Issues: Suspension pending investigation and Group III Written Notice with termination (food stamp fraud); Hearing Date: 08/24/05; Decision Issued: 08/29/05; Agency: DSS; AHO: David J. Latham, Esq.; Case No. 8128,8153

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Numbers: 8128 & 8153

Hearing Date: August 24, 2005
Decision Issued: August 29, 2005

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Audit Services Director
Advocate for Agency
One witness for Agency

ISSUES

Did the agency's suspension of grievant comply with applicable policy? Did grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Did the agency discriminate against grievant?

FINDINGS OF FACT

Grievant filed a grievance contesting her suspension pending investigation of grievant's application for disaster food stamp benefits.[1] The grievant filed a second grievance from a Group III Written Notice for intentional fraud in obtaining disaster food stamp benefits.[2] As part of the disciplinary action, grievant was removed from state employment effective June 16, 2005. Following failure of the parties to resolve the two grievances at the third resolution step, the agency head qualified both grievances for hearing.[3] The Department of Employment Dispute Resolution (EDR) consolidated both cases to be adjudicated in one hearing.

The Department of Social Services (DSS) (Hereinafter referred to as "agency") had employed grievant for six years as an administrative procurement specialist.

On September 18, 2003, Hurricane Isabel caused widespread power outages and property destruction throughout much of the Commonwealth. The agency administered a Disaster Food Stamp Program that provided food stamp benefits to persons who qualified given their income, available financial resources, and disaster-related expenses. The disaster period was established as September 18 through October 17, 2003.

On October 7, 2003, grievant filed an application for emergency food stamps at the Social Services office in the city where she resides.[4] Grievant was given an application form and completed Parts I through VI (with certain exceptions discussed *infra*). It was the practice of interviewers not to request verification of the information but to accept whatever applicants said. Applicants were allowed to list their net income rather than gross income. Grievant reviewed the application and certified by signing it that the information she gave was correct and complete.[5] Based on the information provided by grievant, the local Social Services office calculated that grievant was entitled to $139 in food stamps. Grievant subsequently received $139 in food stamps.

The federal Department of Agriculture has oversight responsibility for the food stamp program. It routinely requires that the DSS must audit one hundred percent of the applications filed by DSS employees. The DSS Quality Performance (QP) Manager who reviewed grievant's application referred the case for a fraud investigation. The city fraud investigator investigated the case and then referred it back to the agency for further action.

Grievant had no other people residing in her home on the date of the disaster. Grievant's actual net pay for the disaster period was $2,221.95;[6]

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[1] Agency Exhibit 1. Grievance Form A, filed May 13, 2005. [Case # 8128]
[2] Agency Exhibit 3. Group III Written Notice, issued June 16, 2005.
[3] Agency Exhibit 1. *Grievance Form A*, filed June 27, 2004. [Case # 8153]
[4] An applicant for food stamps must file her application in her county or city of residence.
[5] Agency Exhibit 6. Application for Emergency Food Stamps, October 7, 2003.
[6] Agency Exhibit 7. Grievant's bank statements for September and October 2003 reflecting direct deposits from the agency on September 30 and October 16, 2003.

grievant reported only $2,000. On the date grievant filed her application, her personal checking account contained $243.49; grievant reported only $40. Grievant is joint owner (with her daughter) of a second checking account; grievant did not report this account. On the same date, grievant's regular savings account contained $1,276.97; grievant reported only $50. In addition, grievant had a second savings account (designated vacation account) containing $1,080.52; grievant did not report this account. Grievant claimed expenses of $175 for destroyed food and $300 for miscellaneous disaster-caused expenses; these two expenses are not in question.

Grievant avers that, in filling out Part IV of the application, she used a blue ink pen[7] and wrote "0" as the amount for items 4 & 5, i.e., she did not claim any expense for either damage to home or temporary shelter expense. Grievant further avers that she did not have any such expenses, did not tell the eligibility worker to enter any dollar amounts on the form, and did not know that the worker had changed the amounts. The investigator interviewed the eligibility worker who acknowledged that on items 4 & 5, she changed the "0" to $250.00 and $270.00, respectively, by adding 25 (and 27) prior to grievant's "0" and adding two zeros after the "0." These amounts were not initialed by grievant after the eligibility worker changed them. On the front of the application, grievant checked the "No" block to indicate that she did not have any disaster damage to her home. Although the eligibility worker used black ink on other portions of the application, she used blue ink to alter the dollar amounts referred to above. The blue ink she used is slightly grayer than the blue ink used by grievant.

The agency did not become aware that grievant's application was suspect until the USDA-required audit was conducted in early 2004. Grievant was placed on pre-disciplinary suspension on March 19, 2004. The agency periodically notified grievant that her suspension had been extended after consultation and approval from the Department of Human Resource Management.[8] The agency referred grievant's case to the local Social Services department where she had filed her application.[9] The city's fraud investigator had a large number of cases to investigate and completed grievant's investigation in June 2004.[10] Shortly after being notified of the agency's determination that she should not have received food stamp benefits, grievant repaid the entire amount of $139 to the local DSS office.[11]

In May 2005, a hearing officer conducted an administrative disqualification hearing to determine whether grievant, in applying for food stamps, had committed an intentional program violation pursuant to Va. Code § 63.2-524.

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[7] Grievant Exhibit 3. This copy of the application form is highlighted in yellow to show those portions of the original that were written in blue ink.
[8] Grievant Exhibit 4. Suspension letters from agency to grievant, March through June 2004.
[9] Approximately 100 cases were referred to various city and county
[10] Agency Exhibit 8. City DSS fraud investigation report to agency, June 22, 2004.
[11] Grievant Exhibit 5. Letter and copy of check from grievant to local DSS office, June 10, 2004.

Utilizing the higher standard of proof required in such a hearing, the hearing officer held that evidence was "clear and convincing" enough to demonstrate an intentional program violation.[12] As a result, grievant was disqualified from receiving food stamp benefits for 12 months.

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.

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 the grievant must present her evidence first and prove her claim by a preponderance of the evidence.[13]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less

[12] Agency Exhibit 5. Administrative Disqualification Hearing Decision, May 24, 2005.
[13] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[14] Falsifying any records including reports, time records, or other official state documents is one example of a Group III offense. The offenses listed in the Standards of Conduct are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head undermines the effectiveness of the agency's activities or the employee's performance should be treated consistent with the provisions of the Standards of Conduct.[15]

Evidentiary issue

Although the administrative hearing decision was admitted as evidence in this case, this hearing officer is not bound by the findings, opinion, or decision of another hearing officer. This hearing officer is required to adjudicate the grievance based solely on the testimony and evidence presented during this hearing. In the disqualification hearing, an intentional program violation could be found only if the evidence met the "clear and convincing" evidentiary standard. In contrast, the standard of proof in a grievance hearing is a preponderance of evidence. Accordingly, the level of proof in a grievance hearing need not rise to the higher evidentiary standard required in a disqualification hearing.

Extended suspension (First grievance)

In her first grievance, grievant specified that her grievance occurred on May 9, 2005; however, in six pages of attachments, she never explained what grievable event, if any, occurred on that date. She also failed to address this issue during the hearing. Grievant complained of several issues but her primary complaint was that her suspension had been repeatedly extended and her case remained unresolved after 14 months of suspension.

The *Standards of Conduct* permits an agency to suspend employees for up to ten workdays pending investigation of the employee's conduct.[16] Normally, if the agency does not make a decision regarding disciplinary action within ten workdays, the employee is permitted to return to work pending completion of the agency investigation. In the instant case, because of the unique nature of the case and the large number of investigations being conducted, the agency recognized that more time than usual would be required to complete the investigation process. Accordingly, the agency requested that the Department of Human Resource Management (DHRM) approve an extension of the suspensions in 20-day increments. Part of the rationale was that those being

[14] Agency Exhibit 9. Section V.B.3, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.
[15] Agency Exhibit 9. Section V.A. *Ibid.*
[16] Agency Exhibit 9. Section VIII.B.5, *Ibid.*

investigated might be subject to criminal prosecution dependent upon the outcome of the investigations.[17] DHRM granted approval for the extensions.[18]

As noted in footnote 18, DHRM has issued a Policy Ruling affirming its authority to grant exceptions to state policy. Grievant has not provided any persuasive argument that suggests DHRM would not uphold the aforementioned Policy Ruling if the instant case were appealed to the DHRM Director. Accordingly, it is concluded that DHRM is the ultimate arbiter of state policy and had the authority to grant multiple extensions of grievant's suspension. Therefore, the agency complied with applicable policy, as the Director of DHRM interpreted that policy.

In this same grievance, grievant also complained in Attachment 1 that the agency did not properly handle various aspects of the disaster food stamp program (Issues 1 & 2). However, grievant did not offer any documentation to support her allegations. Moreover, these are complaints for which no relief is available since the program ended in October 2003. Grievant also complains that various regulations for conducting her administrative disqualification hearing were violated (Issues 4, 5, 6, & 7). This hearing officer has no jurisdiction to address the administrative disqualification hearing process. Finally, grievant alleged that the agency investigated, suspended, and terminated only black employees. However, grievant did not present any evidence or testimony in support of her allegation. An employee may demonstrate racial discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact resulting from the process. In this case, grievant has not presented any testimony or evidence of remarks, practices, or impacts that would constitute racial discrimination in the audit, investigation, suspension or termination processes. Moreover, the evidence revealed that the decision to terminate grievant's employment was personally approved by the agency head who is also black.

[17] In fact, some employees' cases were eventually referred to the Commonwealth's Attorney for criminal prosecution.

[18] In a case (No. 770 – Agency Exhibit 2) involving another suspended employee of this agency, the employee grieved the extensions of her pre-disciplinary suspension. The grievance was heard by a hearing officer who ruled that Policy 1.60 does not give DHRM the authority to grant an extension of a suspension. The agency appealed the hearing officer's decision by requesting an administrative review by DHRM. See DHRM *Policy Ruling*, November 17, 2004. The DHRM review opined that Va. Code § 2.2-1201 gives the Director of DHRM the authority to establish, disseminate, and interpret state personnel policy. DHRM stated that the authority to interpret policy includes granting such exceptions as DHRM deems appropriate to ensure fair, effective and efficient human resource management in state government. DHRM concluded that the DHRM Director acted within her authority when she approved the multiple extensions of suspensions. [NOTE: Policy rulings of DHRM are final and are generally not appealable to court].

Intentional fraud (Second grievance)

In her second grievance, in addition to grieving removal from employment, grievant again takes issue with various aspects of the administrative disqualification hearing process (Attachment Issues 1, 2, 3, & 5). As noted above, this hearing officer has no jurisdiction to address an administrative disqualification hearing process that was conducted by another hearing officer pursuant to a statute unrelated to the grievance process. Grievant also reiterates her complaint about the extension of her suspension (Issue 4); that complaint has already been addressed, *supra.*

Grievant argues that because the agency cannot prove the elements of "intentional fraud," it cannot prevail in this case. In a criminal proceeding, grievant's argument would have merit. However, in order to prevail in this administrative hearing, the agency need only demonstrate by a preponderance of evidence that grievant was reasonably informed of the offense she committed, and that she committed the offense.

Black's Law Dictionary defines "falsify" as, "To counterfeit or forge; to make something false; to give a false appearance to anything." The word "falsify" means being intentionally or knowingly untrue. Grievant contends that while the Written Notice charged her with "intentional fraud," there is no such language in the Standards of Conduct policy. The Standards of Conduct lists only *examples* of unacceptable behavior.[19] The agency apparently used the term "intentional fraud" because of the holding in the administrative disqualification decision. But, regardless of the words used in the Written Notice and Notice of Intent, the meaning was clear – grievant was disciplined for knowingly falsifying an official state document. The agency believed it to be intentional and fraudulent.

Grievant's application included three incorrect amounts – income, disaster-related expenses, and available financial resources. First, it is undisputed that grievant's income for the disaster period was underreported by $221.95 (ten percent of her actual income). However, the agency did not dispute that applicants were allowed to estimate their income and that grievant's underestimate was not so egregious as to constitute intentional fraud. Therefore, grievant's underreporting of income is not considered to be evidence of a knowing falsification.

Second, the disaster-related expenses on the form included two items that were false because grievant did not have either home damage or temporary shelter expense. The undisputed evidence is that the eligibility worker, not grievant, wrote the amounts of $250 and $270 as disaster-related expenses in Part IV of the application form. Grievant testified under oath that she did not know the worker wrote those amounts on the form. The agency did not offer the

[19] Agency Exhibit 9. Section V.A. *Ibid.*

eligibility worker as a witness. The worker had told an investigator that her practice had been to enter such amounts only when an applicant suggested the amounts. However, the hearing officer concludes that grievant's sworn denial of knowledge is more credible than the hearsay evidence of the eligibility worker. First, the agency could have offered the worker as a witness to rebut grievant's testimony but failed to do so. Second, the worker said only that it was her general practice to enter amounts suggested by applicants; she did not say that grievant had suggested the amounts to her. Third, grievant stated on the front of the form that she did not have any disaster-related damage to her home. It would have been inconsistent and illogical for grievant to so state on one side of the form and then contradict the statement by claiming $520 of damage and temporary shelter expense on the reverse side of the form.

Therefore, it appears more likely than not that the eligibility worker initially calculated grievant's disaster allotment and realized that grievant would not qualify for benefits based on the information grievant had provided. For whatever reason,[20] the eligibility worker then added $520 of expenses in order to reduce grievant's "disaster income" and thereby make her eligible for a small allotment of benefits.[21] If the eligibility worker had calculated grievant's disaster allotment *based solely on the information grievant wrote on the form*, grievant's disaster income would have exceeded the disaster income limit and grievant would not have received any food stamp benefits. Therefore, but for the *eligibility worker's* falsification of the application form, grievant would not have received benefits, her application would not have been audited, and she would not have been disciplined.

It is particularly noteworthy that the eligibility worker used a blue ink pen to alter the expense figures in an apparent effort to make it appear that grievant had made the entries. However, rather than borrowing grievant's pen, she used a pen in which the ink was slightly grayer than grievant's blue pen. There was no reason for the eligibility worker to have altered the document with a blue pen unless she wanted to hide the fact that she – not grievant – made the false entries. There is no evidence of collusion between grievant and the eligibility worker to amend the application form in order to qualify for benefits. In fact, grievant avers that there was virtually no conversation between her and the eligibility worker. Based on the available testimony in this hearing, grievant's sworn denial of knowledge about the alteration carries more weight than the eligibility worker's hearsay evidence. Therefore, the falsification of disaster-related expense is not attributable to grievant.

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[20] Grievant denied having any relationship to the eligibility worker or ever having met her prior to filing the application for benefits.

[21] The amount allotted as disaster benefits is calculated by deducting disaster expenses from the total of all anticipated income and accessible financial resources. The resulting amount is called "disaster income." If the disaster income is below a specified "disaster income limit," the applicant is eligible for a specified disaster allotment amount. See Agency Exhibit 6 for the disaster allotment calculation in this case.

Third, grievant's application contained incorrect financial resource amounts. Grievant underreported the amount of money in her checking account by $203. However, as noted earlier, applicants were allowed to estimate such amounts and grievant's underestimate was not so great as to be considered evidence of fraudulent intent. Grievant underreported the amount of money in her savings account because she had earmarked almost all the money for home repairs. Grievant had been attempting to change home insurance companies. The company she wanted to switch to inspected her property and told her she would have to make specific repairs to qualify for a policy.[22] Grievant agreed to make such repairs and had been saving money for that purpose. To support her assertion, grievant provided uncontradicted evidence that a few months later, such repair work was performed. Moreover, she provided undisputed evidence that the plan to have the repairs performed had been formulated prior to the disaster.

It is true, of course, that the money in grievant's savings account constituted an available financial resource and that she should have reported it on the application form. However, grievant's explanation of her rationale for not reporting the full amount of her savings account is supported by her corroborative documentation and is, therefore, not inherently incredible. Moreover, it is undisputed that the eligibility worker did not give grievant any instructions for completing the form and did not ask grievant any questions. Grievant's explanation supports a conclusion that her basis for underreporting was not intentional fraud but rather her incorrect conclusion she did not have to report the money. The plain words of the application directed her to list "resources available for you to use." Grievant's decision not to include money that she had earmarked for a specific future use, was not consistent with the plain meaning of the words. Thus, while not intentionally fraudulent, grievant did knowingly state a dollar amount she knew to be untrue.

Finally, grievant also failed to report the money contained in her vacation account. Grievant's testimony, corroborated by her daughter's testimony, is that mother and daughter had an arrangement whereby the daughter allowed grievant to keep some of the daughter's savings in grievant's vacation account. The avowed purpose of this arrangement was to limit the daughter's access to the money so that she would not be able to freely spend amounts that she should be saving. Thus, grievant acted as a gatekeeper, holding the money for safekeeping and releasing money to her daughter only when they both agreed that the daughter had a need for the money. Grievant provided copies of bank statements for February 2003 that show a transfer of $1,300 to grievant's vacation account from her daughter's checking account on February 21, 2003.[23] While not absolutely conclusive, this evidence supports their testimony. The agency has not presented anything to contradict grievant's evidence and testimony. Accordingly, the preponderance of evidence is that all but a small

[22] Grievant Exhibit 6. Letter from insurance company, August 5, 2005.
[23] Grievant Exhibit 9.

amount of the money in grievant's vacation account was, in fact, her daughter's money. Therefore, it is reasonable that grievant would not report her daughter's money as a financial resource because it was, in fact, not grievant's money.

In summary, grievant's underreporting of income and resources was attributable either to underestimates that were deemed by the agency to be within acceptable ranges (her income, and checking account), or to errors that are not indicative of intentional fraud. Moreover, the fact is that grievant's application, *as she first completed it*, would not have qualified her for food stamp benefits; this serves as additional corroboration that there was no intent to defraud the agency. After carefully weighing all the evidence and examining the totality of the circumstances, it is concluded that the agency has not shown, by a preponderance of evidence, that grievant attempted to commit intentional fraud.

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to *promptly* issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.[24] Management should issue a written notice as soon as possible after an employee's commission of an offense.[25] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless a detailed investigation is required, most disciplinary actions are issued within one or two weeks of an offense.

In the instant case, the alleged offense occurred on October 7, 2003. Because of the unusual nature of the situation, it is understandable that discipline could not be immediately issued. During the fall of 2003, the agency's primary objective, as it should have been, was to assure that food stamp benefits were distributed to disaster victims as promptly as possible. Due to the large number of employee applications audited and subsequent investigations, it was not until June 2004 that the agency concluded that grievant had committed an intentional program violation. Had the agency disciplined grievant reasonably promptly after concluding in June 2004 that grievant had falsified state documents, the delay from October 2003 to June 2004 would be considered reasonable under the unique circumstances of this case. However, the agency did not take disciplinary action until one year later, in June 2005, when it removed grievant from employment.

The agency's rationale for such an extraordinary delay is that it wanted to await the outcome of the administrative disqualification hearing. Although the

[24] Agency Exhibit 9. Section VI.A. *Ibid.*
[25] Agency Exhibit 9. Section VII.B.1. *Ibid.*

agency referred the case to the administrative disqualification hearing officer in July 2004, the hearing was not conducted until February 2005 and a decision was not issued until late May 2005.[26] The agency has not offered any evidence to explain why the issuance of discipline should be dependent upon the outcome of the administrative disqualification hearing. The two types of actions are not interconnected. The administrative disqualification hearing addresses whether there has been an intentional program violation pursuant to the Public Assistance subtitle of the Welfare statutes. Such a hearing is conducted under a higher standard of proof (clear and convincing) and affects the individual's right to receive food stamps in the future. On the other hand, agency discipline is administered pursuant to state policy (Policy 1.60), requires a lower standard of proof (preponderance of evidence), and results in disciplinary action up to and including removal from employment.

More significantly, a hearing officer adjudicating a grievance of disciplinary action is not bound by the decision in an administrative disqualification hearing. In the instant case, although the administrative disqualification decision found that an intentional program violation had been committed, this hearing officer is not bound to automatically conclude that grievant should be disciplined. This hearing officer must decide the case based solely on the evidence presented during this grievance hearing. Accordingly, the administrative disqualification hearing and decision are generally given little, if any, evidentiary weight in making a decision in the grievance case.[27]

There is no evidence that any additional investigation was conducted after June 2004. Therefore, as of that date, the agency had available all the evidence used to discipline and remove grievant from employment. No logical reason has been offered to explain why issuance of discipline should have to await the outcome of the administrative disqualification hearing and be delayed for one full year. In at least one other similar case, the agency took disciplinary action notwithstanding the fact that the administrative disqualification decision found that the employee had *not* committed an intentional program violation.[28] Accordingly, it is concluded that the agency's delay in the imposition of discipline for one year after the agency had concluded that grievant should be disciplined is not prompt discipline as that term is used in Policy 1.60.

Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for the reduction of discipline if there are

[26] No evidence was offered regarding what appears to be an unusually lengthy delay in completing the administrative disqualification hearing process. In any case, the reasons for such a delay are beyond the purview of the instant case and therefore, are not relevant to this decision.
[27] However, a hearing officer could give limited weight to any evidence of inconsistency in witness testimony between the two hearings.
[28] Case No. 8031, April 13, 2005.

mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. Grievant knowingly put information on her application that she knew to be untrue; therefore, a Group III Written Notice is warranted. In this case, grievant does not have long service but does have an otherwise satisfactory performance record. However, in the interests of fairness and objectivity, it is concluded that the unusual circumstances of grievant's case, including the extraordinary delay in issuing discipline, compel a reduction in the disciplinary action. Therefore, in lieu of termination, grievant should be suspended for 30 days. In view of the extraordinary amount of time for which grievant has already been suspended, the 30 days is deemed to have been already served.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice is hereby UPHELD. In lieu of removal, grievant is suspended for 30 days, which suspension is deemed already served. Grievant is reinstated to her former position or, if occupied, to an objectively similar position. She is entitled to recover a reasonable attorney's fee, which cost shall be borne by the agency.[29] Grievant's attorney is herewith informed of his obligation to timely submit a fee petition to the Hearing Officer.[30] The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

Grievant has not borne the burden of proof to show that the agency's actions involved racial discrimination.

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 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.

[29] Va. Code § 2.2-3005.1.A & B.

[30] *See* Section VI.D, *Rules for Conducting Grievance Hearings*, effective August 30, 2004. Counsel for the grievant shall ensure that the hearing officer *receives*, within 15 calendar days of the issuance of the hearing decision, counsel's petition for reasonable attorneys' fees.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 15 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 15-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.[31] 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.[32]

[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]

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David J. Latham, Esq.
Hearing Officer

[31] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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