

Issues: Group II Written Notice (unsatisfactory performance), and Termination (due to accumulation); Hearing Date: 01/28/13; Decision Issued: 01/30/13; Agency: TAX; AHO: Carl Wilson Schmidt, Esq.; Case No. 10006; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 02/14/13; EDR Ruling No. 2013-3539 issued 03/21/13; 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: 10006**

Hearing Date: January 28, 2013

Decision Issued: January 30, 2013

#### **PROCEDURAL HISTORY**

On November 27, 2012, Grievant was issued a Group II Written Notice of disciplinary action with removal for unsatisfactory performance.

On December 4, 2012, Grievant timely filed a grievance to challenge the Agency's action. The grievance proceeded to hearing. On December 27, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 28, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency 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?

### **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 Taxation employed Grievant as an Error Resolver. She had been employed by the Agency for approximately nine years. The purpose of her position was:

To examine, analyze, and resolve any type of tax form on error using the information given in the IRMS/CARS data system, or through communication with the taxpayer, attorneys, and accountants. Completes the correction process according to agency policy, procedures, and objectives.<sup>1</sup>

Grievant had prior active disciplinary action. On May 9, 2012, Grievant received a Group I Written Notice for unsatisfactory performance. On September 25, 2012, Grievant received a Group II Written Notice for unsatisfactory performance.

On April 30, 2009, the Taxpayer submitted a 2005 tax return claiming an Out-of-State Credit (OSC) in the amount of \$36,180. The credit applied to multiple states on a consolidated statement. The credit had to be entered manually into the Agency's systems. Grievant failed to follow the proper procedures. She posted the tax return but denied tax credit even though the OSC consolidated statement was attached to the taxpayer's submission. The Taxpayer was billed \$54,731.45. The Agency began lien proceedings including placing a first lien of payment on the Taxpayer's account.

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<sup>1</sup> Agency Exhibit 4.

On August 16, 2012, the Taxpayer submitted a duplicate return for 2005 again claiming the OSC. Another employee reviewed the request and determined that Grievant had incorrectly denied the credit. The tax return was given to Grievant for her to correctly enter the OSC. Correcting the error should not have taken more than two or three hours. Grievant printed off tax forms and entered the information by hand which required her to take several days to correct her mistake instead of two or three hours had she used the automated system to make the changes.

## **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>2</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.”

“[U]nsatisfactory work performance” is a Group I offense.<sup>3</sup> 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’s work performance was unsatisfactory to the Agency because she failed to properly apply the OSC to the Taxpayer’s 2005 return. This resulted in liens being placed on the Taxpayer’s property that should not have been utilized. The disruption to the Taxpayer was significant. The Taxpayer had to re-submit the 2005 return. Another employee had to spend time reviewing the duplicate return. Grievant was assigned responsibility to implement the OSC a second time which should have taken her no more than two or three hours. Instead, she devoted several days to correcting the error. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant received a Group I Written Notice and a Group II Written Notice for unsatisfactory performance. The Agency has established in this grievance that Grievant’s work performance again was unsatisfactory. The Agency has presented sufficient evidence to support its elevation of a Group I offense to a Group II offense in this case.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant received a Group II Written Notice on September 25, 2012.

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<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See Attachment A, DHRM Policy 1.60.

With the issuance of a second Group II Written Notice in this case, the Agency has presented sufficient evidence to support its decision to remove Grievant from employment.

Grievant argued that she was not to be held to a standard of perfection. Although it does not appear that Grievant was held to a standard of perfection, the Agency cannot ignore significant errors either. In this case, Grievant's error had a significant impact on the Taxpayer because liens were placed on the Taxpayer's property. One witness described this as a significant problem rather than as a routine error.

Grievant argued that the Supervisor was disrespectful to her around other employees. If the Hearing Officer assumes for the sake of argument that Grievant's assertion is true, it would not affect the outcome of the disciplinary action against Grievant.

*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>4</sup> 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.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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:

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<sup>4</sup> *Va. Code § 2.2-3005.*

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>5</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>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.