciplinary action against Grievant because of her disabilities.

Grievant argued that she was treated differently from other Water Permit Writers by the Agency because of her disabilities. The evidence showed that Grievant was treated differently by the Agency managers because her behavior was different from that of other employees. She consistently challenged the Manager over minor matters. She behaved in a disrespectful manner to other Agency managers and was counseled for doing so.

Grievant argued that the Agency should have transferred her to a position as an Air Permit Writer. The evidence showed that the Agency had abolished 17 air permit writer positions in the past and it did not intend to add another position. Grievant had no experience as an Air Permit Writer and the Agency did not have funding for the position.

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

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[11] (2) suffered a

[11] See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the

materially adverse action[12]; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[13]

Grievant engaged in protective activity by filing a grievance on June 18, 2010. Grievant suffered a materially adverse action because she received a Group III Written Notice. Grievant has not established a link between her protective activity and the disciplinary action. The Agency did not take disciplinary action against Grievant because she filed a grievance on June 18, 2010. The Agency took disciplinary action because it believed Grievant had engaged in behavior contrary to the Standards of Conduct.

DECISION

For the reasons stated herein, the Agency's issuance on May 24, 2010 to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance of September 24, 2010 to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice of disciplinary action. Based on the accumulation of disciplinary action, Grievant's 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.

General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[12] On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

[13] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.[14]

[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

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Environmental Quality

August 10, 2011

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9458 and 9490. The grievant is challenging the decision because she believes the hearing decision is inconsistent with policy. For the reasons stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer wrote, in part, the following:[*]

> On May 24, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to report to work without notice, unsatisfactory performance, failure to follow instructions and/or policy, abuse of State time, and insubordination. On September 24, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to report to work without notice, unsatisfactory performance, failure to follow instructions and/or policy, abuse of state time, and insubordination.

****

In his FINDINGS OF FACT, the hearing officer wrote, in relevant part, the following:

> After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:
>
> The Department of Environmental Quality employed Grievant as a Water Permit Writer prior to her removal effective September 24, 2010. Grievant began working for the Agency in July 2002 as a Hazardous Waste Inspector. She later became a Pretreatment Coordinator. In December 2008, she was transferred to the Water Permits Unit where she began reporting to the Manager. She received an overall rating of Contributor for her 2009 annual performance evaluation.
>
> Grievant faced numerous medical challenges. In May 2009, Grievant took a leave of absence for back surgery. She returned to work in August 2009. In April 2010, Doctor L wrote:
>
> > This letter is dictated on behalf of my patient, [Grievant]. She has multiple musculoskeletal problems which require medical treatment and physical therapy. She has made a fine recovery, overall, after her cervical surgery this past summer. However, she continues to have other impairments and residual impairments from her neck problem, which makes it difficult to perform work tasks as efficiently as she has in the past.
> >
> > She is still able to complete her work tasks, but may take slightly longer

[*] Footnotes contained in the original hearing decision are not included in this DHRM ruling.

than usual to perform them. Her speed of work completion will increase as her rehabilitation and recovery continue.

I recommended at this time that she have a 30 minute maximum sitting time. Please allow about 5 minutes every 30 minutes to change position and stand or walk briefly. She can probably accomplish some work tasks in the standing mode as well.

Please allow flexible schedule to allow her to see her medically necessary physician appointments as well as her physical therapy. Physical therapy should allow strengthening her neck and shoulder; allow increase endurance and better performance in her work capacity.

Grievant had vision problems which she did not realize until May 2010. She began wearing different glasses in June 2010 to resolve the problems.

On January 29, 2010, the Chief Deputy sent Grievant a counseling memorandum stating:

> This formal counseling memo addresses your behaviors, which include the inappropriate emails that you recently sent, and your unsatisfactory interactions with PRO management regarding your work schedule and duties.
>
> First, let me state that we have always been willing to work with you, and the Agency has gone above and beyond to accommodate your requests that included: purchasing furniture, equipment, and an ergonomic worksite assessment, and allowing you to adjust your work schedule during the week to accommodate doctor visits.
>
> Your emails are excessive, factually incorrect and carry a tone that borders on insubordination. You have monopolized too much of management's time, which is taking away from the work that should be completed.
>
> You say in your email that the agency is requiring you to work a 9- hour day. It concerns me that you would make this statement after we were very clear in our November meeting as to the requirements upon your return to work. It was repeated on numerous occasions that all full-time employees must work 40 hours a week.
>
> You stated that you may need more breaks than the two 15 minute breaks the Agency provides and your lunch hour. [Human Resource Director] stated that you can build in more breaks by extending your workday, as long as you put in an 8 hour day. Plainly put, your workday may be longer to accommodate additional breaks but you are only required to work 8 hours a day. That's very different than your statement that you are being forced to work nine hours per day. This is a total misrepresentation of what we talked about and agreed upon in that meeting.
>
> You do not have the discretion to decide what your work hours will be in a given week. You called in sick on January 2, 2010, which caused you to miss a very important meeting. Management took your reason for missing

> work at face value. You then proceeded to come to work at the end of the day, without permission, and work two hours. This is not acceptable. You called in sick and made no effort to communicate a change in your condition to management. You did not have approval to make up two hours that day.
>
> Your manager instructed you to provide your timecard to show eight hours coded to sick leave and you ignored his instructions; you then inappropriately emailed [Deputy Regional Director], the office manager and the leave coordinator. Again, this is unacceptable behavior.
>
> ****
>
> In summary, you need to accept that you report to new management and you must follow the rules like all other employees. If these types of behaviors continue, management will have no choice but to consider disciplinary actions.

The Agency is funded from several sources including permit fees and federal funds. The Agency uses a Time Reporting System (sometimes referred to as OTL) to ensure that its expenditures are properly allocated among its sources of funding. The Agency must comply with federal regulations, State regulations and generally accepted accounting principles to ensure that costs allowable under one program are not paid by another program.

New employees receive training regarding the Agency's Time Reporting System. The Agency has a person working in its Central Office who specializes in answering questions about the Time Reporting System.

To complete a timecard, an employee must enter the Project Code and Task Number into an electronic form. After completing the form, the employee emails the timecard to a supervisor for review. The supervisor is responsible for verifying that the employee entered the correct information.

****

On May 24, 2010, Grievant received a Group II Written Notice of disciplinary action. The Manager wrote, in part:

> You continually ignored my instructions on submitting your timecard for the April 10 through April 24 timecard and you kept changing your leave with each timecard submittal. Management has had to spend too much time dealing with this routine function that every agency employee must complete. Your incorrect submittal of timecards could be considered falsification and will not be tolerated. If you fail to complete a timecard within agency timeframe and you continue to submit erroneous timecards, you will be further disciplined, up to and including termination.

On May 24, 2010 at 4:40 p.m., Grievant sent the Manager a timecard for the time period May 10, 2010 through May 24, 2010. Grievant claimed 45 hours of personal sick leave. On May 25, 2010 at 6:12 p.m., the Manager sent Grievant an email stating that her timecard for the time period May 10 through May 20, 2010 had not been approved because, "Your available personal sick leave balance is insufficient to cover the sick

leave time claimed." On May 26, 2010 at 12:04 p.m., Grievant responded:

To allow the timecard to be approved in an expedited manner, the communication including your determination of the exact hours of discrepancy would be helpful. My personal tracking shows that I have the available time; however, I could have an hour. If the sick leave is not available, the system will automatically pull from FP.

On May 26, 2010 at 2:01 p.m., the Manager sent Grievant an email stating:

You are ultimately responsible for maintaining an accurate accounting of your available leave. I take it from your note that you have not undertaken efforts to confirm the accuracy of your personal tracking sheet. The approved timesheets in OTL are an available resource for you to use to confirm specific dates of past claims. I would ask that you first initiate confirmation efforts before I set aside my time to do so on your behalf. If after completing confirmation efforts you still believe you have available time, let me know, and we will evaluate our next step. Keep in mind, according to HRO, it appears your leave for the previous leave periods (April 10 - 24 and April 25 - May 9) has not yet been keyed into Payline. I think you will find your time claimed to exceed our available balance by substantially more than an hour.

While system "chaining" may occur, submitting timesheets claiming leave that does not exist (because it exceeds available balances) is not acceptable, nor does it reflect adherents to the expectation for submitting accurate timecards.

****

On June 1, 2010, [Regional Director] sent Grievant a memorandum stating in part:

I have learned that you previously requested and discussed additional workplace accommodations with [Human Resource Officer] and [Manager]. My understanding is that you have requested accommodations pertaining to your work hours/schedule, transferring to another position at DEQ, installation of voice activated software, and safety footwear. DEQ has approved the following accommodations pertaining to your work hour/schedule:

1. You may flex your normal workday hours of 8:30 a.m. - 5:30 p.m. by up to one hour within the same day up to two days a week, when needed.
2. You may start work no later than 7:30 a.m. and work no later than 6 p.m. each day. If you decide on your own to work past your normal work hours, it will not be considered part of your workday. Therefore, if you decide on your own to work past your normal work hours, you cannot enter this unapproved additional time in to OTL as part of your hours worked.
3. You must submit a request for a modified work schedule at least 24 hours in advance, except for last-minute emergencies.
4. You may use your 15 minute breaks in five-minute increments in order to minimize sitting more than 30 minutes at one time.
5. You must submit your OTL timecard on time and correctly by the agency established deadline for each pay period. You must not report work hours on your OTL timecards that are different from what has been approved above or any changes to the above that your supervisor has approved in advance.

At this time, DEQ is not able to make a determination regarding your accommodation request for a lighter weight safety boot due to medical issues.... in order for the Agency to make a determination regarding this accommodation request, you will need to provide your supervisor with a doctor's note prescribing the footwear specifications that would satisfy your medical need. If your doctor determines that your current safety boots do not meet his/her prescribed specifications and boot replacement is warranted, to assist in our evaluation, please identify a safety boot model satisfying the doctor prescribed boot specifications that is both readily available and can be procured for under $125. Alternatively, you may be required to cover any costs that exceed $125, in accordance with Agency policy. DEQ will not approve your accommodation request to install voice-activated software on your work computer and transfer to another position within the agency at this time.

On June 2, 2010 at 2:44 p.m., the Human Resource Director sent Grievant an email stating, in part:

My second concern is your continual lack of respect for your manager and your failure to follow his simple instructions. As stated by [Manager], it is your responsibility to submit a correct timecard and know your leave balances, however, you continue to monopolize everyone's time by not taking responsibility for ensuring your timecards are accurate prior to submittal. You already received a Group II Written Notice for this same type of behavior. If you are determined to continue down the path of ignoring management's instructions, you will be further disciplined up to and including termination. We have done everything possible to make your return to work as seamless and successful as possible but we do not have the time or resources to continually address your inappropriate behavior.

I would also like to remind you that some of your comments on your timecards are not appropriate for this forum. A personal diary or notebook would be better suited for your notes."

On June 2, 2010 at 3:47 p.m., Grievant canceled the timecard she submitted on June 1, 2010 at 10:37 a.m.

On June 3, 2010 at 7:41 p.m., Grievant sent an email to the Manager regarding timecard dates May 10, 2010 to May 24, 2010 stating:

Stats Training at CO on 05/11 & 05/12. SL following attendance at 2 day DEQ class. Changed time for Friday, May 14, 2010. See email from HR directing that my timecard is approved. Changed hours after confirmation with HR.

On June 4, 2010 at 8:33 a.m., the Manager rejected Grievant's time submittal because her request for May 14, 2010 did not reflect eight hours leave requested and approved of that day.

On June 7, 2010 at 5:09 p.m., Grievant sent the Manager an email regarding the timecard dates of May 10, 2010 to May 24, 2010 stating:

Stats Training at CO on 05/11 & 05/12. SL following attendance at 2 day DEQ class. Changed time for Friday, May 14, 2010. See email from HR directing that my timecard is approved. Changed hours after confirmation with HR. I depleted my sick leave during this pay period and chose to balance the amount out on May

14. I think that accepting this timecard would be reasonable.

On June 7, 2010 at 5:34 p.m. Grievant sent the Manager an email regarding the timecard dates of May 10, 2010 to May 24, 2010 stating:

> Stats Training at CO on 05/11 & 05/12. SL following attendance at 2 day DEQ class. Changed time for Friday, May 14, 2010. See email from HR directing that my timecard is approved. Changed hours after confirmation with HR. Following multiple reviews, [Manager] discovered another error. Accidentally put 3 hours in the wrong box.

On June 9, 2010 at 7:03 p.m., the Manager approved Grievant's timecard and told Grievant that her comment "See email from HR directing that my timecard is approved" was not an appropriate comment.

On June 22, 2010 at 8:21 a.m., Grievant sent the Manager an email stating:

> I have a medical appointment tonight at 6:15 p.m. I have to register prior to the test. Since I arrived today at 8:10 a.m., I would like to leave at 5:15 p.m. today.

On June 22 at 10 a.m., the Manager replied:

> My understanding of the 6/1/10 "Request for Workplace Accommodations" memo presented to you from [Regional Director] is that schedule modification requests from you are to be submitted no less than 24 hours in advance, except for emergencies. You have not presented this as an emergency.
>
> However, I am willing to make an exception for this case and approve this particular request on the condition that you will review and abide by the 6/1/10 memo for subsequent requests. Otherwise, future requests for schedule modification exceptions will be subject to rejection.

On August 5, 2010 at 2:25 p.m., the Manager approved Grievant's timecard for the dates July 10 to July 24, 2010.

On August 9, 2010, Grievant informed the Manager that she worked from home for one hour, arrived at the office at 1:43 p.m., worked until 8:16 p.m. Grievant wrote to the Manager, "I count that I worked seven hours that day. Unless I hear otherwise, I plan to submit my timecard for 1 hour of annual leave for Thursday, July 29."

On August 20, 2010 at 5:31 p.m., Grievant sent the Manager an email regarding the timecard dates of July 25, 2010 to August 9, 2010 stating:

> My supervisor created OTL comments at the time of OTL card rejection. These comments merit a response. On 7/29/10, I sent an email noting that I had a migraine. Later that morning, I sent emails, including one to the Regional Director. The Regional Director appeared to know that I was not in the office. Status updates were provided during the day. I returned from a dentist appointment at approximately 1:45 p.m. I received a voicemail from the Regional Director at 5:52 p.m. that day requesting that if I was still in the office to stop by. I stopped by his office at 6:15 p.m. and remained in

> his office until 7:15 p.m. that day. I updated the regional pretreatment work load and distributed a spreadsheet after 8 p.m. Despite numerous attempts to speak with my supervisor, communicate via email, or phone, I received no response until the timecard was rejected 13 days later. The delay in submitting this card was to achieve a negotiated response as the "memo" appears to allow. This meeting was held on *08/20/10* with the conclusion that the only work-related activities occurred from 1:45 to 6:30 during which I took a half an hour break. These details would not be included in the OTL except as a reasonable defense to create issues that could be solved with a reasonable manager.

On August 27, 2010 at 9:31 a.m., the Manager approved Grievant's timecard for the dates of July 25 to August 9, 2010. The Manager wrote, "[Grievant] has been previously counseled regarding employee comments on her timecards. Many of the comments on this timecard are not appropriate for this forum."

Grievant asked to be permitted to telework. The Agency's practice was to permit employees to telework only if the employees could work independently and had a favorable work history. Because Grievant had received a Written Notice, she was not eligible for telework on a full-time basis. Nevertheless, in the Spring of 2010, the Human Resource Director recommended that Grievant be permitted to telework one day per week. On June 29, 2010, the Human Resource Director sent the Regional Director an email stating:

> I understand that [Grievant] is not a good candidate under the AWL program - she is not a good performer. However, it may be to our benefit that we allow her to work two days a week with specific measures and outcomes that she would have to meet with [the Manager] when she returned to work the following day. If she doesn't complete the work as agreed, the telework option would be taken away from her. I'm just concerned about ADA in our unwillingness to consider this request. Of course, it's absolutely up to you guys on how you want to proceed."

In his CONCLUSIONS OF POLICY, the hearing officer wrote the following:

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." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Group II Written Notice Issued May 24, 2010

When an employee fails to comply with an express instruction from a supervisor, the employee may be issued a Group II Written Notice of disciplinary action. This case raises the question of whether an employee may be disciplined for failing to comply with an implicit instruction from a supervisor. The Hearing Officer concludes that an employee may receive a Group II Written Notice for failing to comply with a supervisor's implicit instruction.

The Agency contends that Grievant should receive a Group II Written Notice for failure to follow the Manager's instruction to submit accurate time cards. One of

Grievant's general job duties was to submit timecards to identify the time she worked and the leave she had taken. When Grievant initially failed to submit an accurate timecard, she failed to satisfy one of her job duties thereby justifying the issuance of a Group I Written Notice for unsatisfactory job performance. Once the Manager rejected the timecard, however, the Manager's rejection served as an implicit instruction to Grievant to correct the error identified by the Manager and to resubmit the timecard to reflect the correction. This implicit instruction arose based on the pattern of interaction between the Manager and Grievant. When the Manager rejected a timecard and identified an error, he expected Grievant to correct the error on her timecard and resubmit it to the Manager. When Grievant learned that her timecard was rejected, she understood that the Manager was instructing her to correct the error and resubmit the timecard. Although the Manager did not expressly instruct Grievant to resubmit corrected timecards, his rejections served as implicit instructions for Grievant to correct the errors identified by the Manager and resubmit corrected timecards.

On March 29, 2010 at 4:40 p.m., the Manager rejected Grievant's timecard for the dates March 10, 2010 through March 24, 2010. At 5:02 p.m., Grievant resubmitted the timecard without making the necessary Change. At 5:27 p.m., the Manager again rejected the timecard.

On April 23, 2010 at 4:02 p.m., the Manager rejected Grievant's timecard for the dates April 10, 2010 to April 24, 2010. On April 23, 2010 at 4:56 p.m., Grievant resubmitted the timecard without making the necessary change.

The Agency has presented sufficient evidence to support the issuance on May 24, 2010 of a Group II Written Notice of disciplinary action.

The Agency contends that Grievant's work performance was unsatisfactory due to her excessive error rate and the need for multiple submittals to satisfactorily address previous identified errors. Part of Grievant's work duties included submitting accurate timecards. Grievant repeatedly failed to submit accurate initial timecards. The number of errors made by Grievant exceeded the number of errors made by her coworkers. The Manager testified that most employees were able to correct their timecards by the second submittal. Grievant, on the other hand, often took four to six times to correct her timecard. The Agency has established that Grievant's work performance was unsatisfactory. Unsatisfactory work performance is a Group I offense.

The Agency contends that Grievant abused State time due to inappropriate OTL claims, and the need for excessive supervisory oversight. Abuse of State time is a Group I offense. An employee has not abused State time simply because the employee requires additional management scrutiny due to poor performance. Even if the Hearing Officer assumes for the sake of argument that Grievant abused State time, her behavior would not be sufficient to support the issuance of a Group II Written Notice.

The Agency contends that Grievant failed to report to work without notice. Insufficient evidence was presented to support this allegation.

The Agency contends that Grievant was insubordinate due to inappropriate OTL comments made prior to the issuance on May 24, 2010 of the Group II Written Notice. Insubordination involves a disregard of or contempt for a supervisor's right to manage an employee. Insubordination involves a disregard of a supervisor's authority. Disagreeing with a supervisor is not insubordination. Grievant's comments were not insubordinate simply because the Manager found her comments to be annoying.

Grievant did not make any comments directly criticizing the Manager's authority.

The Agency contends that Grievant had false or conflicting records and misused State records due to withholding leave claims and conflicting submittals covering the same leave time. No credible evidence was presented to show the Grievant intended to falsify any leave records. She may not have understood how the Agency wanted her to classify her time, but no credible evidence was presented to show that Grievant had the intent to falsify her records. No credible evidence was presented to show that Grievant misused any of the Agency's records.

Group III Written Notice issued September 24, 2010

The Agency contends Grievant failed to follow instructions to submit accurate time reporting claims, failed to follow the Manager's written instructions regarding her work schedule and work schedule accommodations, and failed to follow PRO management written instructions to provide information necessary to investigate her time reporting claims.

When the Manager rejected a timecard submitted by Grievant, the Manager was implicitly instructing Grievant to resubmit a timecard to correct the error he had identified. The Manager rejected Grievant's timecard for the dates of May 10, 2010 through May 24, 2010. On May 27, 2010 at 3:22 p.m., Grievant submitted a timecard for the time period May 10, 2010 through May 24, 2010 which did not reflect any change from the timecard she submitted on May 26, 2010 at 6:19 p.m.

The Manager instructed Grievant not to use the comments section of the timecard to include "inappropriate comments". He was concerned that other Agency employees involved in the processing of time records would see Grievant's comments challenging or criticizing the Manager's identification of errors made by Grievant.

On June 2, 2010, the Human Resource Director affirmed the Manager's instruction and suggested an alternative. The Human Resource director wrote:

> I would also like to remind you that some of your comments on your timecards are not appropriate for this forum. A personal diary or notebook would be better suited for your notes.

When Grievant challenged the Manager's statements regarding errors he believed she made, Grievant's words were protected under Va. Code § 2.2-3000 as an attempt by an employee to freely discuss her concerns with Agency management. Although Grievant's words were protected, the Agency retained the right to govern where Grievant could express her concerns. The Agency had the right to prohibit Grievant from using the comments section on the timecard to express her frustration with the Manager. Grievant disregarded the Manager's instruction regarding the location of her comments. Grievant continued to use the comments section to challenge the Manager's decisions to reject her timecards. In particular, on August 20, 2010, Grievant wrote that the Manager's comments "merit a response". She added, "These details would not be included in the OTL except as a reasonable defense to create issues that could be solved with a reasonable manager."

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. Upon the accumulation of the second Group II Written Notice of disciplinary action, agency may

remove an employee. Accordingly, Grievant's removal must be upheld.

No credible evidence was presented to show the Grievant failed to follow the Manager's written instructions regarding her work schedule and work schedule accommodations. No credible evidence was presented to show that Grievant failed to follow PRO management written instructions to provide information necessary to investigate her time reporting claims.

The Agency contends that Grievant abused State time due to inappropriate time reporting claims, the unnecessary expenditure of support staff resources and time, and the need for excessive supervisory oversight. Abuse of State time does not include circumstances in which an employee requires additional management scrutiny. The fact that an employee may be a difficult employee to manage does not mean that that employee is abusing State time. The fact that managers feel compelled to devote more of their time to supervising an employee does not mean that the employee is abusing State time under the Standards of Conduct.

The Agency contends that Grievant failed to report without notice in accordance with DHRM Employee Handbook and the DEQ Leave Approval Policy 2-1. No credible evidence was presented to support this allegation. The Agency did not identify any specific dates for which Grievant failed to report. The Agency presented evidence that on July 29, 2010, Grievant informed the Manager that she had a migraine headache and she was "going to check email and possibly work on a report." Grievant left her office workstation but her absence was not communicated to the Manager until 1:54 p.m. by email, The Agency contends that Grievant was absent from her work station without adequate or clear notification and that her behavior reflected poor communication, inadequate performance, and failure to report without notice. To the extent Grievant's behavior constituted misconduct, mitigating circumstances existed. Grievant was "pretty incapacitated" and "communicating [was] very difficult".

The Agency contends that Grievant was insubordinate due to her behavior in repeatedly ignoring management instructions, her decisions to take certain actions that were knowingly and willingly counter to management instructions given to her, and inappropriate timecard and email comments. No credible evidence was presented by the agency to support this allegation. Insubordination involves a disregard of or contempt for a supervisor's right to manage an employee. The Agency has established that Grievant was a difficult employee to manage. It has not shown that she disregarded the Manager's right to manage

The Agency contends that Grievant, "False or conflicting, and misuse of state records due to knowingly withholding leave claims, knowingly claiming leave that did not exist, and conflicting submittals covering the same leave period." No credible evidence was presented to show that Grievant falsified State records, knowingly withheld leave claims, knowingly claimed leave that did not exist. Grievant submitted conflicting submittals the same time period. She made errors that amounted to unsatisfactory work performance, a Group I offense.

Mitigation

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Grievant contends the disciplinary action should be mitigated. For example, she contends that had the Agency provided her with reasonable accommodations to her

disabilities, she would have been able to perform her job adequately. Grievant's argument fails. The evidence showed that the Agency provided Grievant with reasonable accommodation. Grievant's disabilities affected her ability to perform certain physical activities. The disciplinary action against her, however, did not arise because of her failure to perform physical activity. Grievant argued that her disability affected her ability to read the computer screen. She testified, however, that she received corrective lenses prior to the time period for the issuance of the second Written Notice. Even with corrective lenses, she continued to make mistakes when submitting timecards. If the Agency had permitted Grievant to telework, there is no reason to believe her behavior would have changed regarding the submission of time - cards. There is no basis to reduce the disciplinary action against Grievant because of her disabilities.

Grievant argued that she was treated differently from other Water Permit Writers by the Agency because of her disabilities. The evidence showed that Grievant was treated differently by the Agency managers because her behavior was different from that of other employees. She consistently challenged the Manager over minor matters. She behaved in a disrespectful manner to other Agency managers and was counseled for doing so.

Grievant argued that the Agency should have transferred her to a position as an Air Permit Writer. The evidence showed that the Agency had abolished 17 air permit writer positions in the past and it did not intend to add another position. Grievant had no experience as an Air Permit Writer and the Agency did not have funding for the position.

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

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) suffered a materially adverse action, and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant engaged in protective activity by filing a grievance on June 18, 2010. Grievant suffered a materially adverse action because she received a Group III Written Notice. Grievant has not established a link between her protective activity and the disciplinary action. The Agency did not take disciplinary action against Grievant because she filed a grievance on June 18, 2010. The Agency took disciplinary action because it believed Grievant had engaged in behavior contrary to the Standards of Conduct.

In his DECISION, the hearing officer stated the following:

For the reasons stated herein, the Agency's issuance on May 24, 2010 to the Grievant of a Group II Written Notice of disciplinary action is **upheld.** The Agency's issuance of September 24, 2010 to the Grievant of a Group III Written Notice of

disciplinary action is **reduced** to a Group II Written Notice of disciplinary action. Based on the accumulation of disciplinary action, Grievant's removal is **upheld.**

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In her request to this Department for an administrative review, the grievant raised eleven concerns. Of the eleven concerns, EDR addressed all but two of those. The DHRM finds it appropriate to address the remaining two as follows:

1. *The Hearing Officer (HO) concluded that the Agency presented sufficient evidence that the September 24, 2010 written notice was a Group II offense.*

   Concerning that issue, the evidence does not support that the hearing officer raised the level of the offense from a Group I to a Group II. Neither is there evidence that he reduced the level from a Group II to a Group I offense. Therefore, in combination with the additional Group II Written Notice, removal is proper and consistent with the relevant policy.

2. *The HO concluded that a single time card could result in a Group I offense.*

   Concerning that issue, it appears that hearing officer made his decision based on the evidence presented. A single violation may result in a disciplinary action. Therefore, his decision is consistent with the relevant policy.

CONCLUSION

Based on the above, there is no basis for this Agency to interfere with the application of this hearing decision.

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Ernest G. Spratley, Assistant Director
Office of Equal Employment Services