

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 06/24/19;  
Decision Issued: 07/15/19; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 11343; Outcome: Partial Relief.



***COMMONWEALTH of VIRGINIA***  
***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11343**

Hearing Date: June 24, 2019  
Decision Issued: July 15, 2019

**PROCEDURAL HISTORY**

On October 23, 2018, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions.

Grievant filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 9, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 24, 2019, 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 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Virginia Department of Health employs Grievant as a Program Manager. No evidence of prior active disciplinary action was introduced during the hearing.

The Employee reported to Grievant. Grievant reported to the Manager. The Employee began working for the Agency as a probationary employee on September 10, 2017. The Employee was to remain in probationary status for one year unless the Agency elected to extend the probationary period.

On March 14, 2018, the Special Projects Director sent Grievant an email stating, "please prepare a 6-month probationary period evaluation for [Employee] and discuss it with [Manager] within 2 weeks (by 3/28/18)."<sup>1</sup>

On June 27, 2018, the Manager sent Grievant an email stating:

---

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

My understanding is that you have not completed a probationary review for [Employee]. It is imperative that you complete a probationary review as soon as possible and no later than 7/31/18. I need to review this document before you provide it to the employee. Please let me know if you have any questions about this requirement.<sup>2</sup>

Grievant did not complete a probationary review for the Employee by July 31, 2018.<sup>3</sup>

On July 5, 2018, the Manager sent Grievant an email stating, "I am aware of 3 urgent issues: \*\*\* [Employee's] orientation needs."<sup>4</sup>

On July 25, 2018, Grievant sent the Employee an email stating:

I am attaching the revised training plan for your position. Many of the tasks, you were already assigned and [have] completed. You will need to make them as completed. We may need to revisit some of the areas based on some feedback I have received (e.g. recruitment of staff and filling out references).

At first, I started doing this as your 90 – day orientation plan, then decided to add other activities/tasks that would help you gain more technical knowledge of the program alongside your relational tasks of meeting other managers and learning about the work of their unit and how it is tied to [Agency unit]. \*\*\*

I am proposing we extend your probation for three months to give you adequate time to do these tasks. If you think you can get them done before your one year anniversary, then we can discuss that, but I don't want to you to feel pressure or intimidated by the timeline or the amount you are asked to learn. To me, an extension of your probation is in no way disciplinary; I want you to be successful in this job and be a very strong and confident player in my unit management team.<sup>5</sup>

On August 28, 2018, Grievant sent the Personnel Analyst an email stating, "I was planning to extend an employee's probationary period for non-disciplinary reasons. I'd like to run this by you and get your thoughts to make sure I am approaching this

---

<sup>2</sup> Agency Exhibit 1.

<sup>3</sup> The Agency did not take disciplinary action for Grievant's failure to complete the Employee's probationary review by July 31, 2019. Thus, it cannot for a basis for the disciplinary action before the Hearing Officer.

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

<sup>5</sup> Grievant Exhibit 2.

correctly.”<sup>6</sup> Grievant did not get an immediate response and sent an email to the Personnel Analyst on August 31, 2018 stating, “Any thoughts on this?” The Personnel Analyst responded on September 4, 2018 at 10:03 a.m., “I will let you know today if this is okay. It’s a little tricky since this is non-disciplinary.”

On September 4, 2018 11:17 a.m., Grievant sent an email to the Personnel Analyst stating:

[Manager] has asked that I submit this form (I hope it is the correct one) to HR no later than tomorrow. I’m attaching so you can see what I wrote and to let me know if you all think I should draft differently. I am also attaching her training plan and you will see the things marked important to complete or show increased knowledge and competency by the end of the 3 – month extension. \*\*\* Would you be able to provide me with a copy of her start date?

At 12:53 p.m. on September 4, 2018, Grievant sent the Personnel Analyst an email with an attachment stating, “Please use this updated probationary review as I realized I had some fields that I needed to add information for at the top.”

On September 4, 2018, the Manager assigned Grievant the task of developing an interim Continuity of Operations Plan (COOP) to assure clients in the Virginia, North Carolina, and South Carolina would have uninterrupted access to medications and other services including payment of client’s insurance premiums if needed during a pending Hurricane projected to impact these regions. Grievant felt it was imperative to prioritize preparation for the impact of the Hurricane. She made this decision because of the number of people potentially impacted in all three states and the potential public health consequences of interrupted treatment for clients affected by the Hurricane. The interim COOP needed constant monitoring and alterations based on the track of the storm.

On September 6, 2018, the Employee was on leave and did not report to the workplace.

On September 6, 2018 at 2:48 p.m., Grievant sent an email to the Personnel Analyst:

[Manager] informed me that she met with OHR today and they believe the right course of action is extending [Employee’s] probation. I forwarded [to Manager] the forms I sent to you and she has asked for my supervisory file, which I am giving her today. She stated that there is urgency for this matter since the probationary extension has to be processed tomorrow. I told her that I had not heard back from you about the content I wrote in that neither [Employee] nor I had yet to sign it.<sup>7</sup>

---

<sup>6</sup> Agency Exhibit 1.

<sup>7</sup> Agency Exhibit 2.

On Friday September 7, 2018 at 1:25 p.m., Grievant sent the Personnel Practices Analyst an email asking, "Can [Employee] send a written response to the probationary extension?" At 1:41 p.m. on September 7, 2018, the Personnel Practices Analyst replied, "There is no response needed. When you meet with her you can explain why the probation period is being extended. As long as you review what is on the form, that is all that is needed."<sup>8</sup>

Grievant and the Employee did not report to work on September 8, 2018 and September 9, 2018 because those dates were a Saturday and a Sunday and the employees were not scheduled to work on weekends.

On September 10, 2018, Grievant delivered a Probationary Progress Review to the Employee. The form indicated to the Employee that "Probationary Period Extended" until March 10, 2019. The Employee refused to sign the form and rejected the Agency's contention that her probationary period should be extended.

The Agency reviewed whether the Employee's probationary period had been extended and concluded the time to extend the probationary period had passed since the Probationary Progress Review form had not been delivered to the Employee on or before September 9, 2018. Because the time to extend the probationary period had passed without the Employee being notified of the extension, the Agency concluded the Employee's status had changed on September 10, 2018 from probationary to classified employee.

Grievant responded to the Agency's notification of pending disciplinary action:

I accept responsibility for missing this technical deadline for not presenting the probationary extension to [Employee] by the deadline of September 7, 2018 .... I restate that this failure was not intentional, negligent, or due to an unwillingness to comply with instructions. Unfortunately with managing the events of that day, I did not have a chance to meet with [Employee] that Friday. [Employee] and I were both in meetings all day (her last meeting was 4 p.m. – 5 p.m. with [Manager] and another ... employee." More importantly during this same week, [Manager] assigned me the urgent task for developing an interim Continuity of Operations Plan (COOP) for pending severe weather that might affect [Unit] clients in VA, NC, and SC. The pending hurricane, described as the worst storm to hit the east coast since 1954, had the potential for devastating and life-threatening impact in those states.<sup>9</sup>

---

<sup>8</sup> Agency Exhibit 1.

<sup>9</sup> Agency Exhibit 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.”<sup>10</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>11</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 was assigned responsibility to meet with the Employee and extend the Employee’s probationary period. Grievant failed to complete this expectation thereby justifying the issuance of a Group I Written Notice.

Grievant argued that the expiration of the 12 month probationary period was on September 10, 2018 and, thus, she timely extended the Employee’s probationary period. This argument is not persuasive. DHRM Policy 1.45 governs Probationary Period. This policy provides:

If a probationary employee works beyond a 12-month period without being notified (1) of satisfactory completion or (2) that the probationary period was extended, the employee will be regarded as having successfully completed the probationary requirement.

The Employee’s hire date was effective September 10, 2017. Even though September 10, 2017 was a Sunday, the Employee was an employee effective September 10, 2017 and, thus, began working for the Agency on September 10, 2017. Under DHRM Policy 1.45, the 12 month period began on September 10, 2017. The first month began on September 10, 2017. The second month began on October 10, 2017. The third month began on November 10, 2017. The fourth month began on December 10, 2017. The fifth month began on January 10, 2018. The sixth month began on February 10, 2018. The seventh month began on March 10, 2017. The eighth month began on April 10, 2018. The ninth month began on May 10, 2018. The tenth month began on June 10, 2018. The eleventh month began on July 10, 2018. The twelfth

---

<sup>10</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>11</sup> See Attachment A, DHRM Policy 1.60.

month began on August 10, 2018. The thirteenth month began on September 10, 2018. Thus, the end of the twelfth month would be September 9, 2018, the day before the thirteenth month started.

The Employee worked on September 10, 2018 and had not been notified of satisfactory completion or that the probationary period was extended. Thus, the Employee was to be regarded as having successfully completed the probationary requirement without extension. This outcome was contrary to the Agency's preference.

The Agency argued that Grievant's behavior rises to the level of a Group II Written Notice for failure to follow a supervisor's instructions.<sup>12</sup> There are several reasons why Grievant's behavior does not rise to the level of a Group II offense. First, there is a distinction between an employee who refuses to follow a supervisor's instruction (a Group II offense) and an employee who is unable to follow a supervisor's instruction (a Group I offense). Grievant's behavior in this case more closely resembles that of an employee who was unable to meet the Manager's instruction and not an employee who refused to follow the Manager's instruction. Second, Grievant and the Employee were in meetings for most of the day on September 7, 2018. Grievant's failure to meet with the Employee was an oversight, not an intentional action. The Agency correctly asserted that Grievant could have made time for a 15 minute meeting with the employee and, thus, there is a basis for some disciplinary action. Third, the Agency gave Grievant an unreasonable time frame to meet with the Employee. DHRM Policy 1.45 provides, "[t]he supervisor should meet with the probationary employee approximately 3 weeks prior to the completion of his or her probationary period and provide a progress review." It was not until September 6, 2018 that Agency managers had concluded Grievant could meet with the Employee and present her with their reviewed and approved Probationary Progress Review form. Fourth, the Agency required Grievant to meet with the Employee to deliver the notice of extension even though policy only requires that "employees must be notified in writing if their probationary periods will be extended ...." The Agency could have informed Grievant to send a copy of the Probationary Progress Review form by email once it was completed and then meet with the Employee when possible.

The Agency also alleged Grievant should receive a Group II Written Notice because, "[s]he also failed to follow supervisory instructions to ensure the employee completed the training plan tasks and demonstrated competencies before ending her probationary period." The Agency did not present sufficient evidence regarding the details of these instructions and Grievant's failure to comply with those instructions. At best, Grievant's behavior could not rise above a Group I Written Notice with respect to this allegation based on the evidence presented.

---

<sup>12</sup> The Hearing Officer will assume for the sake of argument that the Agency was authorized to extend the Employee's probationary period for up to an additional six months. DHRM Policy 1.45 authorized extension of a probationary period for performance reasons or for leave (absence from work). The Hearing Officer will assume that the need for additional training was a performance reason.



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>13</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 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 is **reduced** to a Group I Written Notice.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance

---

<sup>13</sup> Va. Code § 2.2-3005.

with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>[1]</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.