Issues: Group II Written Notice (failure to follow instructions), Group II Written Notice (failure to follow instructions) and Termination due to accumulation; Hearing Date: 02/15/17; Decision Issued: 03/07/17; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10939; Outcome: Partial Relief; **Administrative Review: Ruling request received 03/22/17; EDR Ruling No. 2017-4527 issued on 05/05/17; Outcome: Remanded to AHO; Remand Decision issued 05/08/17; Outcome: Original decision affirmed; Policy Review request received 05/23/17; Ruling No. 2017-4557 issued 06/21/17; Outcome: Remanded to AHO to reinstitute Group I; Remand Decision issued 07/06/17.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10939

Hearing Date: February 15, 2017
Decision Issued: March 7, 2017

PROCEDURAL HISTORY

On November 1, 2016, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. On November 1, 2016, Grievant was issued a second Group II Written Notice for failure to follow instructions. Grievant was removed from employment based on the accumulation of disciplinary action.

On December 1, 2016, Grievant timely filed a grievance to challenge the Agency's actions. The matter proceeded to hearing. On January 3, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 15, 2017, 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 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:

The Department of Social Services employed Grievant as a Media Relations Specialist. She had been employed by the Agency for approximately ten years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was on military leave from April 5, 2016 until September 30, 2016. Grievant returned to work on October 4, 2016.

> On October 6, 2016, the Supervisor sent Grievant an email assigning her to "Repurposing "Real Stories" on public site as editorial pitches to local publications throughout the Commonwealth: Due October 27, 2016.[1]

The Supervisor described what action to take and how Grievant should complete the task. Grievant replied on October 6, 2016 to the Supervisor's email by saying she would review the assignment and let the Supervisor know by October 7, 2016 if Grievant had any questions.

Grievant was working on October 24, 2016 but told the Supervisor she had a medical appointment at noon that day.

[1] Agency Exhibit 6.

Grievant met with a Licensed Professional Counselor regarding mental health issues. The Provider provided her with a letter stating:

> To Whom It May Concern:
>
> My name is [Provider] and I am a Licensed Professional Counselor. I have been providing individual psychotherapy for [Grievant] beginning October 24, 2016.
>
> During our initial assessment it became clear to me that [Grievant] would greatly benefit from some time away from work. The current level of stress in her life is threatening to exacerbate her medical conditions.
>
> I would recommend two weeks of leave for [Grievant] during which time she can work on reducing stress and developing health coping skills.[2]

On Monday October 24, 2016 at 4:03 p.m., Grievant sent the Supervisor an email stating:

> My doctor has taken me out of work for the next two days (Tuesday and Wednesday). I will submit my leave in TAL, just wanted to let you know what was going on.

On Monday October 24, 2016 at 4:52 p.m., the Supervisor replied:

> Ok, thanks for letting me know. Please scan/email your doctor's note to me please. Thank you.[3]

On October 24, 2016 at 3:59 p.m., Grievant sent the Benefits Manager an email regarding "Short-Term Disability Claim" stating:

> My doctor has taken me out of work effective immediately until November 11th. I called VRS to file my claim and they informed me that I am still showing up in the system as terminated. Could you please advise me on what I need to do to be updated in the system?

On October 25, 2016 at 8:28 a.m., Grievant sent the Agency's Benefits Manager an email stating:

> Please see attached letter from my doctor. I know that I have to notify [Supervisor] of my leave but I would like to keep the nature of my leave private if at all possible. Please let me know what else you need from me.

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[2] Grievant Exhibit 37.

[3] Agency Exhibit 5.

On October 25, 2016 at 2:25 p.m., the Benefits Manager sent Grievant an email stating:

> [Grievant] – under a separate e-mail where we will copy [Supervisor], I will have [HR Analyst] send you the VSDP information. All medical information is confidential. You do not need to provide medicals to us – just to the [Third Party Administrator].

On October 25, 2016 at 2:43 p.m., the HR Analyst sent Grievant an email regarding initiating a short-term disability claim. He sent the Supervisor a copy of his email to Grievant.

On October 25, 2016 at 4:02 p.m. Grievant sent the Supervisor an email stating:

> I was waiting to hear back from HR before notifying you of my extended absence. My doctor has taken me out of work for a couple of weeks. I anticipate being out until Monday [November 7th]. I will provide you with additional information as I get it.

On October 25, 2016, the Supervisor sent Grievant a text stating:

> I emailed you as well but thought I would send a text in case you were signing off of email for a while. Seeing as though you're not returning until after the launch of national adoption month, please send me what you have so far for the feature story deliverable due this week. Obviously you're not required to do any work while you are out but I just need what you've been able to accomplish to date. Thanks.

On October 25, 2016, Grievant sent the Supervisor a text stating:

> I had still planned to send you my project that's due on the 27th, wasn't going to just drop the ball on it. I'm still putting it together and will send Thursday.

On October 26, 2016 at 10:16 a.m., the Supervisor sent Grievant an email stating:

> Short-term disability means that you are unable to engage in work activity. We cannot allow you to continue to work on this project as you suggested yesterday. Please send me whatever work that has been completed on the feature stories project immediately.
>
> Also, please provide an update on what has been done to date on the Media Engagement Strategy deliverable due next week.

> This is all that will be required of you before you are released to return to work. Thank you?[4]

The Supervisor sent Grievant a text stating:

> Please check your email. Your STD prohibits you from continuing work activity. Just send me what you have now.

On October 26, 2016 at 12:05 p.m., Grievant sent the Supervisor a text stating:

> Ok, I understand that. Along with following my doctor's orders, to give you what I have now will require some time spent compiling it. I will need until tomorrow to get you what I have.

The Supervisor replied:

> But I am not asking you to compile anything. Just send me what you have in whatever form it's in now. Email, word, draft, etc. I don't need you to spend any more time compiling.

Grievant responded:

> In order [to] provide you with what I have, in any format that's electronic, it will have to be compiled as I mentioned before. All of my notes are handwritten and not presentable. I do not feel comfortable providing you with anything that's incomplete or not easy to understand, even if it's drafts.[5]

On October 27, 2015 at 12:35 p.m., Grievant sent the Supervisor an email stating:

> Having connectivity issues with my work computer so I'm sending from my personal e-mail. Just in case you don't receive it, I acknowledge receipt of the NOI. E-mails are sitting in my outbox.
>
> Attached is what I have so far regarding the adoption project. There are five pitch letter[s]. Portsmouth and Roanoke pitch letters contain a family form the area featured in it. There is an attachment that specifies which outlets I have identified to send the two stories to. The generic pitch letter is for all other media outlets. The Fredericksburg and Washington pitch letters are personalized to two reporters who have reported on foster care/adoption issues before.

[4] Agency Exhibit 6.

[5] Agency Exhibit 6.

> There is a media list attached that is color coded with the outlets for Portsmouth (yellow) and the outlets for Roanoke (green).
>
> To date I have done research and identified content to be included in the plan for each element of the strategy.[6]

Because Grievant sent the email from her personal email account and with large attachments, Grievant's email went to the Supervisor's SPAM electronic mail folder instead of to the Supervisor's electronic inbox. The Supervisor did not realize she had received Grievant's email. In December 2016, the Supervisor discovered that VITA had "quarantined" Grievant's email and attachment for 14 days and then removed it from the Supervisor's computer.

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."[7] 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 a supervisor's instructions is a Group II offense.[8]

Group II Written Notice – Doctor's Note

DHRM Policy 4.57 governs the Virginia Sickness and Disability Program. It states:

> An employee who uses [sick leave] must comply with management's request for verification of the appropriateness of using [sick leave.] ***
>
> Employees may use [sick leave] for absences due to personal illness or injuries, pregnancy, and preventive or wellness physician visits, and to cover the 7 calendar day waiting period.

[6] Agency Exhibit 6.

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

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

DHRM Policy 4.57 does not require Grievant to inform the Supervisor of the details and nature of her illness. Grievant was only obligated to provide a provider's note authorizing the taking of sick leave.

Grievant's Provider's note described Grievant as receiving individual psychotherapy for stress that was threatening to exacerbate her medical condition. The Provider's note revealed the treatment she was receiving and the reason (stress) for the treatment. The Provider's note sufficiently discloses Grievant's medical condition such that Grievant was justified in refusing to submit the note to the Supervisor. Grievant did not wish to submit the note to the Supervisor because it showed she was receiving psychotherapy.

Grievant submitted the Provider's note to the Agency's Benefits Manager. Grievant understood the Benefit Manager's reply email to be saying Grievant was not obligated to provide medical information to the Agency including the Supervisor. Grievant submitted the Provider's Note to the Third Party Administrator. Grievant adequately informed the Agency of her reason for being absent from work. Grievant adequately informed the Third Party Administrator of the basis for her claim of short-term disability.

Grievant adequately notified the Supervisor that she would be absent from work. Grievant's failure to give the Provider's note to the Supervisor did not materially affect the Agency's operations.

The Agency argued that Grievant should have provided a doctor's note upon the Supervisor's request. The Agency terminated Grievant on November 1, 2016 before she was to return to work. The Agency could have required Grievant to provide another note after returning to work to verify her sick leave. Grievant was not given that opportunity because she was terminated only a few days after notifying the Agency she intended to use sick leave and seek short term disability benefits.

The Group II Written Notice must be reversed.

Group II Written Notice – Project Work Product

Grievant had a project deadline of October 27, 2016. Grievant had not completed the project. The Supervisor wanted to receive Grievant's work product in order to attempt to have the project completed. The Supervisor instructed Grievant to "immediately" send her Grievant's work product and not revise it. Instead, Grievant re-worked some of her handwritten notes into electronic format and emailed them to the Supervisor on October 27, 2016. Grievant failed to comply with the Supervisor's instruction to immediately send the handwritten notes thereby justifying the Agency's issuance of a Group II Written Notice.

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 Human Resource Management …."[9] 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 relating to Grievant's failure to timely send her work product to the Supervisor.[10]

Accumulation of Disciplinary Action

Grievant was removed from employment based on the accumulation of two Group II Written Notices. Only one of those Written Notices is upheld and, thus, no basis exits to remove Grievant. Grievant must be reinstated.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failing to submit a provider's note to the supervisor is **rescinded.** The Agency's issuance to the Grievant of a Group II Written

[9] Va. Code § 2.2-3005.

[10] Grievant also claimed she was being retaliated against for taking military leave. No credible evidence was presented to support this allegation.

Notice of disciplinary action for failing to submit work product to the supervisor is **upheld**. Grievant's removal is **reversed**.

The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.[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

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Carl Wilson Schmidt, Esq.
Hearing Officer

[11] Agencies must request and receive prior approval from 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: 10939-R

Reconsideration Decision Issued: May 8, 2017

RECONSIDERATION DECISION

EDR Ruling 2017-4527 remanded this matter to the Hearing Officer:

> Having reviewed the evidence in the record, EDR is unable to determine whether the hearing officer considered and addressed whether the grievant complied with the valid instruction to submit a doctor's note directly to the supervisor. The hearing officer determined that the grievant was justified in not providing the doctor's note she had, but that does not address the question of whether the grievant adequately complied with her supervisor's instruction in this instance. For example, the grievant could have obtained a different note from her medical provider that did not contain specific medical information about her diagnosis. Because EDR cannot find that the hearing officer has squarely addressed whether the grievant complied with the supervisor's instruction, the matter must be remanded for clarification on this point.

Grievant informed the Supervisor that she would not be reporting to work. With this information, the Supervisor could assign other employees to perform Grievant's work duties during her absence. The Agency's operations were not affected by Grievant's failure to present her medical provider's note immediately to the Supervisor.

The purpose of asking for a medical provider's note from an absent employee is to verify that the employee was actually ill and, thus, the employee's request for leave was valid. An employee who fails to document his or her reason for not reporting to work suffers the consequence of having his or her leave request denied. In this case, the Agency decided also to discipline Grievant.

Grievant was obligated to "comply with management's request for verification of the appropriateness of using [sick leave.]" She was not obligated to provide the Supervisor with the medical provider's note she had in her possession because it said she was receiving psychotherapy. Employees are not obligated to disclose the nature of the treatment they are receiving in order to justify their leave requests.

Most agencies permit employees to submit medical providers' excuses upon their return to work. The Agency did not present a copy of a written policy requiring her to submit a medical provider's note before taking leave. The Supervisor's instruction did not contain a deadline to submit the medical provider's note. Grievant was removed from employment on November 1, 2016. This was before she was scheduled to return to work. Whether she could have obtained another medical provider's note that did not contain her medical information and provide that to the Supervisor is not known.

Although Grievant was not obligated to do so, she submitted the medical providers' note to Benefits Manager. This satisfied Grievant's obligation under DHRM Policy 4.57 to provide "verification of the appropriateness of using [sick leave]" to Agency management.

There is no basis to modify the Original Hearing Decision.

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 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

COMMONWEALTH of VIRGINIA

Office of Equal Employment and Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 10939-R2

Reconsideration Decision Issued: July 6, 2017

SECOND RECONSIDERATION DECISION

EEDR Ruling 2017-4557 provides:

> Although the grievant complied with the requirements of state policy relating to verification of her need for sick leave, the facts as found by the hearing officer demonstrate that she made no response to her supervisor's request for a doctor's note. It is not unreasonable for agency management to expect employees to respond to inquiries from their supervisors about work-related matters within a reasonable amount of time. Upon considering the totality of the circumstances as determined by the hearing officer in this case, DHRM finds as a matter of state policy that the grievant's failure to respond to her supervisor's request for a doctor's note in this case constituted unsatisfactory work performance that justified the issuance of a Group I Written notice. Therefore, a Group I Written Notice must be reinstituted in place of the Group II Written Notice that was originally issued to the grievant. Because the grievant does not have a sufficient accumulation of discipline under DHRM Policy 1.60, *Standards of Conduct*, to support termination, she must be reinstated to her former position or an equivalent position, as directed by the hearing officer in his previous decision. (footnotes omitted).

The parties should govern themselves accordingly.

APPEAL RIGHTS

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

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. All timely requests for administrative review have been decided and, if ordered by 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

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Carl Wilson Schmidt, Esq.
Hearing Officer