

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 03/28/16;  
Decision Issued: 04/15/16; Agency: VDACS; AHO: Carl Wilson Schmidt, Esq.;  
Case No. 10753; Outcome: No Relief – Agency Upheld; **Administrative Review:**  
**EDR Ruling Request received 05/02/16; EDR Ruling No. 2016-4349 issued**  
**05/17/16; Outcome: AHO's decision affirmed; Administrative Review: DHRM**  
**Ruling Request received 05/02/16; DHRM Ruling issued 05/23/16; Outcome:**  
**AHO's decision affirmed.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10753**

Hearing Date: March 28, 2016  
Decision Issued: April 15, 2016

#### **PROCEDURAL HISTORY**

On April 13, 2015, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions.

On May 12, 2015, 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 January 11, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 28, 2016, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representatives  
Agency Party Designee  
Agency's Counsel  
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 Conservation and Recreation employs Grievant as a Fixed Assess and Leasing Accountant. She began working for the Agency in 2008. Grievant's duties included:

Timely management of payment request submissions for agency rental and equipment leases, conducting detailed analysis and reconciliations and providing oversight and on-going support services to DCR users of these programs.

Her Employee Work Profile required that she, "[s]eeks clarification of instructions" and "[m]eets deadlines."<sup>1</sup> No evidence of prior active disciplinary action was introduced during the hearing.

The Supervisor began working for the Agency in August 10, 2014. Grievant reported to the Supervisor.

Grievant was responsible for reconciling the Agency's FAACS accounting system data with the Department of Accounts CARS accounting system data.

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<sup>1</sup> Grievant Exhibit 1.

Grievant completed reconciliation reports for July through December 2014 and then posted those reconciliations on the Unit's shared computer drive. Grievant had working papers to provide further detail regarding her reconciliation computations. The working papers were not posted on the shared computer drive. The Supervisor wanted to review each reconciliation including Grievant's working papers.

The Auditor of Public Accounts audited the Agency. This resulted in "audit points" for the Finance Department. The Agency decided to have desk procedures developed so that a new employee could read the procedures and understand the Agency's application of policies.

The Supervisor asked her subordinates including Grievant to draft desk procedures to reflect each employee's current procedures. The Supervisor expected each employee to draft desk procedures that were in an editable format so they could be changed as each employee's duties changed in the future.

On February 2, 2015, the Supervisor sent Grievant and other employees an email stating, "[a]ll desk procedures are due. Please submit as soon as possible."

On February 9, 2015, the Supervisor held a staff meeting attended by Grievant. The Supervisor discussed delinquent assignments and the monthly reconciliation process. The Supervisor instructed Grievant to give her a copy of all supporting documents for the previously completed reconciliations.

On February 9, 2015, the Supervisor sent Grievant an email stating, "[d]esk procedures – past due." Grievant replied:

I have my desk procedures that I work on a couple of weeks ago. Brought with me when we last [met]. I went over that waiting to add other items once policy complete and training set up. I will bring to you.<sup>2</sup>

On February 12, 2015, the Supervisor held a staff meeting which Grievant attended. The Supervisor asked Grievant to provide her with Grievant's monthly reconciliations for State Fiscal Year 2015 along with Grievant's work paper. The Supervisor was requesting reconciliation documents for reconciliations Grievant had already completed.

On February 13, 2015, the Supervisor sent her staff including Grievant an email stating:

Staff will have desk procedures for all processes submitted to me for review by 2/27/2015. This is a full month after the initial deadline. No exceptions, we must move forward.

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<sup>2</sup> Grievant Exhibit 12

Grievant submitted scanned copies of older policies but did not re-key the documents and place them in an editable format. Several procedures were not current.

On February 26, 2015, the Supervisor asked Grievant for the reconciliation reports. Grievant said she needed more time to “pull” the files together. The Supervisor said the reconciliations were already completed and did not understand why Grievant needed additional time to provide the documents.

On March 18, 2015, the Supervisor reminded Grievant that her desk procedures were past due. Grievant showed the Supervisor a book of printed documents. The Supervisor told Grievant that the desk procedures had to be in editable format. Grievant scanned the documents and sent them to the Supervisor.

On March 20, 2015, the Supervisor sent Grievant an email stating:

As previously discussed, all procedures need to be in an editable, updatable format i.e. Word. Please submit step by step procedures, following the example provided for the weekly recon for each of your processes by COB Wednesday 3/25/2015.

Grievant replied to this email on March 23, 2015:

After reading the below e-mail and talking to you this morning, I realize since I scanned some of the information including the instructions and screen shots they were in PDF format and you wanted to be able to edit them so I will need to re-do. And some of the steps that apply to me you want me to re-write. \*\*\*<sup>3</sup>

On March 20, 2015, the Supervisor sent Grievant an email stating:

As previously requested, please provide your monthly recon and support for my review and signature for all reports prepared and saved on the I:drive for SFY2015. Please ensure no other reports are saved on the I:drive indicating I have reviewed without my signature.<sup>4</sup>

On March 31, 2015, the Supervisor held a staff meeting to discuss past due assignments. Grievant had not provided the Supervisor with the reconciliation reports.

Grievant did not provide the desk procedures by March 25, 2015.

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<sup>3</sup> Grievant Exhibit 13.

<sup>4</sup> Grievant Exhibit 14.

On April 1, 2015, the Supervisor went to Grievant's office and asked for the reconciliation documents. A confrontation occurred and Grievant instructed the Supervisor to leave Grievant's office.

On April 2, 2015, Grievant provided the Supervisor with copies of the documents relating to the completed reconciliations reports.

Grievant never provided the Supervisor with desk procedures

### **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."<sup>5</sup> 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."

Failure to follow instructions is a Group II offense.<sup>6</sup> Grievant was instructed several times to provide desk procedures in an editable format. She received an email setting a deadline of March 25, 2015. Grievant did not provide the desk procedures in an editable format by March 25, 2015. On February 9, 2015, the Supervisor instructed Grievant to provide the Supervisor with Grievant's supporting documents for the reconciliations Grievant completed several months earlier. Grievant did not provide the documents to the Supervisor until almost two months later. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

Grievant argued that the instructions were unclear and deadlines were not specified. She asserted there was a misunderstanding between her and the Supervisor. The evidence showed that the Supervisor gave clear instructions with due dates. Grievant failed to comply with the Supervisor's repeated instructions. Grievant had many opportunities to seek clarification of any instruction she did not understand.

Grievant contends the disciplinary action should be mitigated. *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 Human Resource Management ...."<sup>7</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to

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

<sup>6</sup> See, Attachment A, DHRM Policy 1.60.

<sup>7</sup> *Va. Code § 2.2-3005.*

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 submitted evidence showing that on March 20, 2015, she was approved for Family Medical Leave. Her leave could be taken intermittently as 60 days or 480 hours or for a continuous 12 weeks. Grievant's Family Medical Leave does not serve to mitigate the disciplinary action. Grievant was disciplined for failing to perform duties even though she went to work and could have performed her duties. She was not disciplined for taking leave. No credible evidence was presented showing her underlying medical condition prevented her from completing her assignments. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>8</sup> (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment 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.<sup>9</sup>

Grievant argued that the Agency took disciplinary action as a form of retaliation. Grievant engaged in protected activity. Grievant sought intermittent FMLA leave and her request was approved on March 20, 2015. On April 1, 2015, Grievant and the Supervisor argued and Grievant complained about the Supervisor. Grievant suffered an adverse employment action because she received disciplinary action. Grievant did not establish a connection between her protected activity and the Agency's disciplinary

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<sup>8</sup> 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.

<sup>9</sup> 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).

action. The Agency took disciplinary action because of Grievant's failure to follow the Supervisor's instructions and not as a pretext to retaliation.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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:

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. Please address your request to:

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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals 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 requests for administrative 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.<sup>10</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>10</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.