Issue: Group I Written Notice (unsatisfactory performance and failure to follow instructions); Hearing Date: 09/02/11; Decision Issued: 09/06/11; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9655; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9655

Hearing Date: September 2, 2011
Decision Issued: September 6, 2011

PROCEDURAL HISTORY

On April 6, 2011, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance and failure to follow instructions.

On May 5, 2011, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 15, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 2, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

5. Whether the Agency 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 Social Services employs Grievant as a Program Administrative Specialist II. She has been employed by the Agency since 1979. The purpose of her position is:

> This position serves as the Department's sole administrator responsible for the disclosure of confidential identifying and non-identifying information from closed adoption records, as allowed by law; administers access to information and finalized adoption records by providing case management services to adoptees and their adoptive and birth families; provides guidance/policy and law interpretations to child-placing agencies, courts, attorneys, adoptees, adoptive parents, birthparents, birth family members, and other State agencies on the disclosure of information from closed adoption records; identifying and implementing efficiencies and adoption timelines; conducts other duties as assigned. This position supports the adoptee, adoptive parents, birthparents, and birth siblings and therefore, supports permanence for these individuals and helps to strengthen the entire family unit.[1]

[1] Agency Exhibit 3.

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

One of Grievant's Essential Responsibilities under her Employee Work Profile includes providing non-identifying information through consultation and technical assistance to parties associated with the adoption according to the Code of Virginia and policy including referral, system search, redaction of case records, and completion of interviews. To complete this Essential Responsibility, Grievant is expected to respond "to initial inquiries within 5 business [days] consistent with FOIA requirements and documents the response on tracking tool and through emails in all possible cases." Another one of Grievant's Essential Responsibilities includes providing information, consultation, and technical assistance related to requests for identifying information from closed adoption records. To complete this Essential Responsibility, Grievant is expected to respond "to initial calls within 5 business days of receipt consistent with FOIA requirements and documents the response in tracking tool and through emails in all possible cases."[2]

On January 11, 2011, the Supervisor sent Grievant a memorandum regarding "Work Performance Concerns." The document was intended to memorialize the Supervisor's counseling of Grievant on December 13, 2010 and January 4, 2011. The Supervisor advised Grievant of "a serious back log of work for Adoption Inquiries." She added that "phone calls have not been returned timely" and "you are expected to work uncompensated overtime as necessary to accomplish your work."[3]

As of February 14, 2011, Grievant had a back log of 98 phone messages from individuals requesting information about adoption records. As of March 8, 2011, Grievant had over 100 new messages in her telephone voice mailbox. She had 61 additional save messages on the voicemail account to which she had not responded. She had 63 calls that she had listened to and documented in her telephone log.

Other staff within the Agency received calls from individuals seeking information about adoptions. The calls were referred to Grievant. When Grievant failed to call the individuals who made inquiries, some of those individuals called Agency employees complaining that their calls had not been returned by Grievant. Staff then complained to the Supervisor about Grievant's failure to call the individuals seeking information about adoptions.

On March 22, 2011, the Permanency Manager received an email from a local Department of Social Services manager:

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[2] Agency Exhibit 3.

[3] Agency Exhibit 5.

> I just wanted to pass along that we have had a lot of difficulty getting [Grievant] to return our correspondences or phone calls over the last few weeks. More importantly, I have had several searches where I have not had any correspondence from her at all, despite letters from us. I have one that was called today, in fact, that we have had for 2 years. I sent a letter on August 17, 2010 about closing the request, but have not heard anything else from anyone, including VDSS. I don't know what to tell the searchee without the state's direction. I also issued a letter on a separate search on November 4, 2009 and have not received anything about a disclosure being permitted.
>
> In recent weeks, other colleagues on my team have also reached out to her looking for records from the state. They have not heard from her. I also called her 10 days ago today and have not received any correspondence.
>
> I hope this is helpful information towards addressing the barriers that may exist in our communication.[4]

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[5] 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."

"[U]nsatisfactory work performance" is a Group I offense.[6] In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory job performance. Grievant was expected to respond to initial inquiries and initial calls within five business days of receipt. Instead, she accumulated a backlog of over 200 telephone calls for which she had not timely responded. Grievant failed to respond to several inquiries from a local Department of Social Services. Grievant's work performance was unsatisfactory to the Agency.

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[4] Agency xhibit 5.

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

[6] See Attachment A, DHRM Policy 1.60.

Grievant argued that her work load exceeded the amount of work she could accomplish within a reasonable time period. She points out that her duties were shared by another employee who retired in the summer of 2010 and that employee's position was not filled. The Agency presented evidence that the employee who retired told Agency managers that two people were not necessary to perform the duties she and Grievant were performing. Agency managers reviewed the duties being performed by Grievant and the retiring employee and concluded that they could be completed by one employee. The Supervisor testified that she performed most of Grievant's duties when Grievant was on leave. She was able to perform her regular duties while also performing Grievant's duties with respect to responding to inquiries. The Supervisor testified that she was able to respond to 27 inquires in one day on behalf of Grievant while performing her regular duties. Although the Supervisor did not perform all of the duties that Grievant was required to perform for each inquiry, the Supervisor concluded that Grievant should be able to respond to inquiries on a timely basis and perform her other duties as time permitted. The Agency' evidence is sufficient for the Hearing Officer to conclude that the Agency's expectations of Grievant were not unreasonable. In addition, Grievant's position was Exempt under the Fair Labor Standards Act. The Supervisor reminded Grievant that she was expected to work overtime as necessary to complete her job duties. No credible evidence was presented that Grievant worked any or an excessive amount of overtime.

Grievant argued that when she was absent from work, she should not be held responsible for inquiries made to the Agency while she was absent. The evidence showed that the Agency did not take disciplinary action against Grievant with respect to the initial telephone inquiries made while she was absent from work. Grievant was disciplined for initial inquires she received while at work and then failing to respond to those inquiries within several weeks and even months, even after the Agency accounted for Grievant's absences from work.

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…."[7] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

[7] Va. Code § 2.2-3005.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[8] (2) suffered a materially adverse action[9]; 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.[10]

Grievant asserted that she was retaliated against for her participation in a past grievance. Participating in a grievance would constitute a protective activity. Grievant suffered a materially adverse action because she received disciplinary action. No credible evidence was presented to show that the Agency retaliated against Grievant. Grievant received disciplinary action because the Agency believed she engaged in behavior giving rise to disciplinary action. The Agency did not disciplined Grievant as a pretext for retaliation.

DECISION

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

APPEAL RIGHTS

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

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

[9] 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.

[10] 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).

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

   Director
   Department of Employment Dispute Resolution
   600 East Main St. STE 301
   Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[11]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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