

Issues: Group I Written Notice (failure to follow policy), and Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 01/31/13; Decision Issued: 02/28/13; Agency: DCR; AHO: Carl Wilson Schmidt, Esq.; Case No. 9885, 10001; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 03/13/13; EDR Ruling No. 2013-3557 issued 04/22/13; Outcome: Remanded to AHO; Remand Decision issued 05/07/13; Outcome: Original decision affirmed; EDR Ruling Request on Remand Decision received 05/17/13; EDR Ruling No. 2013-3615 issued 06/11/13; Outcome: Hearing Decision in Compliance.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9885 / 10001

Hearing Date: January 31, 2013
Decision Issued: February 28, 2013

PROCEDURAL HISTORY

On March 27, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. Grievant initiated a grievance on April 24, 2012. During the Third Step, the Group II Written Notice was reduced to a Group I Written Notice. On August 2, 2012, Grievant was issued a Group II Written Notice with a ten workday suspension for failure to follow a supervisor's instructions.

On August 28, 2012, Grievant timely filed a grievance to challenge the Group II Written Notice. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 4, 2012, the Office of Employment Dispute Resolution (EDR) issued Ruling No. 2013-3486 consolidating the two grievances for a single hearing. On December 19, 2012, EDR assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On January 31, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
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 Conversation and Recreation employs Grievant as an Environmental Manager II. He has been employed by the Agency for approximately 25 years. The purpose of his position is:

Oversees program developments and consistency statewide through central office and field professional staff. Coordinates multiple programs and staff work to improve and protect the state water quality through the management of Virginia's soil and water resources. Follows a comprehensive watershed management approach that provides leadership, coordinates DCR's specific programs with those of other nonpoint source pollution control agencies, organizations, businesses, and individuals. Enforces the laws of the Commonwealth to reduce the environmental risks to the public and the environment. Discovers and explores opportunities to increase public awareness of nonpoint source pollution issues and involve citizens in developing solutions.¹

¹ Agency Exhibit 5.

No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to the Former Supervisor. The Former Supervisor was a poor manager who was disrespectful to employees. The Agency removed the Former Supervisor from employment. The Agency had doubts about the Former Supervisor's treatment of employees including Grievant. The Former Supervisor issued the Group II Written Notice which was lowered to a Group I Written Notice during the Step Process. It is likely that the Former Supervisor issued the Written Notice against Grievant based on an improper purpose. The Agency realized the Former Supervisor was a poor supervisor and the Former Supervisor was removed from employment.

The Agency enters into contracts with 47 local Districts to govern the distribution of money for projects and other needs. The Agency drafts proposed contracts for each District and then submits the contracts to the Soil and Water Board for approval. Once the contracts are approved by the Soil and Water Board, the Agency Head and Chief Deputy sign the contracts and the contracts are sent to the local Districts. The contract process must be timely concluded in order to ensure prompt execution of the contracts.

The Agency maintains the Agency Head's and Chief Deputy's signature in electronic form so that it can be assigned to documents that need to be processed in large volume. Using electronic signatures enables the Agency to avoid having the Agency Head or Chief Deputy sign multiple copies of documents. Use of electronic signatures is at the discretion of the Agency Head and the Chief Deputy.

On June 24, 2012, the Chief Deputy sent Grievant and Mr. M an email stating:

I need you guys to get together tomorrow and come up with a realistic timetable that I can tell the Board [when] we will get them their operational funding. I know we need to send them the contracts after the Board approves the funding on Thursday and then the local boards have to approve the contract. I understand all that.

What I need to know is how long will it take us to process in IDSS the money. I told [initials] I would get back to him and the Association before the Board meeting. So with that in mind I need to meet with you both Wednesday morning.²

On June 25, 2012 at 8:34 p.m., Grievant sent the Chief Deputy an email stating:

Good evening, [the Comptroller] and I discussed that district operational funds today. We surely think we can have the funds in their hands in a timely manner.

² Agency Exhibit 2.

To get this done two things need to happen. One is the development and distribution of the 47 or more contracts. To expedite this, we need to use yours and/or Director [name] electronic signatures. We have them in our possession from past contracts.

The contracts are close to completion. We will show you the signature page template when we are ready. There is just the same one page for all the contracts. Can we use these electronic signatures? Thank you.³

On June 26, 2012 at 7:08 a.m., the Chief Deputy sent Grievant an email stating:

I believe you can use my signature however bring me one that is complete and let me review it tomorrow. Thx.⁴

On June 26, 2012 at 3:45 p.m., Grievant wrote the Chief Deputy an email stating:

Can we meet in the morning tomorrow for a short meeting. We'll show you the District contracts and signature page and finalize the discussion on how to make this happen. If ok, what time would be good for you? Thank you.⁵

On June 27, 2012⁶, Grievant met with the Chief Deputy regarding the proposed contracts. The Chief Deputy wanted to get a better understanding of the terms of the contracts. At the end of the meeting, the Chief Deputy told Grievant that Grievant could attach the Chief Deputy's electronic signature to the contracts but that Grievant needed to talk to the Secretary⁷ to get the Agency Head's approval to use his electronic signature. Grievant did not speak with the Secretary or the Agency Head to obtain permission to use the Agency Head's electronic signature on the contracts.

The Soil and Water Board met on June 28, 2012. The Board approved the contracts with some minor revisions. Several Board members expressed concern that the District Operations funding was a critical element and that it was important to get this funding to the districts by the mid-August target date. The Chief Deputy expressed during the meeting that he wanted his staff to meet the deadline. During a break at the Board meeting, several staff met in the General Assembly Building foyer and discussed

³ Agency Exhibit 2.

⁴ Grievant Exhibit 4.

⁵ Agency Exhibit 2.

⁶ The meeting may have occurred on June 25, 2012. Whether the meeting occurred on June 25, 2012 or June 27, 2012 does not affect the outcome of this case.

⁷ The Secretary worked for both the Agency Head and the Chief Deputy.

how to best accomplish the important task of getting the contracts to the Districts on a timely basis. Ms. M agreed to prepare the 94 contracts (two contracts for each of the 47 Districts) for review and subsequent delivery to the Districts. Grievant did not mention to Ms. M that the Chief Deputy had asked Grievant to speak with the Secretary to determine if the Agency Head would permit his electronic signature to be used. Ms. M assumed she would attach the Agency Head's electronic signature to the contracts as she had done in the past.

On June 28, 2012 at 6:09 p.m., the Chief Deputy sent the Secretary an email with a copy to Grievant stating:

I gave [Grievant] authority to use my signature for the district contracts. Plz asked [Agency Head] in the am if we can use his signature also to get these in the mail tomorrow. Thx.

On June 28, 2012 at 7:41 p.m., Grievant forwarded a copy of the Chief Deputy's email to Ms. M and an employee helping Ms. M. Grievant wrote:

Please check with [Secretary] per the note below ... thanks to the both of you persevering throughout the day. I will be monitoring my [cell phone] so let me know of any announcements, etc.⁸

On June 28, 2012 at 8:08 p.m., Ms. M sent Grievant an email stating:

Too late – all contracts have been merged and printed for [employee name] to mail tomorrow.⁹

On June 28, 2012 at 9:08 p.m., Grievant sent an email to Ms. M stating:

Ok but we need to ensure these are correct with no errors ... please double-check them before they are mailed. Thank you.¹⁰

On June 29, 2012 at 7:51 a.m., the Secretary sent Grievant an email stating:

[Agency Head] wants to see the contract before I put signatures on them. Thanks.¹¹

On June 29, 2012 at 9:26 a.m., Grievant sent Ms. M an email stating:

⁸ Agency Exhibit 2.

⁹ Agency Exhibit 2.

¹⁰ Agency Exhibit 2.

¹¹ Agency Exhibit 2.

Morning. Please do not send those contracts out without [Agency Head] reviewing them. Absolute ...!¹²

The draft contracts were later reprinted without the Agency Head's electronic signature. The Agency Head hand signed each of the 97 contracts that were sent to the districts.

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."¹³ 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."

Group I Written Notice

The Agency contends Grievant should receive a Group I Written Notice for managerial issues regarding Grievant's use of the Commonwealth's small charge supervisory approval procedures. The Group I Written Notice was issued by Grievant's Former Supervisor. After the Written Notice was issued by the Former Supervisor, the Agency began an investigation into the behavior of the Former Supervisor. As a result of that investigation, Agency managers concluded that the Former Supervisor was not credible in his supervisory role and that he may have acted against Grievant based on some improper motive. The Former Supervisor was separated from the Agency based on that investigation. During the hearing, the Third Step Respondent testified that he was unsure whether he would issue the Group I Written Notice today given what he learned about the Former Supervisor's motivations. State agencies should not be ambivalent when enforcing disciplinary action. In this case, it is likely that the Former Supervisor took action against Grievant based on an improper motive. For that reason the Group I Written Notice must be reversed.

Group II Written Notice

Failure to follow a supervisor's instructions is a Group II offense.¹⁴ Grievant was obligated to comply with the instructions of a supervisor, the Chief Deputy. The Chief Deputy instructed Grievant to contact the Secretary so that the Agency Head could decide whether he wanted to use his electronic signature on the contracts or to sign

¹² Agency Exhibit 2.

¹³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

¹⁴ See, Attachment A, DHRM Policy 1.60

each contract by hand. Grievant did not contact the Secretary thereby acting contrary to a supervisor's instruction. Had Grievant complied with the Chief Deputy's instruction and contacted the Secretary, he would have known that the Agency Head wished to hand sign the contracts and not to use his electronic signature. Grievant could have informed Ms. M that the Agency Head wished to hand sign the contracts and Ms. M would not have attached the Agency Head's electronic signature to the final drafts of the contracts. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. Upon the issuance of a Group II Written Notice, an Agency may suspend an employee for up to ten work days. Accordingly, Grievant's suspension must be upheld.

Grievant argued that the Agency Head had reviewed the draft contracts and approved them. He argued that the Agency Head had permitted use of his electronic signature in similar instances and that it was reasonable for Grievant to believe that the Agency Head would not object to use of his electronic signature in this instance. Grievant pointed out that the contracts were not sent to the districts without the Agency Head having an opportunity to see the final drafts. Grievant argued that he and Ms. M were attempting to process the contracts quickly to satisfy the timeliness expectations of the Chief Deputy. Although these assertions may be true, they are not sufficient to serve as authorization for Grievant to disregard the Chief Deputy's instruction to contact the Secretary first to ensure the Agency Head's approval of use of his electronic signature.

Grievant argued that since the written notices were not signed by the issuer, the notices were invalid. It is clear that Grievant knew of the charges against him. Grievant signed both written notices. Grievant had adequate notice and an opportunity to be heard regarding those charged. Although a written notice form should be signed by the issuing person, but it is not a fatal flaw prohibiting the Agency from taking disciplinary action.

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"¹⁵ 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.

¹⁵ *Va. Code § 2.2-3005.*

Grievant argued that the disciplinary action should be mitigated given his favorable work performance and 25 years of service. He has not received an annual performance evaluation lower than Contributor. In 2011, he was selected as "Employee of the Year" from the Agency's approximately 500 employees. Although Grievant's selection as Employee of the Year is a material and significant, it is not sufficient to form a basis for mitigation under EDR's standard for mitigation. Although EDR asserts that it is possible that an employee's length of service and prior work performance could serve to mitigate disciplinary action, EDR has not identified any situation where an employee's work performance and length of service, standing alone, are sufficient to mitigate disciplinary action. From a practical standpoint, it would be unusual for an employee's length of service and exceptional work performance to serve as a basis to mitigate disciplinary action under the EDR mitigation standard.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for failure to follow policy is **rescinded**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension for failure to follow a supervisor's instructions 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.¹⁶

[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

¹⁶ 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: 9885 / 10001-R

Reconsideration Decision Issued: May 7, 2013

RECONSIDERATION DECISION

On April 22, 2013, the Office of Employment Dispute Resolution issued Ruling 2013-3557 stating:

The grievant argues in his request for administrative review that the hearing officer should have mitigated the disciplinary action because: (1) the agency head never revoked the authority he granted to Ms. M on January 24, 2011 to use his electronic signature without his pre-approval; (2) the grievant's supervisor did not provide the grievant with a deadline when the grievant was supposed to have the agency head's approval to use his electronic signatures on the contracts before the contracts left the agency; (3) the agency head never communicated that he wanted to pre-approve the use of his electronic signature on the contracts prior to them being sent to the regional offices; (4) the grievant did make his supervisor's deadline because he did obtain approval from the agency head to use his electronic signature on the contracts before they left the agency; (5) the grievant has a "superlative work performance" history; and (6) the hearing officer rescinded the Group I Written Notice for failure to follow policy, and as such, the grievant had a clean disciplinary record which the grievant alleges the hearing officer did not consider under the totality of the circumstances.

While it cannot be said that length of service is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor alone could adequately support mitigation. Ultimately, the applicable standard to consider is the same for all issues of mitigation: did the mitigating factors support a finding that the disciplinary action

exceeded the limits of reasonableness? In this case, the grievant's longevity of service and favorable work performance are commendable, especially given the fact the grievant was selected as the agency's "Employee of the Year" in 2011. In his hearing decision, the hearing officer acknowledged the grievant's work performance and length of service, but stated these two factors, "standing alone, are not sufficient to mitigate disciplinary action." However, the hearing officer did not address whether these two factors may serve as a basis to mitigate when the grievant's disciplinary record was cleared after the hearing officer rescinded the Group I Written Notice for failure to follow policy as part of this hearing. Likewise, the hearing officer did not address whether other mitigating factors, when considered in their totality and in combination with the grievant's work record, could serve as a basis to mitigate the Group II Written Notice for failure to follow a supervisor's instruction. Accordingly, the hearing decision must be remanded for an explanation and/or reconsideration of all mitigating factors, considered in their totality and in light of the mitigation standard.¹⁷

If there were to be a case in which an employee's work performance would serve to mitigate disciplinary action, surely, this is that case. Grievant was selected from 500 employees by the Agency as the Employee of the Year. EDR sets the standard for mitigation and the Ruling does not indicate that even the most exemplary service (such as being Employee of the Year) makes any difference as to mitigation. Even with the additional allegations made by Grievant, there does not exist a basis to mitigate the disciplinary action. Grievant has not met the standard to show that the discipline imposed is unconscionably disproportionate, abusive, or totally unwarranted based on any individual factor or when considered as a group.

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

¹⁷ Footnotes omitted.

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