Issue: Group II Written Notice (unsatisfactory job performance); Hearing Date: 03/04/16; Decision Issued: 03/24/16; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 10761; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 04/07/16; EDR Ruling No. 2016-4340 issued 04/29/16; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 04/07/16; DHRM letter issued 04/25/16; Outcome: Declined to review – no policy violation cited.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10761

Hearing Date: March 4, 2016
Decision Issued: March 24, 2016

PROCEDURAL HISTORY

On September 10, 2015, Grievant was issued a Group II Written Notice of disciplinary action for inadequate job performance and failure to follow policy or instructions.

On October 8, 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 he requested a hearing. On February 1, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 4, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Virginia Department of Health employs Grievant as an Environmental Health Specialist at one of its offices. He has been employed by the Agency for approximately 12 years. Grievant is licensed as an Onsite Soil Evaluator with the rank of Alternative Onsite Soil Evaluator. No evidence of prior active disciplinary action was introduced during the hearing.

Landowners submitted to the Agency applications for the installation of sewage disposal systems. One of the objectives of the permitting process for sewage disposal systems was to ensure that a sewage system was at least 100 feet from a water well unless an exception existed.

Grievant was responsible for performing Level I and Level II reviews. A Level I review was a "paperwork" review. Every application received by the Agency was to receive a Level I review. A paperwork review included looking at land records for properties adjoining the applicant's property to ensure that a proposed sewage system was not installed too close to an existing well.

A Level 2 review involved "field work." To complete field work, Grievant would visit the property identified in the application and look at adjoining properties.

Owner B owned Property 7-9-11-13. His property contained a water well. Owner B's property was adjacent to Property 4-5 owned by Owner H.

On June 7, 2012, Owner H submitted an application for a sewage system permit for Property 4-5. The application incorrectly claimed the property had a public water supply. A Professional Engineer indicated that the property was supplied by a public water supply. This was an error by the Professional Engineer. The property did not have a public water supply. Because the property did not have a public water supply and its water source was from a well, any new sewage system on an adjacent property had to be at least 100 feet from the well on Owner B's property.

Grievant conducted a Level 1 and Level 2 review of Property 4-5. When conducting the Level 1 review, Grievant failed to notice that the Professional Engineer's claim of a public water system was not correct. When conducting the Level 2 review, Grievant failed to observe a well on the properties that would have shown that the Professional Engineer's claim of a public water system was not true.

Grievant concluded that "[s]ite features affecting location [were] adequately identified" and "[s]eparation distances [were] adequate." On June 22, 2012, he issued a permit to Owner H to install an expanded sewage disposal system on Property 4-5. The expanded sewage disposal system on Property 4-5 was approximately 54 feet from the water well on Owner B's property rather than the required 100 feet.

The Agency discovered the error in May or June 2015.

On July 8, 2015, the Agency Head sent Owner B a letter stating in part:

> Please be aware that staff who reviewed your variance request discovered the sewage system on your neighbor's property [Owner H] appears to be too close to your well. Your neighbor's [sewage system] is approximately 54 feet from your well and his previous conventional sewage system was farther away. I strongly caution against using your well as a source of drinking water, including cooking or other potable uses because of this sewage system's proximity to your well with unknown construction. I understand staff spoke with you about how you could submit a free application to abandon your well and drill a new well. I also understand staff provided you with information on how you may request consideration of a claim for reimbursement of costs to abandon your well and drill a new well. ****[1]

The Agency paid Owner B approximately $2,300 so enable him to drill a new well.

[1] Grievant Exhibit 1.

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."[2] 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."

The Agency combined several separate fact scenarios into one Group II Written Notice rather than issuing several written notices. Because the Agency has combined these separate scenarios, the Hearing Officer must evaluate each one separately to determine if anyone rises to the level of a Group II offense.

It is not necessary to address all of the factual scenarios because only one can be elevated to a Group II offense.[3]

"[U]nsatisfactory work performance" is a Group I offense.[4] 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.

Grievant was obligated to perform a thorough Level 1 review with respect to the application for a sewage system permit filed by Owner H on June 7, 2012. The application contained incorrect information that there existed a public water supply. If Grievant had conducted a thorough "paperwork" review, he would have noticed the existing well on Owner B's property and been able to determine that the proposed sewage system would be too close to the existing well. He would have denied the application for the sewage system.

Grievant had a second opportunity to discover the error. He conducted a Level 2 review which involved "field work." When he visited the property, he should have observed that a well existed on the property and then questioned whether the property had a public water system. Had he realized the property did not have a public water supply, he would have recognized that the proposed sewage system would be too close

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

[3] The Agency presented evidence that Grievant failed to conduct Level 1 reviews on all of the applications he received. At most, this behavior would rise to a Group I offense for unsatisfactory work performance. The Agency did not present a policy that clearly sets forth Grievant's obligation to conduct Level 1 reviews in every case. (Grievant merely received training of the Agency's expectation.)

[4] See Attachment A, DHRM Policy 1.60.

to the water well and then denied the application. Instead, Grievant approved the permit for Owner H to install an expanded sewage disposal system.

Once Owner H installed an expanded sewage disposal system, that system was approximately 54 feet (instead of the required 100 feet) from the water well on Owner B's property. As a result, Owner B's drinking water was at risk of contamination. The Agency has presented sufficient evidence to show that Grievant's work performance was unsatisfactory.

In rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

The Group I offense in this case may be elevated to a Group II Offense. Grievant's error resulted in the Agency having to send a letter to Owner B to "strongly caution against using your well as a source of drinking water." Owner B had been using the well since 2012 even though there was a risk of contamination. The Agency felt obligated to correct the error by paying Owner B approximately $2,300. These factors had a material impact on the Agency thereby justifying the elevation of the offense from a Group I to a Group II Written Notice. The Agency's decision to issue Grievant a Group II Written Notice must be upheld.

Grievant admitted making the error but contested its significance or the need to take disciplinary action. He points out that the error was made by the Professional Engineer and Grievant had reason to believe the Professional Engineer had performed his work correctly. He argued the matter could have been resolved with a lower level of disciplinary action or by written counseling.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Although the Professional Engineer made the initial error, the Level 1 and Level 2 reviews were designed to enable Grievant to identify that error. Grievant failed to do so thereby justifying the taking of disciplinary action. Although the Agency could have resolved the matter with a lesser action, the Hearing Officer is not authorized to reduce disciplinary action simply because he does not agree with the Agency's decision when that decision is supported by the Standards of Conduct.

Grievant argued that the disciplinary action should not be elevated to a Group II offense. He points out that the Agency could have conducted a water test of the well water to determine if it was contaminated and, if not, avoided spending $2,300 on a new well. The Agency's decision is supported by the record. The Agency wanted to eliminate the risk of contamination regardless of whether actual water contamination had occurred. Had the 100 foot requirement been followed in 2012, the risk of

contamination would have been avoided. The Hearing Officer will not second guess the Agency's decision to pay $2,300.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[5] (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.[6]

Grievant engaged in protected activity when he complained about a supervisor. He suffered an adverse employment action because he received disciplinary action. Grievant has not established a link between his protected activity and the disciplinary action. Insufficient evidence was presented to show that the Agency's managers were motivated by retaliation.

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 …."[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.

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[5] 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.

[6] 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).

[7] Va. Code § 2.2-3005.

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 14th St., 12th 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 14th St., 12th Floor
   Richmond, VA 23219

   or, send by e-mail to 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.[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 EDR before filing a notice of appeal.