Issues: Group II Written Notice (failure to follow instructions), Group II Written Notice (unsatisfactory job performance) and Termination (due to accumulation); Hearing Date: 12/12/14; Decision Issued: 12/16/14; Agency: DSBSD; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10492; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Office of Employment Dispute Resolution

Department of Human Resource Management

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10492

Hearing Date: December 12, 2014
Decision Issued: December 16, 2014

PROCEDURAL HISTORY

Grievant was a business development specialist with the Department of Small Business and Supplier Diversity ("the Agency"), and he challenges the two Group II Written Notices, both issued on September 5, 2014 for conduct occurring from June to August 2014—unsatisfactory job performance and failure to follow instructions. The discipline was termination of employment based on the accumulation of written notices. The Grievant had an active prior Group II written notice for failure to follow instructions and an active prior Group I written notice for unsatisfactory job performance.

Grievant timely filed a grievance to challenge the Agency's disciplinary action. On October 29, 2014, the Office of Employment Dispute Resolution ("EDR") appointed the Hearing Officer to conduct the consolidated grievance hearing. Through pre-hearing communications with counsel, the grievance hearing was ultimately scheduled for the earliest date available for the parties and witnesses, December 12, 2014, on which date the grievance hearing was held, at the Agency's designated location. For such good cause, availability of all parties and witnesses, the time for completing the grievance hearing and decisions was extended, accordingly.

Both the Agency and Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits and Grievant's Exhibits, respectively. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Agency Representative
Counsel for Agency
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 under applicable policy)?
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?

The Grievant asserts in his written grievance (Form A):

> I was terminated while out on short term disability. I have been harassed and defamed by agency management over the past ten month period. This defamation continued after my termination as well. The harassment, defamation, and termination have been a form of retaliation due to the grievance I have filed in the past.

The allegations supporting his grievance set forth on Form A:

> I was terminated from my position while out on short term disability for an acute medical condition that has been documented by two different physicians. This information was supplied to Unum and the Department of Small Business as soon as it was reasonably available. [My supervisor] sent emails requiring very short response times that I was unable to make due to my illness. However, I did respond to him and informed him that I would be responding to his accusations once I returned to work on 9/8/2014 as indicated by my physician's note. Please find attached a copy of all emails and correspondence from [my supervisor] and myself. I also have over ten months of emails that can be supplied that show [my supervisor's] ongoing harassment and ongoing deception of the facts of my work performance.

The Grievant requested expedited process because of "discrimination or retaliation by immediate supervisor." The relief sought was for three Agency employees to be disciplined and dismissed, monetary damages, and retirement benefit adjustments. At the grievance hearing, the Grievant requested rescission of the Written Notices, reinstatement, back pay, and attorney's fees, as appropriate.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden*

of proof is on the Agency. 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. However, *the employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*. GPM § 5.8.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The State Standards of Conduct, DHRM Policy 1.60, provides that Group II offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that have a significant impact on business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. Agency Exh. 4. Failure to follow instructions and repeated instances of poor job performance specifically are considered Group II offenses. *Id*. The Standards of Conduct require Employees to:

- Perform their assigned duties and responsibilities with the highest degree of public trust.
- Devote full effort to job responsibilities during work hours.
- Meet or exceed established job performance expectations.
- Make work-related decisions and/or take actions that are in the best interest of the agency.
- Comply with the letter and spirit of all state and agency policies and procedures.
- Work cooperatively to achieve work unit and agency goals and objectives.
- Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

Agency Exh. 4.

The State Performance Planning and Evaluation, DHRM Policy 1.40, provides that the re-evaluation process does not prevent an agency from taking disciplinary action based on the employee's poor performance or other reasons stipulated in the Standards of Conduct. Agency Exh. 5, p. 11.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offenses

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions. The two Written Notices, issued September 5, 2014, charged the following:

A.
Written Notice for Failure to Follow Instructions

The Written Notice charged:

> On June 19, 2014, during our weekly performance meeting I provided you with the following instruction: **Reporting** – I further indicated that if you were out on leave on the days reports are due (Fridays COB), the report would be due on the day you return to work. The specific dates and description of each occurrence are outlined in the attached document.

Agency Exh. 2. A list of the specific items charged:

1. 7/7/14 – You failed to submit your Weekly Report as instructed in the June 19, 2014 email.
2. 7/8/14 – You did not follow my instructions regarding my second request for the submission of your Weekly Report for the week of June 27, 2014.
3. 7/14/14 – You failed to follow my instructions on my July 10, 2014 email to provide me with the requested documents by 2:00pm on July 11, 2014 when you returned to work on July 14, 2014.
4. 7/15/14 – You failed to follow my instructions regarding my second request for the four remaining items due on July 14, 2014 as outlined in my July 10, 2014 email.
5. 7/25/14 – You failed to submit your Weekly Report as instructed.
6. 8/1/14 – You failed to provide me the narrative description for your work efforts of July 29 and July 31, 2014 as instructed by me during our meeting at 9:45 am on August 1, 2014.

As for circumstances considered, the Written Notice stated, "consideration has been given to your length of state service, your previous performance evaluations, your current performance and work contributions, your current active Group II written notice and suspension for Failure to Follow Instructions, your current active Group I written notice for Unsatisfactory Job Performance and your response to the advance notice of discipline."

B.

Written Notice for Unsatisfactory Job Performance

The Written Notice charged:

> During the period of June 17, 2014 through August 18, 2014 your job performance has not been satisfactory. In fact there were twenty-eight days where your performance did not meet the duties as outlined in your EWP. The specific dates and performance issues are outlined in the attached document.

Agency Exh. 3. A list of the specific items charged:

1. 6/17-6/20/14 – You did not report any work efforts identified in your EWP for a total of 32 hours.
2. 6/23/14 – You did not report assisting any businesses during your 8 hours of work at Biz Works.
3. 6/24/14 – You reported 8 hours spent creating an e-mail list but were unable to verify the businesses added to the list of 1700 names
4. 7/7/14 – You did not report assisting any businesses during your 8 hours of work at Biz Works.
5. 7/8/14 – You reported working for a total of 2 hours while assisting [a named business] from 1-3 pm.
6. 7/9/14 – You did not report any work efforts for a total of 8 hours.
7. 7/10/14 – You reported working for a total of 1 hour while assisting [two named businesses].

8. 7/14/14 – You did not report assisting any businesses during your 4 hours of work at Biz Works.
9. 7/15-16/14 – You did not report any work efforts identified in your EWP for a total of 15 hours.
10. 7/17/14 – You reported assisting two businesses for a total of 1 hour and you reported working on a special project for 30 minutes.
11. 7/18/14 – You reported assisting two businesses for a total of 1 hour.
12. 7/22/14 – You did not report any work efforts for a total of 8 hours.
13. 7/23/14 – You reported a total of 2 hours worked.
14. 7/24/14 – You reported a total of 2.5 hours worked.
15. 7/25/14 – You reported assisting one business for .5 hours and working on a special project for 3.5 hours.
16. 7/28/14 – You reported assisting two businesses for a total of 3 hours.
17. 7/29/14 – You reported assisting one business for 1 hour and working on a special project for two hours.
18. 7/30/14 – You reported assisting three businesses for a total of 3.5 hours.
19. 7/31/14 – You reported assisting one business for 1 hour and working on a special project for 4 hours.
20. 8/4/14 – You reported assisting one business for 2 hours at Biz Works.
21. 8/5/14 – You reported assisting five businesses for a total of 2.5 hours.
22. 8/6/14 – You reported assisting six businesses for a total of 3.5 hours.
23. 8/7/14 – You reported assisting one business for 1 hour out of a 4 hour workday.
24. 8/18/14 – You did not report assisting any businesses during your 8 hours of work at Biz Works.

As for circumstances considered, the Written Notice stated, "consideration has been given to your length of state service, your previous performance evaluations, your current performance and work contributions, your current active Group II written notice and suspension for Failure to Follow Instructions, your current active Group I written notice for Unsatisfactory Job Performance and your response to the advance notice of discipline."

The Grievant's job is to provide advice and assistance to minority and small businesses engaged in state procurement. Duties include on-site visits to client businesses, assisting with the certification process, and working with state agencies with initiatives and other projects as directed. Agency Exh. 7. The Grievant is experienced and has been in this position for eight years.

Prior to the current Written Notices, pursuant to Policy 1.40, on February 6, 2013, the Agency placed the Grievant on a performance plan following his unsatisfactory work performance review covering the November 2012-October 2013 performance cycle. Agency Exh. 7, 8. Because of the Grievant's absence for medical leave, the three-month re-evaluation period was extended and would have ended on or about August 5, 2014.

The Grievant has two active Written Notices:

1. Group I, Unsatisfactory Job Performance, issued March 8, 2013. Agency Exh. 22.
2. Group II, Failure to Follow Instructions, issued May 8, 2013. Agency Exh. 21.

In EDR Ruling No. 2007-1409 (September 21, 2006, at page 7), the Director of Employment Dispute Resolution appropriately noted the correlation between the Written Notice and the Form A:

> (Only the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.) **This standard is complementary to the burden placed on grievants in that only those grounds asserted on a grievant's Form A will be permitted to proceed to hearing.** (Emphasis supplied.)

Accordingly, because the Grievant did not challenge the merit to the disciplinary bases in his Form A, except to allege harassment and retaliation, the factual bases of the discipline are not specifically challenged. The Grievant may rely on a necessary implication that he challenges the factual bases of the discipline by grieving, but his evidence at the grievance hearing centered on challenging the timing of the discipline and his alleged lack of opportunity to respond, denying him due process.[1] However, the Grievant was given full opportunity to present his case at the

[1] The Grievant may be arguing that he has been subjected to a form of discrimination through the alleged failure of the Agency to provide a reasonable accommodation for his disability. The Grievant, however, has not presented any medical evidence of a condition that would prevent him from phoning, emailing, or otherwise responding to the Agency's due process procedure.

The Grievant seemed to assert that the Agency knew or should have known of his alleged medical inability to communicate, however, he did not put the Agency on notice of a specific medical impediment excusing his ability or obligation to respond to the disciplinary notice.

While not directly on point, the discipline concept in ADA circumstances is instructive. Generally, it is the obligation of an individual with a disability to request a reasonable accommodation. *Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including a termination) or an evaluation warranted by poor performance. See Hill v. Kansas City Area Transp. Auth.,* 181 F.3d 891, 894 (8th Cir. 1999) (request for reasonable accommodation is too late when it is made after an employee has committed a violation warranting termination).

In an ADA situation, the employer may refuse the request for reasonable accommodation and proceed with the termination because an employer is not required to excuse performance problems that occurred prior to the accommodation request. When an employee does not give notice of the need for accommodation until after a performance problem has occurred, reasonable accommodation does not require that the employer:

> tolerate or excuse the poor performance;
>
> withhold disciplinary action (including termination) warranted by the poor performance;
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> raise a performance rating; or
>
> give an evaluation that does not reflect the employee's actual performance.

See EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, at II (2.3) and IV (4.4), (1992). Thus, without any specific medical evidence justifying or excusing the Grievant's failure to respond to the disciplinary process before termination, the failure of the Grievant to bring this to the employer's attention prior to discipline and prior to termination renders the medical excuse issue out of

grievance hearing, curing any alleged, prior procedural violation by the Agency. He had a full hearing before this hearing officer; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the presence of counsel. Accordingly, EDR has determined that, based upon the full post-disciplinary due process provided to the grievant, the lack of pre-disciplinary due process (if any) was cured by the extensive post-disciplinary due process. EDR Ruling No. 2013-3468 (November 28, 2012). Further, GPM, at § 6, provides the proper manner for raising such alleged defects in the grievance process prior to the actual grievance hearing. The grievance hearing is a *de novo* review of the charges and evidence, and it provides due process.

Unum is the third party administrator for the Commonwealth's short-term disability plan. The Grievant had been out on short-term disability that was approved by Unum through August 25, 2014. The record evidence shows that as of the grievance hearing date, the Grievant's short-term disability had not been extended by Unum.

Testifying for the Agency were the Grievant's immediate supervisor and the Agency's human resources manager. The Grievant's supervisor testified to the Grievant's prior annual evaluation, the re-evaluation plan implementation and performance, circumstances of the two Group II Written Notices, with detailed testimony supported by documentation, including email and memoranda. See, generally, Agency Exh. 8 through 20. The supervisor also testified that the Grievant's conduct had an adverse impact on Agency operations, and others, including the supervisor, who had to try to cover the Grievant's territory obligations to deliver services. Moreover, the Agency was short staffed during this time.

The human resources manager testified that an employee who is on short-term disability is not excused from the disciplinary process. However, she testified that if a grievant requests additional time because of medical reasons, it would typically be granted. The H.R. manager also testified that each of the enumerated instances in the Written Notices could have justified separate written notices, and the conduct and Grievant's prior work and discipline record weighed against lesser discipline.

Testifying for the Grievant was a former co-worker at the Agency, who described the supervisor and human resources director as liars with insufficient management skills. This witness demonstrated a hostile and angry disposition toward the Agency, but her testimony did not address the specific factual bases of the discipline. Her testimony was not credible.

The Grievant testified in generalities to his disagreement with the Agency's bases for discipline. However, the Grievant provided no reliable evidence or documentation to refute the Agency's *prima facie* case of unsatisfactory work performance and failure to follow supervisor's instructions. The Grievant also testified that the Agency retaliated against him for filing previous grievances, and suggested that his supervisor targeted him because of the supervisor's competition with him.

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reach. The Agency has met its burden of proof, and, under the applicable law, there is no excuse available to reverse discipline.

The Grievant underwent an endoscopic procedure on August 26, 2014. The Grievant and his wife testified to this event, and his recuperation the following day. The Grievant, however, did not request additional time to respond to the Agency's due process letter or state that he was unable to respond because of medical disability. The Grievant expressed general disagreement with the charged offenses and the expectations of his supervisor and management. He testified that the Agency expected too much from him. The Grievant testified that his supervisor had targeted him. However, the Grievant did not produce any reliable evidence to refute the Agency's evidence supporting the two Written Notices. The Grievant asserted that he did not have the resources at home with which to respond to the impending discipline. However, the Grievant did not show that any documentation was unavailable to him or withheld from him by the Agency.

The supervisor's advance notice of disciplinary action was delivered by courier to the Grievant on August 29, 2014. Agency Exh. 1, p. 9. The notice requested the Grievant to contact the supervisor on Tuesday, September 2, 2014, to arrange a time to meet. The Grievant did not respond with willingness to meet or to request additional time to respond. The Grievant testified, however, that he was out of work for medical reasons and was in no position or condition to respond. There is no medical evidence to show that the Grievant was unable to respond. However, if the Grievant did not have the resources available to him before, he did not present any such documentation at the grievance hearing to refute the Agency's case. As discussed above, the hearing officer may not grant relief for these reasons.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id*. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

I find that the Agency has met its burden of showing the Grievant's conduct as charged in the Written Notices. Further, I find that the offenses are appropriately considered Group II offenses. Failure to follow supervisor's instructions is a policy designated Group II offense, and repeated instances of poor job performance is also designated as a possible Group II offense. Additionally, each of the Written Notices includes multiple instances of the conduct charged and proved by the Agency. Thus, the Agency has borne its burden of proving the offending

behaviors, the behaviors were misconduct, and each of the two written notices rose to the level of a Group II offense.

Retaliation

The Grievant asserts that the Agency's action is motivated by retaliation. For a claim of retaliation to succeed, the Grievant must show (1) he engaged in a protected activity; (2) he suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant engaged in protected activity by advancing a prior grievance of one of the active written notices. The Grievant asserts that the retaliation he has experienced stems from this grievance. Further, he could be viewed as having potentially suffered a materially adverse action due to the agency's discipline and termination. However, the Grievant does not satisfy the burden of proof of showing that the materially adverse action was taken because of his protected activity.

There is nothing to suggest that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual conduct and behavior, all of which was solely within the control of the Grievant.

Mitigation

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." 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.

While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that termination was its only option. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

On the issue of mitigation, EDR has ruled:

> Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling No. 2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

> When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling No. 2010-2465 (March 4, 2010) (citations omitted).

The Agency presents a position in advance of its obligation and need to manage the important affairs of the Agency. The hearing officer accepts, recognizes, and upholds the Agency's important responsibility for its mission to the business community. The Grievant's position placed him in a responsible role, and the Grievant's lack of productivity and responsiveness was contrary to the Agency's expectations and instructions. I find that the Agency has demonstrated a legitimate business reason and acted within the bounds of reason in its discipline of the Grievant.

Termination is necessarily a harsh result, and the Agency's decision for termination may be fairly debatable. However, there is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that the chosen discipline was its only option. While the Agency could have justified or exercised lesser discipline, a hearing officer may not

substitute his judgment for that of Agency management. I find no mitigating circumstances that render the Agency's action of two Group II Written Notices with termination outside the bounds of reasonableness, particularly considering the other two active Written Notices. The conduct as stated in the written notices occurred. The conduct at issue involves the very essence of the Agency's purpose. The normal result of two Group II Written Notices is termination. Here, the Agency credibly asserts the aggravating circumstances of the Grievant's work record outweigh any mitigating circumstances. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

DECISION

For the reasons stated herein, the Agency's issuance of the two Group II Written Notices with termination must be and 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.[2]

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

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