

Issues: Group II Written Notice (failure to follow instructions), Group II Written Notice (unsatisfactory work performance) and Termination (due to accumulation); Hearing Date: 10/01/13; Decision Issued: 10/03/13; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10172, 10173; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received on 10/18/13; EDR Ruling No. 2014-3749; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received on 10/18/13; DHRM Ruling issued on 12/13/13; Outcome: AHO's decision affirmed; **Judicial Review**: Appealed to Richmond City Circuit Court (01/14); Outcome: AHO's decision affirmed (760CL14000218-00); **Judicial Review**: Appealed to Virginia Court of Appeals; Court of Appeals Ruling issued 07/05/16; Outcome: Circuit Court's Ruling affirmed (0083-16-2).



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10172 / 10173

Hearing Date: October 1, 2013
Decision Issued: October 3, 2013

PROCEDURAL HISTORY

On April 25, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. On May 7, 2013, Grievant received a second Group II Written Notice for unsatisfactory work performance. Grievant was removed from employment due to the accumulation of disciplinary action.

Grievant timely filed grievances to challenge the Agency's actions. On August 23, 2013, the Office of Employment Dispute Resolution issued Ruling Number 2014-3700 consolidating the two grievances for a single hearing. On September 3, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 1, 2013, 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 Web Application Development Analyst. He had been employed by the Agency for approximately 7 years. Grievant received annual evaluations with a rating of contributor from 2006 through 2011. Grievant had prior active disciplinary action. He received a Group I Written Notice on April 11, 2013 for unsatisfactory work performance.

The Agency was in the process of converting its child support mainframe computer system to a web-based system. It decided to adopt the .NET language. Of the employees reporting to the Supervisor, only Grievant had experience with web-based applications. The project involved phases, including Phase 1 and Phase 2.

Grievant was one of approximately eight developers reporting to the Supervisor. Grievant received training on the new software when the Supervisor began working for the Agency in March 2011.

Agency staff hold staff meetings called scrum meetings. The meetings are "stand up meetings" that last for approximately five minutes per meeting. On scrum meeting days, several small groups of employees take turns entering a conference room and reporting on what activities they are working and the percentage those activities have been completed. For example, three employees may be working on a specific task. During the scrum meeting, each employee reports what activities he or she has performed and what percentage of the task has been completed.

The Supervisor observed deficiencies in Grievant's work performance. On March 13, 2013, the Supervisor gave Grievant a Notice of Improvement Need/Substandard Performance. The Supervisor listed six areas of specific performance deficiencies:

- Failing to make adequate progress on assigned tasks in comparison with other team members.
- Failing to accurately report progress on assigned tasks.
- Resistance to follow specific instructions from supervisor and/or management.
- Not checking in code on a daily basis and/or with adequate documentation comments.
- Working on unassigned tasks outside of current top priority (.NET development for iAPECS).
- Not maintaining normal business hours in the office.

As part of the Improvement Plan, Grievant was instructed:

Attend the scheduled weekly team meetings including scrum, admin and code review meetings.¹

On March 28, 2013, Grievant received an email notifying him of two scrum meetings to be held on each Thursday. Grievant attended two scrum meetings each day on April 4 and April 11, 2013 meetings. On Thursday April 18, 2013, Grievant attended the first scrum meeting. He failed to attend the second meeting. Agency staff went to look for him at his desk and in the restroom. Grievant was not at either location so the other team members conducted the meeting without Grievant. At approximately 10:29 a.m., the Supervisor observed Grievant at his desk. The Supervisor sent Grievant an email stating:

In addition to your Schedule maintenance scrum meeting today, you also had a meeting for Participant Manual Locate. We looked for you at that time and were not able to find you. Can you explain why you missed the meeting?²

Grievant sent the Supervisor an email stating:

Sorry, I forgot the next one, went to get coffee.
I'll keep that in mind next time.³

The Supervisor instructed Grievant to complete Phase 1 of his assigned tasks by March 31, 2013. As of April 5, 2013, Grievant had only completed 69 percent of his

¹ Agency Exhibit 1.

² Agency Exhibit 1.

³ Agency Exhibit 1.

duties under Phase 1. On April 8, 2013, Grievant received a memorandum from the Supervisor instructing Grievant:

I am expecting that you will dedicate your energy to catching up on your tasks. In order to do this, you will need to complete the pages from the current phase⁴ by the end of April. Completion means that the pages have been tested successfully and any bugs have been fixed. In addition, the layout for your pages in the next phase⁵ should be completed. I will expect continued adherence with the items mentioned in the Notice of Improvement Needed/Substandard Performance given to you on March 13, 2013.

By May 3, 2012, Grievant had only completed 73 percent of his Phase 1 duties. He had not completed any portion of his duties under Phase 2.

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.”⁶ 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.⁷ On March 13, 2013, the Supervisor instructed Grievant to attend scheduled weekly meetings including scrum meetings. Grievant received notice of two scrum meetings to be held on Thursday April 18, 2013. Grievant failed to attend one of the meetings. His actions were contrary to the Supervisor’s instruction thereby justifying the issuance of a Group II Written Notice.

Grievant argued that he did not intend to miss the meeting. He asserted that his behavior was better described as merely an attendance issue or a forgetfulness issue. Grievant argued that his behavior should not have resulted in more than a Group I Written Notice.

If Grievant had failed to attend the meeting without more, a Group I Written Notice would have been appropriate. In this case, however, the Supervisor had observed that Grievant had missed meetings and provided Grievant actual notice of his

⁴ The current phase was Phase 1.

⁵ The next phase was Phase 2.

⁶ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁷ See, Attachment A, DHRM Policy 1.60.

obligation to attend meetings. Grievant had attended two scrum meetings per day on two Thursdays prior to April 18, 2013. Grievant was aware of his obligation to attend two meetings. His failure to attend the meeting provides the Agency with a sufficient basis to support its issuance of a Group II Written Notice.

“[U]nsatisfactory work performance” is a Group I offense.⁸ 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 assigned to complete his duties for Phase 1 by March 31, 2013. When he failed to meet that time period, the deadline was extended to the end of April 2013. As of May 3, 2013, Grievant had completed only 73 percent of his tasks for Phase 1. He had not completed any of his tasks for Phase 2. Grievant’s work performance was unsatisfactory to the Agency. The Agency has established that Grievant engaged in a Group I offense.

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 had an active Group I Written Notice for the same offense of unsatisfactory work performance. He received a Group I Written Notice for unsatisfactory work performance on April 11, 2013. The Agency has presented sufficient evidence to elevate the Group I offense to a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency’s decision to remove him from employment.

Grievant argued that the tasks given were difficult and required a significant amount of work to complete. He argued that some design issues were not resolved by the Supervisor on a timely basis and that delay caused his delay.

It is clear that Grievant’s duties were difficult and required a significant amount of work to complete. The evidence showed, however, that the Agency provided Grievant with training on the new computer language, the duties assigned to Grievant were not unreasonable, and that other employees holding with similar workloads were able to complete their tasks by the deadlines. Every conversion project involves some confusion regarding work duties. The difficulties Grievant experience waiting for the Supervisor were not so significant as to prevent him from meeting the April 30, 2013 deadline for Phase 1. Grievant had many tasks he could have performed without waiting on Supervisor’s work product.

Grievant’s tasks were not the most difficult of the Phase 1 tasks. Out of 8 developers reporting to the Supervisor, the difficulty of Grievant’s Phase 1 tasks was

⁸ See Attachment A, DHRM Policy 1.60.

“right in the middle.” Other employees completed their Phase 1 tasks within the time frame.

No evidence was presented to show that Grievant was prevented from working overtime to increase his likelihood of meeting the deadlines. No evidence was presented showing that Grievant worked significant overtime and yet remained unable to complete the work.

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.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action failure to follow instructions is **upheld**. The Agency’s issuance to the Grievant of a Group II Written Notice for unsatisfactory work performance is **upheld**. Grievant’s removal is **upheld** based on the accumulation of disciplinary action.

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

⁹ Va. Code § 2.2-3005.

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.¹⁰

[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

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