Issues: Group I Written Notice (unsatisfactory performance), Group II Written Notice (failure to follow instructions), Group III Written Notice (giving false information to supervisor), and Termination; Hearing Date: 09/09/11; Decision Issued: 09/15/11; Agency: CNU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9665; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 09/30/11; Reconsideration Decision issued 11/17/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 09/30/11; EDR Ruling No. 2012-3122 issued 12/11/11; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 09/30/11; DHRM letter issued 01/09/12 declining to review.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9665

Hearing Date: September 9, 2011
Decision Issued: September 15, 2011

PROCEDURAL HISTORY

On June 3, 2011, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance. On June 3, 2011, Grievant was issued a Group II Written Notice for failure to follow a supervisor's instructions. On June 3, 2011, Grievant was issued a Group III Written Notice with removal for providing a false statement to a supervisor.

On June 9, 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 he requested a hearing. On August 1, 2011, 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 in this case due to the unavailability of a party. On September 9, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel

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?

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:

Christopher Newport University employed Grievant as an Assistant Dining Operations Manager. No evidence of prior active disciplinary action against Grievant was introduced during the hearing. With the exception of the facts giving rise to these grievances, Grievant's work performance was satisfactory to the Agency.

Grievant reported to the Supervisor, the Dining Operations Manager. On weekends, Grievant served in the place of the Supervisor. He was responsible for supervising employees located in five restaurants in the Student Union Center. On weekends only three of the restaurants were open, Restaurant R, Restaurant C, and Restaurant G. The posted closing time for Restaurant R was 8 p.m., Restaurant C was 10 p.m., and Restaurant G was 10 p.m.

Although Restaurant R had a sign posted at the restaurant entrance indicating that the restaurant closed at 8 p.m., the Agency had an informal practice of allowing a 15 minute grace period. This meant that if a student appeared at Restaurant R after 8 p.m. but before 8:15 p.m., staff of Restaurant R would provide food to the student from Restaurant's R full menu. The Agency considered 8:15 p.m. to be Restaurant R's actual closing time.

Employees working at Restaurant R had several duties in order to close down the restaurant after the grace period. These duties included cleaning the dining area. Employees required approximately one half hour to 45 minutes in order to close the restaurant and leave.

The Agency's practice was not to reduce the number of items available on its menu under any circumstances while the restaurant was open and operating with electric power. If the restaurant lost power, the restaurant would remain open and provide food that did not require heat in order to be served. The restaurant would continue to operate until its usual closing time.

On April 16, 2011, between 30 and 40 employees were working at Restaurant R and were under Grievant's chain of command. Restaurant C and Restaurant G had approximately six employees working and reporting to a supervisor who reported to Grievant.

Grievant called the Supervisor and left a message on her cell phone. At 6:53 p.m., the Supervisor called Grievant. Grievant asked if he could close Restaurant R early. The Supervisor asked why it was necessary to close the restaurant. Grievant replied that the University had sent out a Tornado Warning alert and the lights had flickered in the facility. The Supervisor asked if Grievant had lost power and Grievant said only in the back receiving area. The Supervisor asked Grievant to confirm that the restaurant had power in the dining room and kitchen and Grievant said "yes". The Supervisor said that "we would not be able to close early." She explained that the restaurant needed to operate as normal because the students needed to be fed. Grievant responded "okay".

At 7:32 p.m., the Agency sent an emergency alert to students and staff stating, "National Weather Service has issued a tornado warning for Newport News until 8 p.m."[1] Grievant did not learn of the alert until 7:50 p.m. He decided to close Restaurant R at 8 p.m., the time posted on a sign located outside of the restaurant and to eliminate the 15 minute grace period. Grievant reduced the number of food items available to students so that employees could begin their clean up and close down process early. Restaurant R began serving only pizza, salad/soup, and ice cream to students.

On April 18, 2011, the Supervisor was approached by an employee who worked at either Restaurant C or Restaurant G who complained that employees at Restaurant R were permitted to leave early on April 16, 2011 while employees at Restaurant C and Restaurant G remained at work until their restaurants closed at 10 p.m. The Supervisor began an investigation. She spoke with Grievant and asked him how he came to the decision to close Restaurant R on April 16, 2011. As part of Grievant's explanation, he told the Supervisor that he gauged the volume of operations prior to making his decision. He told the Supervisor that "there was no business between" 7:40 p.m. and 8

[1] Agency Exhibit 8.

p.m.[2] The Supervisor reviewed the patron reports from the register at Restaurant R and concluded that the restaurant had 20 customers during the last 17 minutes the doors were open. She described this as a "consistent flow of customers" and concluded that Grievant had lied to her when he said that there was no business between 7:40 p.m. and 8 p.m.

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."[3] 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" as a Group I offense.[4] The Agency's practice was to reduce the number of menu items available only in extreme circumstances such as when the Building lost power and food items requiring heat could not be served. On April 16, 2011, Restaurant R had power and could serve hot food. Grievant reduced the menu selection available to customers contrary to the Agency's long-standing practice. Grievant's work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

Grievant argued that he had the authority to reduce the number of food items available and a reasoned basis for doing so. Although Grievant had the authority to reduce the number of food items, he had the responsibility to exercise that authority consistent with the Agency's expectations. The Agency's expectations were that food items be reduced only in extreme circumstances such as the loss of power or with the permission of the Director of Dining Services.[5] The Building did not lose electric power and Grievant did not have the permission of the Director of Dining Services to reduce the number of items on the menu. Grievant made no attempt to contact the Supervisor to obtain permission to reduce the number of items available from the menu.

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[2] The Supervisor testified that she was referring to the time -- 45 minutes prior to 8 p.m. In other words, the time period from 7:15 to 8 p.m. In Grievant's written response, Grievant states "There were very few students in the dining hall, or even the [student Union] between 7:40 and 8 p.m. I said in our meeting that there was no business between those times." The Hearing Officer will assume for the sake of argument that Grievant's description of the time periods are accurate.

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

[4] See, Attachment A, DHRM Policy 1.60.

[5] The Supervisor reported to the Director of Dining Services.

"[F]ailure to follow [a] supervisor's instructions" is a Group II offense. On April 16, 2011, at approximately 6:53 p.m., Grievant asked the Supervisor if he could close Restaurant R early. The Supervisor told Grievant that he would not be able to close the restaurant early and that the restaurant needed to operate as normal because the students had to be fed. The normal closing time for Restaurant R was 8:15 p.m. Grievant closed Restaurant R at the posted time of 8 p.m., at least 15 minutes early. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

Grievant argued that he did not close Restaurant R early but merely reduced the number of food items available to students. Grievant argued that two students came after 8 p.m. and wanted ice cream. They helped themselves to ice cream but were not charged for the food. Grievant's argument fails. In his written response to the Agency's allegations against him, Grievant writes:

> On April 16, 2011, I made the decision to close [Restaurant R] at its regularly scheduled time of 8 p.m. and to skip the fifteen–minute grace period that we normally provide.[6]

Although a sign was posted outside of Restaurant R indicating to students that its closing time was 8 p.m., the normal or actual closing time of Restaurant R was 8:15 p.m. following the grace period. By skipping the 15 minute grace period, Grievant closed Restaurant R early thereby acting contrary to the Supervisor's instruction.

Grievant argued that he was being given a Group I and a Group II Written Notice for the same action. The evidence showed that Grievant's behavior was sufficiently distinct to form a basis for two separate written notices. Grievant decided to reduce the menu selection and also decided to close the restaurant early. These were separate decisions justifying separate disciplinary actions.

DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."

The Agency considers providing false statements to a supervisor to be a Group III offense. Falsification of records is a Group III offense under the Standards of Conduct. Providing false statements to a supervisor is similar to falsifying records and is consistent with a Group III offense. On April 18, 2011, the Supervisor asked Grievant to explain his decision to close the restaurant on April 16, 2011. Grievant said that there was no business between 7:40 p.m. and 8 p.m. His statement was false. Fourteen students purchased food at Restaurant R during the time period 7:40 p.m. to 8

[6] Agency Exhibit 4.

p.m. Grievant testified that he recalled two students receiving free ice cream between 8 p.m. and 8:15 p.m. If Grievant was able to recall those students, surely he should have known that several students purchased food between 7:40 p.m. and 8 p.m. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for providing false statements to a supervisor. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that he did not intend for his comments to be taken literally by the Supervisor. He argued that he was making a relative statement, namely that there was no business as compared to the usual number of customers. The Agency, however, presented evidence that there were 14 students who were served from 7:40 p.m. until 7:54 p.m. The Supervisor testified that this was a normal flow of business. The Hearing Officer has no evidence upon which to conclude that 14 customers within a 14 minute period was a significantly reduced level of business such that Grievant's assertion would be logical.

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.

Grievant contends the disciplinary action should be mitigated because of his prior exemplary work performance. Grievant presented evidence of his 2010 performance evaluation in which he received an overall rating of "Contributor" and was referred to as "a tremendous asset". Although Grievant's work performance was otherwise satisfactory to the Agency, his prior work performance is not sufficiently mitigating to reduce the disciplinary action against him.

Grievant argued that the disciplinary action should be reduced because his motive for closing early was to ensure the safety of his employees. He testified that many of his employees relied upon public transportation that could have been shut down because tornadoes touched ground in nearby areas. Grievant testified that he drove several employees home and made arrangements for other employees to be driven home to ensure their safety. To the extent Grievant's motive was a mitigating

[7] Va. Code § 2.2-3005.

factor, his decision was an aggravating factor. The tornado alert expired at 8 p.m. The safest place for employees to be during a tornado would have been within the Agency's Student Union building where Restaurant R was located. Closing early and transporting employees while the risk of a tornado remained increased the likelihood that those employees would be harmed by a tornado.

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

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for unsatisfactory work performance is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is upheld. The Agency's issuance to the Grievant of a Group III Written Notice with removal for providing false statements to a supervisor is **upheld**.

APPEAL RIGHTS

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

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

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

   Director
   Department of Human Resource Management
   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.[8]

[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

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9665-R

Reconsideration Decision Issued: November 23, 2011

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

The closing time for Restaurant R was 8:15 p.m.[9] Grievant was instructed by the Supervisor not to close the Restaurant early. The Agency has presented sufficient evidence to support its allegation that Grievant closed the Restaurant early. In his written response to the Agency's allegations against him, Grievant wrote:

[9] From the perspective of a customer, the closing time of Restaurant R would appear to be 8 p.m. because that was the time posted on a sign in front of the restaurant. From the Agency's perspective, the closing time was at the end of the 15 minute grace period after the posted closing time.

> On April 16, 2011, I made the decision to **close** [Restaurant R] at its regularly scheduled time of 8 p.m. and to skip the fifteen–minute grace period that we normally provide.
> ***
> I also informed you that I left [out] certain items such as pizza, salad/soup and ice cream **after our doors closed** in case any students came by while we were cleaning up they could have something. We had these options **until closer to 8:10 p.m.**[10] (Emphasis added).

Grievant's statement shows that he "closed" the restaurant prior to 8:15 p.m. If the Hearing Officer assumes for the sake of argument that the restaurant remained open while providing a limited menu, the limited menu ended five minutes early at 8:10 p.m. In other words, the Agency has met its burden of proof based on Grievant's statement alone.

The primary method by which Grievant closed the restaurant early was to reduce the menu available to customers. The Original Hearing Decisions states:

> The evidence showed that Grievant's behavior was sufficiently distinct to form a basis for two separate written notices. Grievant decided to reduce the menu selection and also decided to close the restaurant early. These were separate decisions justifying separate disciplinary actions.

Upon reconsideration, the Hearing Officer finds that the behavior giving rise to the Group I and the Group II Written Notice were not materially different. Taking disciplinary action against Grievant for closing the restaurant early was effectively the same as taking disciplinary action against him for reducing the menu selection. Accordingly, the Group I Written Notice must be reversed.

The Agency contends that Grievant provided a false statement to the Supervisor. The evidence showed that the restaurant had a normal flow of customers until 8 p.m. The Supervisor challenged Grievant's decision to close the restaurant and asked for his justification. Grievant knew or should have known that the Supervisor expected him to respond to her questions truthfully. Instead, Grievant said there was "no business". Grievant's statement that there was "no business" is materially different from the truth, namely, that the restaurant had a normal flow of customers. Grievant knew or should have known that his statement "no business" was not accurate. The Agency presented sufficient evidence to support its assertion that Grievant was untruthful to the Supervisor.

The Supervisor interpreted Grievant's phrase "no business" to mean zero customers. Grievant argued that he intended to merely convey that business was "really slow". Even if the Hearing Officer assumes for the sake of argument that Grievant's phrase "no business" meant "really slow" business, sufficient evidence

[10] Agency Exhibit 4.

remains to conclude that Grievant was untruthful to the Supervisor. No evidence was presented that Grievant was unable to distinguish between "really slow" business and the normal flow of customers. If the Hearing Officer assumes that Grievant's statement "no business" meant "really slow" business, Grievant's phrase remains untruthful. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

RECONSIDERATION DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for unsatisfactory work performance is **reversed**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice with removal for providing false statements to a supervisor is **upheld**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

_____

Carl Wilson Schmidt, Esq.
Hearing Officer

January 9, 2012

[Parties to the Grievance]

RE: **Grievance of [Grievant] v. Christopher Newport University**
Case No. 9665

Dear [Parties]:

The Agency head, Ms. Sara Wilson, has asked that I respond to the grievant's request for a review of the hearing officer's decision in the above referenced case. Please note that an employee may file an administrative review request within 10 calendar days from the date the decision was issued if any of the following apply:

1. If either party believes there is new evidence that could not have been discovered before the hearing, or if it is believed the decision contains an incorrect legal conclusion, that party may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If either party believes the hearing decision is inconsistent with state policy or agency policy, that party may request the Director of the Department of Human Resource Management to review the decision. The party must state the specific policy and explain why the decision is inconsistent with that policy.

3. If either party believes that the hearing decision does not comply with the grievance procedure, that party may request the Director of the Department of Employment Dispute Resolution to review the decision. The party must state the specific portion of the grievance procedure with which the decision does not comply.

In the instant case, in reference to item 2 above, the only area over which this Agency has jurisdiction, the grievant has not identified how the hearing decision violates or contradicts Policy No. 1.60. While he mentioned Policy No. 1.60, he did not spell out any specifics of any violation. Rather, it appears that the grievant is disagreeing with what evidence the hearing officer considered, how he assessed the evidence and with his final decision. Therefore, this Agency has no basis to interfere with the application of this decision.

Sincerely,

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

c: Sara R. Wilson, Director, DHRM
Claudia T. Farr, Director, EDR
Carl Wilson Schmidt, Esq.
D. Scott Gordon, Esq.