Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice (failure to follow instructions and insubordination), and Termination; Hearing Date: 11/09/12; Decision Issued: 11/14/12; Agency: DJJ; AHO: William S. Davidson, Esq.; Case No. 9927, 9943; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 11/30/12; EDR Ruling No. 2013-3490 issued 12/03/12; Outcome: No Ruling – Untimely; Administrative Review: DHRM Ruling Request received 11/30/12; Outcome: No ruling issued – untimely; Judicial Appeal: Appealed to Powhatan Circuit Court; Outcome: AHO's decision affirmed (04/01/13) [CL-12-13].**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos: 9927 and 9943

Hearing Date: November 9, 2012
Decision Issued: November 14, 2012

PROCEDURAL HISTORY

A Group II Written Notice was issued to the Grievant on August 20, 2012, for:

> On August 14, 2012 I notified you that a previously approved leave request was being rescinded, and that you were to attend mandatory GED training on Thursday, August 16, 2012. In an e-mail dated August 14, 2012, you notified me that you would not be attending the required training as instructed. On August 16, you failed to report to the GED training as scheduled. Your refusal to follow supervisory instructions warrants the issuance of this Group II written notice. [1]

A Group III Written Notice was issued to the Grievant on August 27, 2012, for:

> On August 21, 2012, you received a memorandum from Director A instructing you to cease your practice of submitting complaints and grievances directly to him, and to address any concerns and complaints through your immediate chain of command. You were also instructed that any issues that needed to be addressed outside of your chain of command be discussed with the agency's Human Resources Director. On that same day, you sent Director A another e-mail which was insulting, argumentative, and insubordinate, and which was a direct violation of the instructions given [to] you by the Director. [2]

Pursuant to the Group II Written Notice, the Grievant received no punishment other than the issuance of the Group II Written Notice. Pursuant to the Group III Written Notice, the Grievant was terminated on August 27, 2012. [3] On August 20, 2012, the Grievant timely filed a grievance to challenge the Agency's actions, regarding the Group II Written Notice. [4] On August 27, 2012, the Grievant timely filed a grievance to challenge the Agency's actions, regarding the Group III Written Notice. [5] On October 1, 2012, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On November 9, 2012, a hearing was held at the Agency's location. Due to scheduling conflicts with the Agency and their witnesses, the hearing was not able to be scheduled prior to November 9, 2012.

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[1] Agency Exhibit 1, Tab 1, Page 12
[2] Agency Exhibit 1, Tab 2, Page 8
[3] Agency Exhibit 1, Tab 2, Page 8
[4] Agency Exhibit 1, Tab 1, Pages 1 and 2
[5] Agency Exhibit 1, Tab 3, Pages 1 and 2

APPEARANCES

Attorney for Agency
Agency Party
Attorney for Grievant
Grievant
Witnesses

ISSUE

1. Was the Grievant's failure to follow supervisory instructions to attend training on August 16, 2012, sufficient to warrant a Group II Written Notice for insubordination?

2. Did the Grievant commit insubordination when, on August 21, 2012, she sent emails to Director A after having been specifically instructed on that date to no longer send Director A complaints and/or grievances?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. [6] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

BURDEN OF PROOF

[6] *See* Va. Code § 2.2-3004(B)

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. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. [7] However, proof must go beyond conjecture. [8] In other words, there must be more than a possibility or a mere speculation. [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 Agency provided the Hearing Officer with a notebook containing fifty-eight (58) tabs (only 57 of which had documentation) and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing fourteen (14) tabs and two (2) loose documents in the front of the notebook. One document being a multi-page copy of a calendar and the second document being a one-page fax cover sheet. The notebook and the loose documents were accepted in their entirety as Grievant Exhibit 1.

Prior to taking any evidence from witnesses in this matter, the parties entered into stipulations regarding each of the Written Notices. For the Group II Written Notice issued on August 20, 2012, it was stipulated that on August 14, 2012, the Grievant was notified that a previously approved leave request was being rescinded; that the Grievant was directed to attend mandatory GED training on Thursday, August 16, 2012; that on August 14, 2012, the Grievant notified her immediate supervisor that she would not attend the GED training; and that on August 16, 2012, the Grievant did not attend the GED training.

Regarding the Group III Written Notice, it was stipulated that the Grievant received a memorandum on August 21, 2012, from Director A instructing her to stop her practice of submitting complaints and grievances directly to him and to address concerns and complaints through her immediate chain of command. The Grievant was also instructed that, if any issue that she needed to address was outside of her chain of command, then she should take that to the Agency's Human Resources Director. On that same day, after receipt of the memorandum, it was stipulated that the Grievant sent him another email.

After these succinct stipulations, the Hearing Officer heard evidence for approximately eleven (11) more hours. Most of the evidence dealt with the Grievant's allegations of retaliation,

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[7] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[8] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[9] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

discrimination and/or hostile work environment. For a claim of retaliation to qualify as an affirmative defense, there must be evidence to establish that, (i) the employee engaged in a protected activity, (ii) the employee suffered an adverse employment action, and, (iii) a causal link exists between the adverse employment action and the protected activity. Where the Agency presents a non-retaliatory business reason for the adverse employment action, the Grievant will not prevail, unless the Grievant presents sufficient evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. [10]

There is absolutely no question this Grievant took part in protected activities. From October 26, 2011, to date, she has filed at least eight (8) grievances with this Agency and its immediate predecessor. [11] The Grievant, in her testimony, acknowledged using the state hotline and acknowledged filing many complaints in addition to the aforesaid grievances.

In questioning of Grievant's witnesses, Grievant's counsel suggested that the Grievant was a difficult employee, who was extraordinarily passionate about her job. Grievant called several witnesses to attempt to establish that the workplace was hostile towards her or that there was retaliation. The Grievant offered no testimony from her witnesses, nor herself, dealing with discrimination based on a protected status such as race, sex, color, national origin, religion, age, veteran status, political affiliation or disability. [12] One of the Grievant's witnesses testified that she thought the Grievant had been subjected to retaliation and by way of example suggested that Grievant's immediate supervisor may not have been listening to the Grievant. Another of the Grievant's witnesses testified that, if she were the Grievant, she would feel like she was being retaliated against and she felt that the retaliation was because of the Grievant's many complaints. This witness could offer no specific examples of retaliation. This same witness, upon cross-examination, stated that she specifically did not believe that Director A, anyone with the Department of Human Resources, nor members of the Attorney General's Office were targeting the Grievant for discrimination.

A third witness for the Grievant testified that she thought the Grievant might be the subject of retaliation but again could offer no examples of such retaliation. This witness acknowledged that, when she was told to go to training, that is exactly what she did. A fourth witness called by the Grievant testified to the Grievant's good character and that she was a good teacher. However, this witness testified that the Grievant's complaining often became redundant. This witness stated that the Grievant was a difficult person to manage and that she often sent many emails containing her complaints. Further, this witness testified that there were complaints from another employee who thought that the Grievant was racist. A fifth witness called by the Grievant testified that she has seen no acts of retaliation against the Grievant.

Grievant's counsel essentially attempted to impeach more than one (1) of the witnesses that the Grievant called, as it was clear their testimony was more harmful than helpful to the Grievant. The Grievant did call one (1) witness who testified to a hostile work environment as it

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[10] Qualification Ruling in the matter of the Department of Corrections, Ruling No.: 2013-3446, 3447, dated October 24, 2012

[11] Grievant Exhibit 1, Tabs 3 through 8

[12] *See* DHRM Policy 2.30, Workplace Harassment (defining Workplace Harassment" as conduct that is based on "race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability").

related to this witness. This witness testified as to events that were taking place regarding him and a grievance that he was in the process of filing. He did not testify to any retaliation against the Grievant or hostile workplace issues regarding the Grievant.

Regarding the Group II Written Notice, the Grievant, pursuant to her stipulation, admits all of the facts required to show that she committed the acts set forth in the Group II Written Notice. The Grievant, through her testimony and through her questioning of the Agency witnesses, argued strenuously that leave had been granted to her, the leave was taken from her, that she was the only person who was forced to come back to attend this training, and that the training date was established on the date of another conference she wished to attend for the sole purposes of causing her to not attend that second outside conference.

Fairly read, the Grievant's claim asserts in part a claim of misapplication or unfair application of the educational training leave policy by Agency management. There must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the application policy.

The evidence before the Hearing Officer is quite clear that the Grievant requested leave for eight (8) hours on August 15, 2012, and that request was granted. [13] As late as 3:43 p.m., on August 9, 2012, the Grievant wrote to her supervisor indicating that she could not attend the Agency training as she had been approved to attend the Governor's summit on education on August 15, 2012. [14]

On August 14, 2012, at 2:25 p.m., the Grievant was sent an email from her immediate supervisor that directed her as follows:

> Therefore, you are to cancel your outside training to attend the agency GED training on Thursday, August 16, 2012. This training will be more in line with your role responsibilities and is more specific to the DOE expectation. [15]

The Grievant's response to her supervisor, approximately nine (9) minutes later, was as follows:

> Let me be clear, I will NOT be bullied or threatened by you or anyone else in your chain of command when YOU are the ones that have repeatedly made errors. If you must discipline me, do so, but be prepared for a grievance to address this. [16]

On August 20, 2012, the Grievant sent an email to an employee of the Governor's Office. In that email, she stated, in part, as follows:

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[13] Agency Exhibit 2, Tab 8, Page 1
[14] Agency Exhibit 1, Tab 13, Page 1
[15] Agency Exhibit 1, Tab 14, Page 1
[16] Agency Exhibit 1, Tab 14, Page 1

> ...As I anticipated, and shared with you, upon returning to work today, I received a Group II, Written Notice, for attending the Governor's Educational Reform Summit. The allegation was "insubordination," even though I was approved to attend the summit and to reschedule the last minute training for another day by my immediate supervisor, as is documented by email.... [17]

It is clear that this Grievant was directly told to cancel her attendance at a meeting outside of the Agency on August 16, 2012, in order that she attend training that was specific to her task within the Agency. The Grievant acknowledged written instructions to attend on August 16, 2012, told her immediate supervisor that she refused to attend, that she fully anticipated discipline for failing to attend, and she even wrote to an employee of the Governor's Office that the anticipated discipline, which she had previously shared with this person, had come to fruition. The Grievant was forewarned and knew exactly what would happen, anticipated what would happen, and now complains that it should not have happened.

Finally, regarding this Written Notice, the leave that the Grievant complains about being rescinded, was educational leave. This is a leave that is discretionary with management both in its granting and in its rescinding. The Grievant complained that no member of the Agency could produce any documentation that could indicate that such a leave could be withdrawn by management. However, as the burden of proof shifted to the Grievant when she acknowledged all of the facts of this particular charge, it is of interest to the Hearing Officer that the Grievant introduced no evidence whatsoever that there was any written policy regarding educational leave, much less a policy that set forth when it could be rescinded.

Regarding the Group III Written Notice, the Grievant acknowledged that she had received a letter from Director A indicating that she was not to send further emails, letters, grievances, nor complaints to Director A. [18] The Grievant testified that she received this letter sometime between noon and 2:00 p.m., on August 21, 2012. The letter was delivered to her by her immediate supervisor and he indicated that he delivered it to her at 1:10 p.m., on August 21, 2012. The letter states in part as follows:

> ...Your conduct in this regard is not appropriate, nor is it consistent with my expectations regarding the manner in which complaints and grievances are to be addressed and resolved. Accordingly, neither Dr. B nor I are to be copied in the future on any such correspondence...I am instructing you to follow your immediate chain of command. If you have concerns which you are reluctant to discuss with your immediate supervisors and believe it necessary to go outside your chain of command, then you may contact the agency's Human Resources Director...who will try to assist you.
>
> It is also my expectation that any grievances filed by you reflect the tone and tenor of a professional level employee like yourself and that they contain sufficient facts and details to allow for an informed response

[17] Agency Exhibit 1, Tab 49, Page 1
[18] Agency Exhibit 1, Tab 51, Page 1

> by your immediate supervisors. Unsupported, baseless, and acrimonious allegations made against your coworkers are not in keeping with the spirit of the grievance procedure and serve only to diminish any argument that you may present. I appreciate your immediate attention to the above instructions. [19]

While the Grievant did not remember the exact time that she received this letter, she responded directly to the Director, contrary to his instructions in the letter, at 1:19 p.m. This was nine (9) minutes after it was delivered to her by her supervisor. [20] Further, having not heard from the Director for approximately three (3) hours, the Grievant emailed him again at approximately 4:32 p.m., on the same day. In this second email, the Grievant stated, in part, the following:

> ...You have no intention of cleaning up corrupt and abusive leadership within our division.
>
> You have no intention of obtaining the truth of what is really going on within our division, instead you opt to blindly believe what is told to you by those that seek to not only discredit you, but undermine your authority as well as Dr. B.
>
> I will forward everything to the Governor's office, the DJJ Board, and the media.
>
> I am extremely disappointed in your unwillingness to address this matter and allow dedicated employees and students to be abused. We deserve better than that from you...[21]

After having been specifically instructed not to be in touch with the Director, the Grievant was only able to withhold herself for nine (9) minutes and then approximately three (3) hours. The second email was clearly insulting and insubordinate. In her own testimony, the Grievant first stated that she only wanted clarification as to the meaning of the Director's letter and then, upon cross-examination, acknowledged that she was writing because she was concerned about prior grievances. Clearly, she understood, or should have understood, the direct instructions from the Director. And clearly, she violated them.

There is no question that the Grievant did exactly as the Agency has charged in each of the Written Notices. The Grievant defends on retaliation. The Grievant seems to pose a rather novel theory of having filed a grievance against nearly everyone in her chain of command in the Agency, therefore none of them can issue a Written Notice without retaliation being alleged. It is of interest to note that, regarding the Group III Written Notice, the Grievant and her witnesses testified that those parties who were responsible for the issuance of the Group III Written Notice were not parties that she felt were retaliating against her. Regarding the Group II Written Notice, the Grievant acknowledged that the Human Resources representative who prepared the Group II Written Notice and who was the person whom the Grievant's immediate supervisor relied upon

[19] Agency Exhibit 1, Tab 51, Page 1
[20] Agency Exhibit 1, Tab 52, Page 1
[21] Agency Exhibit 1, Tab 53, Pages 1 and 2

as to whether a Group II Written Notice should be issued, was not someone who was retaliating against her. The person who issued each notice was her immediate supervisor, but his testimony was that he did not prepare them, he did not have any input in the decision-making of whether or not to issue them and that his role was simply to convey the facts as to what the Grievant had done.

The Hearing Officer specifically finds that this Grievant has not reached her burden regarding retaliation. The Grievant offered no evidence as to discrimination and very limited evidence as to hostile work environment. For a claim of hostile work environment, the Grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the Agency. [22] Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. [23] The Hearing Officer specifically finds that the Grievant has not bourne her burden of proof regarding discrimination and/or hostile work environment.

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..." 24 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

The Hearing Officer finds that the Agency did consider mitigation in this matter, but there was nothing that justified mitigating either the Group II Written Notice or the Group III Written Notice.

DECISION

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[22] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007)
[23] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993)
[24] Va. Code § 2.2-3005

For reasons stated herein, the Hearing Officer finds that the Agency has bourne its burden of proof in this matter and that the issuance of the Group II Written Notice and the Group III Written Notice with termination were appropriate. The Grievant has not bourne her burden of proof in establishing retaliation, hostile work environment or discrimination as a defense.

APPEAL RIGHTS

You may file an administrative review request if any of the following apply:

1. 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. You may fax your request to 804-371-7401, or address your request to:

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

2. 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. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
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 of the original hearing decision. A copy of all requests for administrative review must be provided to the other party, EDR and the hearing officer. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[25] 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.[26]

[25] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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

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

_____

William S. Davidson
Hearing Officer

VIRGINIA:

IN THE CIRCUIT COURT FOR POWHATAN COUNTY

Grievant/Appellant,

v. **CL-12-13**

VIRGINIA DEPARTMENT OF JUVENILE JUSTICE,

Agency/Appellee.

FINAL ORDER

The Court, having reviewed the record and having considered the arguments of the parties in this appeal under the Grievance Procedure for state employees, Va. Code § 2.2-3000 *et seq.*, has determined that the decision of the hearing officer is not "contradictory to law" within the meaning of Va. Code § 2.2-3006(B), the statutory standard for judicial review of such appeals. Accordingly, the Court AFFIRMS the hearing officer's decision and dismisses this appeal with prejudice.

Because the Appellant is not represented by counsel in this matter, the Court waives endorsement as permitted by Rule 1:13 of the Rules of the Supreme Court of Virginia, and notes Appellant's objections to this ruling. The Clerk is directed to provide copies of this order to Appellant and counsel for Appellee.

Entered this 1 day of April, 2013.

Paul W. Cella
Judge

A COPY:
Teste: WILLIAM E. MAXEY, JR., Clerk
By Barbara Hutchison **Deputy Clerk**

I ask for this:

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