Issue: Group III Written Notice with termination (actions that undermine the effectiveness of the agency); Hearing Date: 09/20/05; Decision Issued: 09/21/05; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 8174. **Administrative Review: HO Reconsideration Request received 10/11/05; HO Reconsideration Decision issued 10/18/05; Outcome: No newly discovered evidence or incorrect legal conclusions. Request to reconsider denied. Addendum Decision addressing attorney's fees issued 10/07/05**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8174

Hearing Date: September 20, 2005
Decision Issued: September 21, 2005

APPEARANCES

Grievant
Attorney for Grievant
Program Manager
Representative for Agency
Six witnesses for Agency

ISSUES

Did the 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?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice for actions that undermine the effectiveness of the agency, viz., unauthorized access

of over 240 customer records including the records of 20 coworkers.[1] As part of the disciplinary action, grievant was removed from state employment effective July 21, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[2] The Department of Motor Vehicles (DMV) (Hereinafter referred to as "agency") employed grievant for 25 years as a program support technician. During the two most recent performance evaluation cycles, grievant was rated "Contributor" for all of his core responsibilities.[3]

The agency has promulgated an Information Security Policy which grievant had received.[4] By signing a receipt for the policy, grievant agreed not to access any records of DMV except as necessary to perform his assigned duties. He also agreed to complete an application and pay appropriate fees for DMV services. When agency employees log on to their computer, a warning announcement advises that access is permitted only for authorized purposes, and that unauthorized use may subject the violator to prosecution under the law.[5] Grievant's primary responsibility was to process driver clinic rosters by posting safe driving points to the records of customers who complete a driver improvement clinic.[6] Although grievant's responsibilities involved access to customer computer records, grievant was not assigned any duties that would require him to access such records except to post safe driving points.

On April 20, 2005, a manager speaking with grievant observed him access a customer record on the computer system. Grievant had no business need to access the customer's record but was able to access it from memory. Because this access constituted a violation of the Information Security Policy, the manager reported the incident to grievant's supervisor and then to the agency's Investigative Services Office.[7] An investigator was assigned to the case; he obtained a computer printout listing all of grievant's customer accesses over the six-month period from January through June 2005.[8] Analysis of the data revealed that grievant had accessed 244 vehicle records not related to his job duties.[9] Of those, 20 records belonged to DMV employees. The investigator interviewed grievant, his supervisor, and the manager who reported the initial

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[1] Agency Exhibit A. Group III *Written Notice*, issued July 21, 2005.
[2] Agency Exhibit A. *Grievance Form A*, filed July 25, 2005.
[3] Agency Exhibits C & F. Grievant's Performance Evaluations for 2004 and 2003, respectively.
[4] Agency Exhibit D. *Certification of Receipt of Information Security Policy*, signed September 27, 2004.
[5] Agency Exhibit J. Computer warning notice.
[6] Agency Exhibit C. Grievant's *Employee Work Profile Work Description*, October 13, 2004.
[7] See Agency Exhibit D. The *Information Security Policy* requires employees to immediately report any knowledge of a policy violation to their immediate supervisor.
[8] Because of the considerable expense of extracting such data from the computer system, the investigator limited the computer run to the most recent six months' data. In a recent (August 2005) workers' compensation hearing, grievant acknowledged that he had been accessing customer records without authorization for approximately ten years. However, the agency did not become aware of this until after grievant's removal from employment.
[9] Agency Exhibit H. Spreadsheet listing the 244 unauthorized accesses.

incident. He also interviewed the 20 employees whose records grievant had accessed. None of the 20 employees had given grievant permission to access their records and many were upset that grievant had invaded their privacy.

Grievant neither filed applications nor paid the requisite fee to access the 244 computer records. Grievant accessed most of the records of non-DMV employees to satisfy his curiosity about the make, model, and purchase price of vehicles he observed while driving.[10] He did not divulge this information to anyone and did not use the information for any other purpose. In one instance, grievant accessed multiple records in an effort to locate a person against whom he had obtained a court judgment.[11] Grievant sought to obtain the current address of this person in order to have the judgment formally served on the person. When the investigator interviewed grievant, he showed him several photographs including one of the person against whom grievant had obtained a judgment. When asked if he recognized any of the persons in the photographs, grievant stated that he did not. The investigator then pointed out the photograph of the person against whom grievant had obtained judgment and grievant admitted knowing the person.

Grievant was given a due process notice advising him of the charges of unauthorized access and affording him a reasonable time within which to provide a written response.[12] He was subsequently disciplined and removed from employment on July 21, 2005.

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:

[10] Grievant jotted down the license plate number of such vehicles and accessed the customer records by using this number.
[11] The person in question had taken grievant's vehicle without permission and wrecked it. Grievant sued the individual and obtained a judgment for damages. Grievant then accessed that person's records as well as the records of the individual's mother-in-law in an effort to ascertain his whereabouts.
[12] Agency Exhibit G. Memorandum from supervisor to grievant, July 5, 2005.

> 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 his evidence first and prove his 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 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] 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] Unauthorized use of state records is a Group II offense.[16]

The agency decided that grievant should be removed from employment because he had accessed such a large number of records, because he had neither filed an application nor paid the requisite fee for such accesses, and because he had accessed some records for personal gain.

The *Standards of Conduct* policy provides a list of example offenses which are grouped into three categories based on the severity of the offense. In the instant case, it is undisputed that grievant's unauthorized use of customer

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[13] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.
[14] Agency Exhibit B. Section V.B.3, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.
[15] Agency Exhibit B. Section V.A., *Ibid.*
[16] Agency Exhibit B. Section V.B.2.e., *Ibid.*

records constitutes a Group II offense as specified in Section V.B.2.e. The cited offense does not assign severity level based either on the quantity of unauthorized uses, or on the perceived egregiousness of the uses. For example, the *Standards* do not provide that one unauthorized use is a Group II offense, and that some larger number of unauthorized uses constitutes a Group III offense. Rather it simply concludes that any unauthorized use of records is a Group II offense.[17] This is in contrast to certain other offenses such as violation of the policies on Alcohol and Other Drugs, Workplace Harassment, and Equal Employment Opportunity – each of which may be considered either a Group I, Group II, or Group III offense, depending upon the nature of the violation.[18]

The agency asserts that grievant's actions undermined agency effectiveness, thereby implicitly invoking Section V.A of Policy 1.60. That section provides, in pertinent part: "…any offense that, in the judgment 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." The agency argues that grievant's actions upset many of the employees whose records he accessed, and that grievant failed to pay the required $8 fee for each of the 244 accesses. The agency contends that these consequences undermined agency activities. As grievant did not rebut the agency contention, it is concluded that grievant's actions did indeed undermine agency effectiveness. But, the language cited above provides that any offense that undermines agency effectiveness *must be treated in a manner consistent with the provisions of this section.* Thus, the fact that a particular offense undermines agency activities does not automatically make that offense a Group III offense. The categorization of the offense as Group I, II, or III must be consistent with the severity level of the offenses listed as examples in the policy.

If an employee commits an offense not specifically listed as an example of Group I, II, or III offenses, there is some latitude in determining into which of the three Groups the offense most appropriately falls. However, when the offense that undermines agency effectiveness is already specifically listed among the examples provided in Group II, the offense must be treated consistent with other Group II offenses. In this case, the hearing officer concurs with the agency assessment that grievant's unauthorized use of records did, to some extent, undermine agency activities. Nonetheless, it is clearly a Group II offense and must be treated as such. Agencies are bound by the *Standards of Conduct* policy. Where the *Standards of Conduct* policy allows an offense to be categorized as Group I, II, or III (as in the three examples cited *supra*), the agency is free to make such a decision, depending upon the nature of the violation. In this case, there is no such latitude. Unauthorized record access is a Group II offense; it cannot be elevated to Group III because of the number of accesses, the perceived egregiousness of the offense, or any other criterion.

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[17] Of course, if an employee were to commit a second such offense after being disciplined once, the second offense would warrant another Group II Written Notice and removal from employment.
[18] Agency Exhibit B. Section V.B.1. g, h, & I; Section V.B.2.g, h, & I; and Section V.B.3.m, n. & o.

The agency has cited other circumstances. It is appropriate to consider both mitigating and aggravating circumstances in such cases. In mitigation, grievant has 25 years of service, has had satisfactory performance, and has no active disciplinary actions. The agency asserts that grievant had displayed disruptive behavior and created a negative atmosphere for several years. The agency sought to introduce testimony from previous supervisors who would address grievant's behavior as long ago as 1998. The hearing officer determined such testimony to be irrelevant for three reasons. First, grievant's alleged disruptive behavior as long as seven years ago is simply not relevant to the disciplinary action in this case. Second, if grievant's behavior was so disruptive and negative at that time, the agency should have disciplined grievant at the time the alleged behavior occurred. If the alleged behavior did not justify discipline at that time, it certainly cannot now be used to justify removal from employment. Third, in the due process notice of July 5, 2005, the agency did not charge grievant with disruptive behavior or any other performance problems. Therefore, the agency failed to give grievant an opportunity to respond to allegations of such behavior prior to being removed from employment. This constitutes a clear violation of the agency's duty to give grievant notification of the offense, an explanation of the evidence in support of the charge, and a reasonable opportunity to respond.[19]

In any case, Section IV of the Written Notice directs agencies to "Describe circumstances or background information used to mitigate (reduce) or *to support the offense described above*" (Italics added).[20] Even if grievant had engaged in disruptive behavior, such behavior does not support the offense described above, i.e., unauthorized access of records. The agency may not use this section to add additional charges or offenses for which grievant was not given due process notification.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice is REDUCED to a Group II Written Notice with 10 days suspension without pay. Grievant's removal from employment is hereby RESCINDED. Grievant is reinstated to his former position or, if occupied, to an objectively similar position. Grievant is awarded back pay from the point at which suspension ends, and benefits and seniority are restored. The award of

[19] Agency Exhibit B. Section VII.E.2, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

[20] Examples of circumstances that would support an offense could include: prior counseling for the same offense, prior disciplinary actions for the same offense, and any prior active disciplinary actions (where accumulation of discipline results in removal, demotion, transfer, or suspension).

back pay must be offset by any interim earnings, and by any unemployment compensation received.

Grievant is further entitled to recover a reasonable attorney's fee, which cost shall be borne by the agency.[21] Grievant's attorney is herewith informed of his obligation to timely submit a fee petition to the Hearing Officer for review.[22]

APPEAL RIGHTS

You may file an administrative review

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.[23] 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.[24]

[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

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[23] 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).

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8174

Hearing Date:	September 20, 2005
Decision Issued:	September 21, 2005
Reconsideration Request Received:	October 6, 2005
Response to Reconsideration:	October 18, 2005

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.[25]

[25] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

<u>OPINION</u>

Grievant objects to the agency's Request for Reconsideration on the basis that the appeal appears to been have been filed untimely. The time limit to file an appeal in this case was within 15 days of the date of the original hearing decision; the 15th day was October 6, 2005. The agency dated its Request October 6, 2005 and transmitted it via telephonic facsimile to the hearing officer who received it the same day. The agency subsequently mailed a second copy to the hearing officer on October 7, 2005. Accordingly, because the facsimile copy of the request was received on October 6, 2005, the agency's appeal was timely.

The agency requests that the hearing be reopened because criminal prosecution against grievant was "pending" at the time of this grievance hearing. However, the agency goes on to state only that grievant *could* be criminally prosecuted for his actions; the agency does <u>not</u> state that grievant has been or will be criminally prosecuted. The fact that grievant *could* have been criminally prosecuted is not new; this possibility was raised by the agency at the hearing. The fact is that either the agency and/or the Commonwealth Attorney has apparently elected not to criminally prosecute grievant.

The agency recites facts, most of which, if not all, were presented either as testimony or evidence during the hearing. It has not identified any constitutional provision, statute, regulation, or judicial decision as a basis to challenge the hearing officer's conclusions of law. The agency takes issue with the hearing officer's Opinion. Its disagreements, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

Finally, the agency raises a legitimate concern regarding grievant's reinstatement. It points out that if grievant is returned to his prior position, he would still have access to the computer system and would be still be able to abuse that system by unauthorized access of records. A hearing officer does not have authority to transfer grievant to a different position; reinstatement must be to the same, or a functionally equivalent position. However, the hearing officer can offer two possible solutions that might alleviate the agency's concern. First, if grievant is returned to the same position, the agency has the ability (through information technology) to monitor grievant's computer usage on a continuous, periodic, or random-check basis. Should the agency find that grievant has made an unauthorized access of records, it could take appropriate disciplinary action. Alternatively, upon reinstatement, the agency may, if it determines there are justifiable operational reasons, reassign grievant to a position with little or no access to records. Such decisions are internal management decisions pursuant

to Va. Code § 2.2-3004.B which provides that "Management has the exclusive right to manage the affairs and operations of state government."

DECISION

The agency has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered the agency's arguments and concludes that there is no basis either to reopen the hearing or to change the Decision issued on September 21, 2005.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.[26]

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David J. Latham, Esq.
Hearing Officer

[26] 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).

COMMONWEALTH *of* VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 8174

Hearing Date:	September 20, 2005
Decision Issued:	September 21, 2005
Addendum Issued:	October 7, 2005

APPLICABLE LAW AND PROCEDURE

The grievance statute provides that for those issues qualified for a hearing, the hearing officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[27] For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.[28]

DISCUSSION

The decision rescinded the discipline and reinstated grievant to his position. Accordingly, it is held that grievant substantially prevailed in this case. Following issuance of the hearing officer's decision ordering reinstatement of the

[27] Va. Code § 2.2-3005.1.A.

[28] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. Section VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

grievant, grievant submitted a petition for attorney's fees for services rendered by his attorney from September 1, 2005 through September 29, 2005.

AWARD

The grievant is awarded attorneys' fees incurred from September 1, 2005 through September 29, 2005 in the amount of $948.00 (7.9 hours x $120.00 per hour).[29]

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

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David J. Latham, Esq.
Hearing Officer

[29] Section VI.D. EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004, limits attorney fee reimbursement to $120.00 per hour.