

Issue: Group III Written Notice with termination (excessive unauthorized use of state property and falsification of records); Hearing Dates: 11/24/03 and 12/15/03; Decision Issued: 01/23/04; Agency: VEC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5848; **Administrative Review:** EDR Ruling Request received 02/04/04; EDR Ruling issued 03/12/04; Outcome: HO did not violate grievance procedure [2004-583]; **Administrative Review:** DHRM Ruling Request received 02/04/04; DHRM Ruling issued 03/10/04; Outcome: DHRM policy does not address HO's role in considering mitigating circumstances. No basis to interfere with decision; **Judicial Review:** Appealed to the Circuit Court in the City of Richmond on 04/09/04; Outcome pending



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5848

Hearing Date: December 15, 2003
Decision Issued: January 23, 2004

PROCEDURAL HISTORY

On September 12, 2003, Grievant was issued a Group III Written Notice of disciplinary action for "misuse of travel funds, your work time, and state equipment including your computer, telephone, issued cell phone, and state car." On October 10, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On October 30, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled for November 20, 2003. Upon Grievant's motion, the Hearing Officer found just cause to grant a continuance and the matter was re-scheduled for December 3, 2003. At the conclusion of the hearing on December 3, 2003, Grievant requested additional time to present his case. The Hearing Officer granted Grievant's motion for additional time and a second full day of testimony was heard on December 15, 2003.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Agency Counsel

Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for excessive unauthorized use of state property and falsification of records.

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 Virginia Employment Commission hired Grievant on September 10, 2002 as an Assistant Commissioner for VEC Field Operations. His duties included administering the Job Search and Unemployment Insurance programs for the VEC. He had responsibility for 39 field offices, four regional offices, and a central office program. Approximately 1200 employees were part of his chain of command. He also was responsible for overseeing facility and budget formulation and execution for federal programs. Grievant's position was formerly held by the current VEC Commissioner.

Prior to joining the VEC, Grievant worked at the Department of Motor Vehicles. He began working for DMV as a Branch Office Manager Senior in December 1994. As a Branch Office Manager Senior, Grievant managed the daily operations of a DMV field office including ensuring quality customer service and supervising 35 employees. In May 1997, he was promoted to DMV District Manager. As District Manager, Grievant managed the delivery of customer service by 12 regional DMV offices. He improved the delivery of services to customers by lowering the customer wait time from an average of 50 minutes to an average of 15 minutes. In May 1998, he was promoted to DMV Director for Field Operations. As Director of Field Operations, Grievant managed customer service delivery of DMV drivers' licensing and vehicle registration for 73 local offices and approximately 1400 direct customer service employees. Grievant ensured that field office operations were well-run and that facilities were maintained in a serviceable manner.

While working at DMV, Grievant received an overall performance evaluation of Contributor in 2001; Exceptional in 1998, 1996; and Exceeds Expectations in 2000, 1999, 1997, 1995.¹

Grievant served in the U.S. Army and U.S. Navy prior to his employment with DMV. He enlisted in the Army to serve in Vietnam. During his military career, Grievant received two Army Commendation Medals, three Navy Commendation Medals, a Bronze Star and a Purple Heart. His military career ended when he was involved in a mid-air collision from which he suffered permanent injuries.

Grievant is well-educated. He earned a B.S. in Business Management in 1976, a Masters in Public Administration in 1992 and attended the Air War College in 1992.

In July 2003, an employee complained about Grievant. The person complaining raised questions about Grievant's travel expenses and personal use of telephones. On August 11, 2003, the Commissioner asked the Agency's Internal Audit section to begin an investigation. An auditor reviewed travel vouchers and supporting documents, State-owned fleet vehicle billings from the Department of General Services, long distance and cellular phone bills provided by the Department of Information Technology, VEC Central Office Security Access Logs, Grievant's email and calendar records, and monthly time reports.

Ms. SF works as a Human Resource professional in a location DMV office. She met Grievant in 1997. While Grievant and Ms. SF were working at DMV, they established a close personal friendship.² Topics of their conversation included matters relating to DMV business as well as matters relating to their lives and families independent of DMV business. They sometimes used "pet names" to refer to one another.

After joining VEC, Grievant made numerous calls to Ms. SF. The Agency reviewed Grievant's long distance telephone records from September 10, 2002 to July 31, 2003. It also reviewed Grievant's cellular telephone³ records from September 10, 2002 to June 30, 2003. The DMV Internal Audit Director provided a listing of calls made from Ms. SF's office telephone to Grievant's office and cellular telephones. Based on this information, Grievant spoke with Ms. SF

From Grievant's State cell phone to Ms. SF	790	5889	\$1,095.58
From Ms. SF's Office telephone to Grievant	57	807	Costs paid by DMV
Totals:	1510	13,096	\$1,403.24

Upon reviewing Grievant's telephone records, the Senior Internal Auditor concluded that Grievant's calls with Ms. SF,

constituted approximately 17% of total business hours in his first week at the agency. On a single day, over 20 calls to these numbers lasting a total of 78 minutes were noted in our review of VEC phone records. Based on information provided to use by the DMV Internal Audit Director, we noted similar calling patterns between [Grievant] and [Ms. SF] during the last four months of his employment at DMV.

Grievant admitted to making personal telephone calls to Ms. SF using his office and cellular telephones.⁴

The Senior Internal Auditor compared all of Grievant's long distance and cellular telephone calls with calls made to Ms. SF and Ms. ND. Ms. ND managed a regional office of DMV. She met Grievant in 1996. She and Grievant developed a friendship while Grievant worked at DMV. The Senior Internal Auditor concluded that 45% of Grievant's calls were made to Ms. SF and eight percent were made⁵ to Ms. ND.⁶ Of the total time Grievant spent on all calls, 66% of the time was devoted to Ms. SF and seven percent was devoted to Ms. ND.⁷

Grievant made 13 trips for which he sought some type of travel reimbursement. Ten of the trips were to the Northern Virginia region. Grievant traveled there because Northern Virginia included field offices with the highest volume of activity and services.

During his employment with DMV, Grievant developed a technique of improving DMV field offices by appearing at those offices unannounced. He would sometimes arrive at DMV field offices before they opened in order to observe whether they opened on time. He would enter the facility and sit among the general public and observe DMV operations. His objective was to see how the facility staff functioned when they did not realize a senior manager was there to observe them. Grievant's practice of

⁴ In a September 11, 2003, memorandum to the Commissioner, Grievant states, "I apologize again for the misuse of the phones during my duties. I have previously admitted to the misuse and I regret my actions greatly."

⁵ Ms. ND testified that during her telephone calls with Grievant, they spoke of DMV business.

⁶ Grievant Exhibit 14.

⁷ Grievant Exhibit 15.

unannounced visits at DMV offices enabled Grievant to make material improvements in DMV operations.

Once Grievant began working for the VEC, he continued his practice of unannounced field office visits in order to learn about how different field offices operated and to begin formulating ideas on ways to improve VEC operations. He sometimes stayed overnight in a hotel so that he could start his field office visits before the field offices opened. Although Grievant did not inform the Commissioner that one of his management techniques would include unannounced field office visits, no evidence was presented suggesting Grievant should have known he was obligated to inform the Commissioner. Indeed, Grievant held an executive level position giving him sufficient independence to enable him to decide whether to conduct unannounced office visits and what to do with that information.

Grievant had difficulties working with the VEC Human Resource division. He sometimes sought the opinion of Ms. SF regarding how to address particular problems. When the VEC Commissioner worked in Grievant's position, she also experienced similar problems with the VEC Human Resource division. The number and type of human resource problems for which Grievant did not receive adequate support from the VEC Human Resource division are insufficient to justify the volume and length of calls Grievant made to Ms. SF seeking assistance.

On August 8, 2003, Grievant sent Ms. SF an email regarding settlement discussions between a VEC employee and VEC managers.⁸ The email indicated that the VEC employee filing the grievance had not signed the proposed settlement agreement and a recommendation was made that a deadline for signing be given and that telephone calls from the employee not be accepted.

Grievant has been employed by the Commonwealth for approximately nine years. During eight of those years, Grievant advanced seven pay grades.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).⁹ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior

⁸ Grievant Exhibit 4J.

⁹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

of such a serious nature that a first occurrence should normally warrant removal.”
DHRM § 1.60(V)(B)(3).

Excessive Unauthorized Use of State Property

DHRM § 1.60(V) lists numerous examples of offenses. These examples “are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section.”

It is the Agency's judgment that the number of calls and time devoted to telephone calls to Ms. SF and Ms. ND exceeded what would be necessary for the customary operations of the Agency's business and were so excessive as to justify issuance of a Group III Written Notice. The Hearing Officer agrees. It was unnecessary for Grievant to make so many calls and to spend so much time speaking with Ms. SF and Ms. ND for him to carrying on the business of the VEC. The number of calls and amount of time devoted to calling Ms. SF and Ms. ND shows that Grievant's primary motivation for calling these individuals was social or related to DMV business. There are approximately 47 weeks from September 10, 2002 through July 31, 2003. Grievant spoke with Ms. SF for approximately 13,484 minutes and Ms. ND 1,384 minutes. This amounts to approximately 316 minutes or five hours and 16 minutes per week.

Grievant contends he was discussing VEC personnel matters with Ms. SF because of her expertise. He presented evidence that the VEC human resource division did not provide him with the level of service he expected and due to his frustration he needed a second opinion from an external expert. Although Ms. SF had substantial expertise in human resources, the Hearing Officer finds that the nature of the problems experienced by Grievant were not so severe as to require him to have an extraordinary level of contact with Ms. SF. Grievant contends most of her conversations with Ms. SF related to “business”, but it is clear from the testimony that a significant portion of his conversations related to the business of DMV. Since Grievant worked for the VEC, his conversations regarding DMV business would not be consistent with carrying out his duties for the VEC.

Grievant argues that when employees who have become friends speak about business matters, they also may discuss some non-business related issues of a personal nature as a normal course of interaction. Because of this incidental personal communication, Grievant asserts that all business contacts between Grievant and Ms. SF would include non-business discourse that should be discounted when evaluating Grievant's telephone calls. If the Hearing Officer assumes for the sake of argument that Grievant's assertion is correct and the Hearing Officer disregards a reasonable portion of each telephone call between Grievant and Ms. SF, the Hearing Officer finds that his communication with Ms. SF remains so excessive as to justify issuance of a Group III Written Notice.

Grievant contends his telephone use was necessitated because of the difficulties he was having with the VEC human resource department. He needed to contact Ms. SF in order to obtain independent and reliable information about human resources. The evidence showed that the difficulties Grievant was having with the Agency's human resource department were not so severe as to require him to make such extensive contact with Ms. SF. In Grievant's first week with the Agency, he devoted approximately 17% of his total business hours contacting Ms. SF. It is difficult for the Hearing Officer to believe that Grievant would have any significant problems with the VEC human resource department while he was familiarizing himself with the Agency's operations.

Falsification of Records

"Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents" constitutes a Group III offense. DHRM § 1.60(V)(B)(3)(b).¹⁰ DHRM § 2.10 states:

Before an applicant is eligible for employment with the Commonwealth, several records must be reviewed or verified. This information is considered part of the application process and, as with information contained on the application form, if it is later discovered that an applicant falsified any information related to his or her employment, the employee may be terminated.

"Falsifying" is not defined by DHRM § 1.60(V)(B)(3)(b) or DHRM § 2.10, but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

Grievant did not falsify State records. The expenses he claimed were indeed incurred by Grievant. For example, if Grievant claimed reimbursement for his payment

¹⁰ The Hearing Officer construes this language to include the circumstances where an employee creates a false document and then submits it to an agency where that document becomes a record of the agency.

to a hotel for an overnight stay, Grievant submitted the necessary receipt from the hotel to verify that he incurred the expense he sought. Grievant's travel vouchers were approved by the Commissioner without question.

The Agency contends Grievant falsified documents because he obtained reimbursement for travel that was not related to Agency business. This allegation is unsupported by the evidence. Grievant regularly made unannounced visits to local facilities to observe their operations and to formulate ideas for improving the operations within facilities. His actions were consistent with the practice he developed while working at DMV and for which he had achieved significant success at improving DMV operations. The Agency's assertion that Grievant was not actually making field office visits on the days alleged is nothing more than a suspicion.

The Agency contends that because Grievant cannot account for his activities for several days during which he claims to have conducted field work, Grievant must not be telling the truth about how he spent his time. The fact that Grievant cannot recall his activities in detail on specific days for field work occurring several weeks and months earlier is not surprising. From Grievant's perspective, these field visits were routine work which he did not expect to need to define in detail on a later date. Grievant's lack of perfect recollection does not mean he is lying regarding conducting field work. Although Grievant did not tell the Commissioner of his activities, Grievant held an executive level position for which he would not be expected to obtain the Commissioner's permission before conducting activities within his area of responsibility.

Disclosure of Grievance Information

DHRM § 6.05(III) states that "personal information may not be disclosed to third parties without the written consent of the subject employee." This information includes, "records concerning grievances or complaints." By sending communicating with Ms. SF about the merits of a pending VEC grievance, Grievant acted contrary to established written policy.

Grievant argues that significant facts about his grievance were well-known among Agency staff and that such disclosures show the Agency standard for disclosing information is lacking. The evidence showed that Agency managers did not reveal information about Grievant but that several employees spread rumors about what they had observed about Grievant. Few agencies can control the spread of rumors by employees who have first hand knowledge of certain facts and then speculate on other matters relating to those facts.

Mitigation

Although the Agency has presented sufficient evidence to support its issuance of a Group III Written Notice, the question arises regarding whether Grievant's removal should be mitigated thereby reinstating him to his former position. Whether to mitigate Grievant's disciplinary action must be resolved based on the Hearing Officer's authority

and the standard used for decision-making. Because of the decision-making standard set forth in the *Rules for Conducting Grievance Hearings*, the Hearing Officer will not mitigate the disciplinary action against Grievant.

Analysis Independent of the Rules for Conducting Grievance Hearings. If the Hearing Officer considers the evidence as presented¹¹ and without considering the decision-making standard set forth in the *Rules for Conducting Grievance Hearings*, Grievant has presented sufficient evidence to establish that his removal should be reversed.

Grievant possesses exceptional qualifications and demonstrated achievements as a manager.¹² He began his career near the bottom of the chain of command at DMV. During a period of eight years, he advanced seven pay grades to an executive management position within DMV. Grievant was the driving influence and was instrumental in the planning, design, and implementation of the Q-MATIC queuing system.¹³ Under this system, a customer entering a DMV field office is asked about the purpose of the customer's visit and then the customer is given a ticket and offered a seat in the lobby. Customers requiring services that normally would take a short period of time are assigned to customer service staff in a manner enabling them to receive services quickly. Customers requiring more complex services also are assigned to customer service staff in a manner enabling them to receive services quickly. The overall effect of implementing this system is a dramatic reduction in the amount of time the average customer has to wait in DMV offices. In some Northern Virginia field offices, the average customer waiting time was reduced by up to an hour. In addition, Grievant developed the idea of placing the field office waiting time on the Agency's web site so that customers located near a number of field offices could chose which office to visit by determining which office has the shortest waiting time. When Grievant's achievements at DMV¹⁴ are considered, he has presented a reasonable basis to otherwise justify his reinstatement.

¹¹ DHRM § 1.60(VII)(C)(1) provides that Agencies may mitigate disciplinary action based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance.

¹² One of Grievant's former DMV supervisors testified that Grievant's management style was overbearing and ineffective. The Hearing Officer finds that witness's opinion to be unsupported by the evidence.

¹³ Q-MATIC is a computer software system that has general parameters and functions which must be customized to be effectively implemented. Grievant was responsible for determining how the software should be customized and how it should be implemented and reviewed.

¹⁴ Since Grievant began working at the VEC in September 2002, his work history at that Agency is insufficient in itself to establish mitigating circumstances. Grievant was beginning to learn the duties of his position.

The Commonwealth's treatment of veterans suggests an employee's military record could be considered when deciding whether to mitigate disciplinary action. DHRM Policy 2.10, *Hiring*, states:

Consistent with the requirements of the Va. Code § 2.2-2903, the veteran's military service shall be taken into consideration by the Commonwealth during the selection process, provided that such veteran meets all of the knowledge, skill, and ability requirements for the available position.

Additionally, if the position is filled using a scored test or examination, the grade or rating of an honorably discharged veteran must be increased by 5% or by 10% if the veteran has a service-connected disability rating fixed by the U.S. Veterans Administration.

To be eligible for such an increase in score, the applicant must first achieve a passing score on the test or examination.

When this policy and others addressing veterans (e.g. DHRM Policy 4.50, *Military Leave*) are considered, it is clear that an employee's veteran status influences many aspects of his or her employment with the Commonwealth.

Grievant did not merely serve in the Armed Forces, he is a military hero. He enlisted to serve the United States in Vietnam. He earned a Bronze Star, two Army Commendation Medals, three Navy Commendation Medals, and received the Purple Heart. His military service ended when he suffered injuries resulting from a mid-air collision. If the Hearing Officer considers Grievant's military service without consideration of any decision-making standard, the Hearing Officer finds that Grievant has presented a reasonable basis otherwise to justify his reinstatement.

The Agency contends it considered Grievant's employment and military record and concluded that mitigation was not warranted. The Hearing Officer finds that although the Agency reviewed Grievant's employment and military record, it did not fully consider the depth and breadth of his prior achievements because that information was not known to the Agency prior to the hearing.

Applying the Rules for Conducting Grievance Hearings. Va. Code § 2.2-1001 requires the EDR Director to "[a]dopt rules ... for grievance hearings." The *Rules for Conducting Grievance Hearings* set forth the Hearing Officer's authority to mitigate disciplinary action. The Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations

should be given due consideration when the contested management action is consistent with law and policy.”

First, Grievant should have known that the amount of time he devoted to calling Ms. SF and Ms. ND was excessive, inappropriate, and would result in disciplinary action. Thus, Grievant had adequate notice of the rule he was accused of violating. Second, no credible evidence was presented suggesting the Agency has not consistently applied disciplinary action. Grievant presented evidence that DMV issued Ms. SF a Group II Written Notice. Grievant argues that since he received more than a Group II Written Notice the Agency has inconsistently disciplined him.¹⁵ Grievant’s argument fails because Ms. SF worked for DMV and DMV chose the disciplinary action against her. Thus, the VEC could not have inconsistently disciplined Grievant when compared to Ms. SF. Third, no credible evidence was presented suggesting the Agency’s disciplinary action was based on an improper motive. Grievant argues that the Agency disciplined him because of its false assumptions about the close relationship he had with Ms. SF.¹⁶ The evidence, however, showed that the Agency disciplined Grievant based on his use of Agency equipment and time devoted to other than Agency business. Grievant was not disciplined because of any perceived relationship he may have had with Ms. SF. In light of the decision-making standard required by the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Miscellaneous Arguments

Grievant contends the Agency failed to take action against Grievant as soon as a supervisor became aware of Grievant’s unsatisfactory behavior. The Hearing Officer finds that the Agency did not become aware of Grievant’s unsatisfactory behavior until July 2003 and following an investigation notified Grievant in August 2003. The Agency did not unreasonably delay in taking action against Grievant. Accordingly, Grievant’s assertion is unfounded.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

¹⁵ Grievant presented other examples of claimed inconsistent application of disciplinary action. None of those examples were developed sufficiently to enable the Hearing Officer to conclude that the Agency disciplined Grievant in a manner inconsistent with the discipline given to other employees.

¹⁶ Grievant cites the type of questions asked by the State Police investigator of Ms. SF. The VEC has little control over the mechanics of a State Police investigation. To the extent any questions asked by the State Police investigator were inappropriate or excessive, any fault rests with that investigator and not the VEC. The Agency referred the matter to the State Police as a matter of routine.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.¹⁷

[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].

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of
Virginia Employment Commission
March 10, 2004

The grievant has requested an administrative review of the hearing officer's January 23, 2004, decision in Case No. 5848. The grievant was terminated and filed a grievance to have the termination reversed. The hearing officer nullified some of the charges placed against him but upheld others. However, he upheld the termination. The grievant objects to the hearing officer's decision on the basis of his refusal to apply the mitigating circumstances of the grievant's military service, longevity, and outstanding employment achievement to reduce the disciplinary action. The grievant's request was based on his position that the hearing's officer's refusal to mitigate the discipline imposed was not in compliance with the grievance procedure, and was inconsistent with state and agency policy. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this administrative review request.

FACTS

The Virginia Employment Commission (VEC) employed the grievant as an Assistant Commissioner for VEC Field Operations before he was terminated. His duties encompassed administering the Job Search and Unemployment Insurance programs for the VEC. He had more than 1200 employees in his division. He also was responsible for overseeing facility and budget formulation and execution for federal programs.

Based on a complaint, VEC officials launched an investigation and determined that the grievant had falsified travel expenses and abused the state telephone services. The VEC officials issued to him a Group III Written Notice and terminated him. He was issued the disciplinary action for "misuse of travel funds, your work time, and state equipment including your computer, telephone, issued cell phone, and state car." He filed a grievance and in a decision dated January 23, 2004, the hearing officer upheld the agency's disciplinary actions. The grievant also requested that the Director of the Department of Employment Dispute Resolution review the decision on the basis that the hearing officer refused to consider the mitigating circumstances of the grievant's military service, longevity, and outstanding employment achievement to reduce the level of the disciplinary actions.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, states that it is the Commonwealth's objective to promote the well being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2)

behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth, but is not all-inclusive, examples of unacceptable behavior for which specific disciplinary action may be warranted. This

same policy, at Section VII. C(1), Mitigating Circumstances, also states “While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:

- (a) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
- b) an employee’s long service or otherwise satisfactory work performance.”

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer’s decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. The Department’s authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer’s assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the hearing officer determined that there was sufficient evidence to support the allegations the agency made against the grievant. DHRM Policy No. 1.60, Standards of Conduct, provides guidance to agencies for handling workplace misconduct and behavior and for taking corrective action, including mitigating circumstances. However, DHRM policy does not address the hearing officer’s role in considering mitigating circumstances. Therefore, we have no basis to interfere with the execution of the hearing officer’s decision. In addition, we note that in its ruling the Department of Employment Dispute Resolution has issued a ruling on this issue.

If you have any questions regarding this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley
Manager, Employment
Equity Services