Issues: Group II (failure to follow policy), Group II (unsatisfactory performance, failure to follow policy, unauthorized use of State property), Disciplinary Transfer, Arbitrary/Capricious Performance Evaluation; Hearing Date: 05/17/17; Decision Issued: 05/30/17; Agency: VDFP; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10988; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10988

Hearing Date: May 17, 2017
Decision Issued: May 30, 2017

PROCEDURAL HISTORY

Grievant was a division chief with the Virginia Department of Fire Programs (the Agency), with many years of service. On November 23, 2016, the Grievant was issued two Group II Written Notices for failure to follow policy, unsatisfactory performance, and unauthorized use of state property, with suspension without pay for ten workdays. When he returned to work after the suspension, the Grievant was transferred to a different position. On or about December 15, 2016, the Grievant received his annual performance evaluation, with an overall rating of "Below Contributor." The grievant filed a timely grievance on December 19, 2016, in which he disputes the issuance of the Written Notices, alleges that his performance evaluation was "[a]rbitrary and capricious," asserts that he was transferred "for retaliatory or disciplinary purposes," and requests that he "be reinstated to [his former] position at [sic] with all lost pay and benefits."

The grievance qualified for a hearing, and on March 23, 2017, the Office of Employment Dispute Resolution, Department of Human Resource Management (EDR), appointed the Hearing Officer. EDR considered all of the issues combined a single grievance, and a single grievance hearing should not last more than one day unless circumstances compel a longer hearing. *Rules for Conducting Grievance Hearings* § III(B) (*Rules*). During the pre-hearing conference, the grievance hearing was scheduled for May 17, 2017, on which date the grievance hearing was held, at the Agency's designated location.

Knowing the scope of the issues, at the pre-hearing stage, the hearing officer directed counsel for the parties to confer on stipulations of facts to conserve the time for hearing testimony, particularly in an effort to eliminate unnecessary or duplicative testimony for facts not in dispute. Because hearings are typically expected to be

concluded in one day, each side was initially limited to three hours for evidence, whether by direct or cross examination. Counsel ultimately reported that no stipulations would be submitted and that the parties would comply with the allotted time. At hearing, the parties conformed their cases to the three hour limit, and neither side moved, for good cause, for additional time for evidence.

Both the Grievant and the Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's exhibits as numbered, respectively. During the hearing, the Grievant moved to introduce documents produced at the hearing by the State Police investigator, but, without the investigator's testimony referring or relying on any specific documents, the hearing officer did not admit the documents for the hearing record. The documents are proffered by the Grievant. The hearing officer has carefully considered all record evidence.

APPEARANCES

Grievant
Counsel for Grievant
Agency Representative
Counsel for Agency
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?
5. Whether the Grievant's post-disciplinary transfer was disciplinary or retaliatory?
6. Whether the Grievant's performance evaluation was arbitrary and capricious?

Through his grievance filings and presentation, the Grievant requested rescission of the Written Notices, restoration of pay and benefits, and return to his prior position.

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. However, § 5.8 states *"[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

To the extent the Grievant asserts his transfer and performance evaluation were motivated by discrimination or retaliation, or that they constituted a misapplication and/or unfair application of policy, the Grievant bears the burden of proving that the actions were unwarranted, not supported by the facts, or otherwise improper.

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.

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 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 comply with written policy is considered a Group II offense. *Id.*

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 Agency employed the Grievant as a division chief, with a long tenure at the Agency. The current Group II Written Notices, both issued November 23, 2016, detailed the offenses, as follows, identified herein as Written Notice 1 and Written Notice 2:

Written Notice 1 (SPCC[1]).

The Written Notice charged:

> After an investigation was conducted it was discovered that on September 16, 2016, you split an SPCC purchase to circumvent the Department of Accounts' (DOA) single transaction limit policy.

For circumstances considered, the Written Notice provided:

> In taking this disciplinary action, consideration has been given to your length of service, your previous performance evaluations, your current performance, your response to the advance notice of discipline. However, after consideration of these factors, mitigation is not warranted due to the serious violation of state policy. Please understand that any future incidents of the same or similar nature could result in further disciplinary actions including up to termination consistent with the Standards of Conduct.

Agency Exh. 3.

[1] Small purchase credit card.

The Agency witnesses testifying in support of Written Notice 1 included the deputy state fire marshal, the Agency's chief administrative officer, and the employee from the vendor who handled the SPCC split charge. The vendor rendered a repair invoice to the Agency for a total of $6,419.14, including parts and labor. The Grievant has use of a small purchase credit card (SPCC) issued by the Agency, with a $5,000 limit per transaction. Agency policy prohibits the splitting of invoices to get around the $5,000 transaction limit. The testimony of the witnesses, including the Grievant, was that, with the Grievant's knowledge and consent, the vendor split the invoice into separate invoices for parts and labor, each one under $5,000, so that the Grievant's SPCC would cover the payment. This was discovered by the deputy state fire marshall during a routine expense report audit. The Grievant testified that he understood that the Agency accounted for labor and parts separately, so he believed the splitting was appropriate. However, the Agency policy, Agency Exh. 6, at p. 5, specifically prohibits this activity, and the Agency provided evidence of the Grievant's policy training on this issue. The Grievant did not deny the training, and acknowledged that he knew the policy. The Grievant's explanation did not overcome the Agency's proof of the offense.

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* § 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 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. DHRM Policy 1.60 As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules* provides that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." *Rules* § VI(A). More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

(i) the employee engaged in the behavior described in the Written Notice,
(ii) the behavior constituted misconduct, and
(iii) the agency's discipline was consistent with law and policy,

the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness. *Rules* § VI(B).

Accordingly, the Agency has met its burden of proof for Written Notice 1, and has shown that violation of written policy may be considered a Group II offense under the Standards of Conduct. Agency Exh. 4. There is no showing of mal intent, personal gain, or specific damage to the Agency, but, nevertheless it is a clear violation of applicable policy. Therefore, this Written Notice must be upheld.

Written Notice 2 (truck rental).

The Written Notice charged:

> On or around April 4, 2016, you rented a 26' truck from Ryder Rental Corporation under the agency's rental contractual agreement to relocate a former employee to another state. The 26' truck you rented on or around April 4, 2016, from Ryder Rental Corporation under the agency's contractual agreement sustained damage during the rental and you returned the vehicle and did not report the damage to the agency nor to Ryder. Subsequently, the agency was held liable for the damages incurred by you as a result of the unauthorized rental. Also, Ryder continued to pursue the agency for payment of this rental and when you were questioned about this rental you indicated that the former employee paid the bill directly to Ryder months ago. However; the outstanding debt of $1411.69 was paid directly to the vendor on September 14, 2016. Additionally, the agency paid Ryder $364.00 for the damage incurred to the vehicle which resulted in a financial loss to the Commonwealth.

For circumstances considered, the Written Notice provided:

> In taking this action, consideration has been given to your length of service, your previous performance evaluations, your current performance, your response to the advance notice of discipline and your current active Group II written notice. Typically, a second Group II written notice results in termination however, the agency has elected to issue a ten day suspension in lieu of termination. Therefore, after consideration of these factors, further mitigation is not warranted. Also, please understand that any further formal disciplinary actions can result in your termination consistent with the Standards of Conduct based on the accumulation of written notices.

Agency Exh. 2.

The Agency witnesses testifying in support of Written Notice 2 included the truck rental representative and the Agency's chief administrative officer. The rental representative testified that she knew the Grievant as the point of contact for the Agency's contract for the rental of tractor trailers. When the Grievant asked to rent a

box truck, she assumed he was renting for the Agency and prepared the rental agreement in the name of the Agency, with the box truck rental a "lease extra." Agency Exh. 11. The rental representative testified that, by virtue of the Agency's contract, the box truck rental rate was at a 25% discount. Also, the Commonwealth's liability insurance was noted, without charging the required insurance for an individual rental, and no deposit was required as is normal for an individual rental. The Grievant signed the rental agreement as prepared by the rental representative, and never corrected the contract to a personal rental.

The Grievant arranged the box truck rental for his former co-worker and friend, who was moving out of state. The Grievant actually drove the box truck for the move, and he so noted himself on the rental agreement as the driver. The co-worker presented his credit card to the truck rental agency, and it was accepted for a "voucher."

The truck rental representative testified that there was some minor damage to the vehicle, and that the Grievant requested a waiver of the "down time" charged for the repair of the truck. The rental representative testified that the down time was waived out of deference for the Agency contract.

This rental ultimately appeared on a delinquent account list for the Agency's payment. Upon investigation, the Agency learned that this was not a rental for Agency purposes, and turned the matter over to the State Police for criminal investigation. Other allegations were included in the referral to the State Police. The State Police investigator testified at the request of the Grievant, and she testified that she found no evidence of a crime—that it was merely a misunderstanding on the part of the truck rental company.

In addition to the Agency witnesses, the Grievant, the State Police investigator and the Grievant's friend/former Agency employee testified in support of the Grievant.

The evidence preponderates in showing that the Grievant rented the truck as a favor to help his friend and former Agency employee move out of state. The Grievant was the point of contact for the Agency's contract with the truck rental company. The evidence preponderates in showing that the Grievant's written rental agreement was prepared by the truck rental representative and made, in fact, with the Grievant signing as the Agency being the renter instead of the Grievant or his friend, personally. Agency Exh. 11. The Grievant accepted the discounted rental rate (provided pursuant to the Agency's contract with the vendor) as well as the insurance waiver. Because of the Grievant's express or apparent authority, this put the Agency responsible and ultimately at risk for the rental.

The Grievant and the friend/former employee both testified that the friend presented his personal credit card to the truck rental company for payment of the rental. The truck rental representative, considering the rental as a "lease extra" for the Agency's contract, accepted a "voucher" from the credit card but did not charge the credit card because the billing for the Agency contract was through invoices.

There was some minor cosmetic damage to the truck, and, at the Grievant's request, the truck rental company waived the "down time" charge for the truck during the repair. The truck rental company waived the down time charge because of the Agency's contract. The Grievant and his friend testified they intended for the damage to be paid through the friend's personal credit card that had been presented to the truck rental company. The charges for the truck rental and damage were ultimately covered by the friend's personal credit card, albeit delayed by the circumstances of what I find to be a misunderstanding about payment between the Grievant, his friend, and the truck rental company. The Agency became aware of the transaction when presented with a delinquent invoice from the truck rental company. The Agency then investigated the circumstances of the truck rental, concluding that the Grievant was guilty of using state resources for personal use or gain.

The Agency believed the conduct was criminal and referred the matter to the State Police for investigation. The State Police investigator testified that from her investigation of the information the Agency provided to her, she found the allegations of criminal intent unfounded. She testified that she found the Grievant's intent was to rent and pay for the truck charges personally and not surreptitiously to have the Agency responsible for the expense. The State Police investigator concluded that the Agency's additional allegation that the Grievant also appropriated an Agency-leased tractor trailer for the move was wholly unfounded. The Agency was unhappy with the State Police conclusion.

The State and Local Government Conflict of Interests Act provides, at Va. Code § 2.2-3103, Prohibited Acts:

> 1. Solicit or accept money or other thing of value for services performed within the scope of his official duties, except the compensation, expenses or other remuneration paid by the agency of which he is an officer or employee.

The Agency's Code of Ethics, provides:

> 4. We do not accept anything of value offered in consideration of performing our public duties, other than the compensation, benefits and reimbursement of expenses duly authorized by the agency or otherwise permitted by law.

Agency Exh. 7.

I find that the Agency has met its burden to show that the Grievant improperly rented the truck under the auspices of the Agency's business, regardless of whether the Grievant did so inadvertently or by inattention. As stated above, EDR's *Rules* provide that the Agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness. *Rules* § VI(B). Accordingly, the Grievant received personal economic benefit, and such deed was an

abuse of state resources and misconduct justifying a Group II Written Notice under the Standards of Conduct. Agency Exh. 4. However, contrary to the charge in Written Notice 2, the Grievant did not intend for the Agency to be ultimately responsible for either the truck rental charge or the damage. The Agency was not, in fact, ultimately held responsible for the payment. Thus, while upheld as a Group II Written Notice, the Written Notice 2 should be amended to delete the reference to the Agency being held responsible for the rental payment or the damage charge.

Transfer

The Agency did not include among the Written Notices that the discipline included a demotion or transfer. Included as discipline under the Written Notices, the Agency imposed a ten day suspension. The Grievant's position upon returning from his disciplinary suspension is a different position than the one he held before the Written Notices were issued, with less responsibility and fewer duties, and I find that the transfer adversely affected the terms, conditions, or benefits of the Grievant's employment. The Agency, according to the chief administrative officer, transferred the Grievant to another position because of organizational changes within the Agency.

The grievant bears the burden of proving that the contested adverse employment action, though unaccompanied by a formal Written Notice, was nevertheless taken primarily for disciplinary reasons. *See, e.g.*, EDR Ruling No. 2002-127; *Rules* § VI(B)(1). The Grievant and another co-worker testified that the Agency director, upon assuming his position as director, expressed vocally that the Agency was not representative of his race (black) and he would make the Agency personnel more racially representative. The Grievant (white) believes his ultimate transfer was racially motivated. Although the agency director was the Agency's party representative at the hearing, neither side called him as a witness.

The Agency was rather intent and persistent on the pursuit of a criminal case against the Grievant, making allegations to the State Police that were unfounded. The Grievant testified that he basically had no duties upon his post-disciplinary transfer. While the Agency had issued two Group II Written Notices, the chief administrative officer testified that the Agency had undergone an organizational change, and that the Grievant's transfer was part of that change. Circumstances could support a belief that the transfer was disciplinary or retaliatory, but, if so, the Agency could have justified and included the transfer as part of the discipline of the second Group II Written Notice (such discipline conceivably could have included termination). This transfer may have been a sloppy implementation of discipline or animus, but I find the evidence equivocal on the issue of the motivation for the transfer (whether discriminatory, disciplinary, or retaliatory). Accordingly, when the evidence is in equipoise, the party bearing the burden of proof—the Grievant for this issue—fails to meet his burden.

Performance Evaluation

As for the Grievant's challenge to the Performance Evaluation as arbitrary and capricious, the record of two Group II Written Notices (that could, conceivably support termination) preceding the evaluation may reasonably lead to an evaluation of below contributor. Giving the Agency appropriate deference to manage its affairs, I do not conclude that the performance evaluation was arbitrary and capricious.

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."

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 manage effectively and efficiently its work force. The Grievant's position placed him in a responsible role, and the Grievant's conduct as documented by the Agency 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.

The two Group II Written Notices with ten days suspension is arguably a harsh result, issued within the context of the Agency's pursuit of a criminal investigation, but the Agency has demonstrated mitigation and restraint since two active Group II Written Notices normally warrant termination. Short of termination, a second Group II Written Notice may include suspension of up to 30 days. Regardless, 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 outside the bounds of reasonableness. The basic conduct as stated in the written notices occurred. The normal result of two Group II Written Notices is termination. Here, the Agency credibly asserts that it has exercised reasonable discretion and has already mitigated the discipline.

Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

DECISION

For the reasons stated herein, I uphold the Agency's discipline of the two Group II Written Notices with ten days suspension. Based on the proof and findings, above, the second Written Notice has been factually amended to make it less aggravating, deleting the aspect of the Agency ultimately being held responsible for the truck rental or damage. When the hearing officer sustains fewer than all of the agency's charges, the hearing officer may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process or proceedings before the hearing officer that it desires that a lesser penalty be imposed on fewer charges. *Rules* §VI(B)(1). Two Group II Written Notices are upheld, as modified, and the Agency has not indicated that it would consider any lesser discipline for two modified Group II Written Notices, so the ten day suspension must be 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.