

Issues: Group II Written Notice (failure to perform assigned work), Group II Written Notice with suspension (failure to perform assigned work and failure to follow supervisory instructions), Retaliation, and Group I Written Notice with termination (due to accumulation) (unsatisfactory work performance); Hearing Date: 01/10/06; Decision Issued: 01/17/06; Agency: Dept. of Fire Programs; AHO: David J. Latham, Esq.; Case No. 8193,8194,8228; Outcome: Agency upheld in full



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case Nos: 8193/8194/8228

Hearing Date: January 10, 2006  
Decision Issued: January 17, 2006

**PROCEDURAL ISSUE**

Grievant received three disciplinary actions between July 13, 2005 and September 22, 2005 and filed separate grievances for each of the disciplinary actions. Pursuant to Section III.C of the *Rules for Conducting Grievance Hearings*, the Director of the Department of Employment Dispute Resolution consolidated the three grievances and directed that they be heard at one hearing. In the opinion section, this decision will address each disciplinary action separately.

**APPEARANCES**

Grievant  
Attorney for Grievant  
Executive Director  
Advocate for Agency  
Three witnesses for Agency

## ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Was the issuance of the second disciplinary action retaliatory?

## FINDINGS OF FACT

Grievant filed a timely grievance from three disciplinary actions – a Group II Written Notice for failure to perform assigned work,<sup>1</sup> a Group II Written Notice with 10-day suspension for failure to perform assigned work and failure to follow supervisory instructions,<sup>2</sup> and a Group I Written Notice for unsatisfactory work performance.<sup>3</sup> Due to the accumulation of active disciplinary actions, grievant was removed from employment effective September 22, 2005. Following failure of the parties to resolve the grievances at the third resolution step, the agency head qualified the grievances for a hearing.<sup>4</sup>

The Virginia Department of Fire Programs (VD FP) (Hereinafter referred to as "agency") has employed grievant for seven years. He was a General Administration Manager I at the time of the disciplinary actions.<sup>5</sup> He supervised two classified employees and four to six wage employees. His responsibilities included, *inter alia*, supervision of the purchasing and fiscal functions and direct LAN, workstation, and telephony support throughout the agency.

Grievant's work performance during 2004 was marginal. Although his overall performance evaluation rating was Contributor, he was rated Below Contributor on five of 12 core responsibilities. Among the deficiencies noted were grievant's failure to carry through some tasks to completion. In some cases, grievant would forget assigned work for days, weeks, even months until he was reminded of them. In some cases, missed deadlines on tasks assigned to grievant by the agency head resulted in embarrassment to the agency.<sup>6</sup>

Beginning in mid-2004, the newly created Virginia Information Technologies Agency (VITA) began performing the information technology functions for 90 state agencies including the VD FP. As needed, VITA purchases

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<sup>1</sup> Agency Exhibit 1. Group II Written Notice, issued July 13, 2005.

<sup>2</sup> Agency Exhibit 9. Group II Written Notice, issued August 18, 2005.

<sup>3</sup> Agency Exhibit 14. Group I Written Notice, issued September 22, 2005.

<sup>4</sup> Agency Exhibit 2. Grievance Form A, filed August 11, 2005; Agency Exhibit 10, Grievance Form A, filed September 6, 2005; Agency Exhibit 15, Grievance Form A, filed October 17, 2005.

<sup>5</sup> Agency Exhibit 6. Grievant's Employee Work Profile Work Description, October 2003-2004.

<sup>6</sup> Agency Exhibit 6. Section H, Grievant's Performance Evaluation, November 18, 2004.

and installs computers and other information technology equipment at customer agencies. VITA purchases equipment only if the customer agency has submitted a purchase order approved by the customer agency's authorized employee. It then submits a monthly invoice to the customer agency for the cost of purchased equipment and services provided by commercial contractors, plus a standard administration fee. Before sending an invoice to a customer agency, VITA first obtains written confirmation from the agency that the equipment has been received, installed, and is working properly. VITA does not bill for the services of its own employees. Agencies were required to pay invoices within 30 days of the invoice date.<sup>7</sup>

Beginning in December 2004, VITA began sending monthly invoices to VDFP for information technology equipment and services VITA had provided. Pursuant to an agreement between VITA and VDFP, grievant was the designated VDFP employee to receive invoices. He could then delegate to a subordinate the actual payment of the invoice via an interagency transfer (IAT) of funds. In order to access invoices in the computer system, grievant had to obtain a "Pegasus" user name and verification code. Instructions to access Pegasus were sent via e-mail to designated agency invoice receivers in January 2005. In February 2005, VITA notified grievant by e-mail that there were unpaid invoices dating back to December 2004 and again provided instructions for acquisition of the Pegasus account.<sup>8</sup>

VITA sent to grievant an e-mail each month from December 2004 through March 2005 containing the monthly invoices for VDFP. From December 2004 through March 2005, VITA invoices to VDFP were not paid, despite efforts by VITA accounting personnel to collect these past due bills. Grievant asserted that he did not have instructions to establish access.<sup>9</sup> In April 2005, a VITA employee again e-mailed grievant the instructions needed to acquire access and included the December 2004 bill and detail listing.<sup>10</sup> On the same day, she also e-mailed to grievant the January and February bills and detail listings. The billing for those three months totaled over \$33,000. By June 2005, VDFP was five months in arrears and the past due amount totaled over \$48,000. Grievant had taken no action to activate his Pegasus account. He had received the bills electronically and recalls that he had asked for "hard copies."<sup>11</sup> VITA e-mailed grievant requesting that the bills be paid before the fiscal year ended (June 30, 2005).<sup>12</sup>

Around this time, grievant developed a health problem for which his physician recommended surgery. The surgery was originally scheduled for June 22, 2005 but it had to be postponed for various reasons until June 28, 2005. Due

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<sup>7</sup> This changed to 10 days in April 2005 when VITA began to experience a cash flow problem.

<sup>8</sup> Agency Exhibit 4. E-mail from VITA to grievant, February 18, 2005.

<sup>9</sup> Agency Exhibit 4. E-mail from grievant to VITA, April 14, 2005.

<sup>10</sup> Agency Exhibit 4. E-mail from VITA to grievant, April 14, 2005.

<sup>11</sup> Agency Exhibit 4. E-mail from grievant to VITA Director, July 13, 2005.

<sup>12</sup> Agency Exhibit 4. E-mail from VITA to grievant, June 15, 2005.

to his illness and the surgery, grievant was absent from June 23 through July 6, 2005.<sup>13</sup> He worked partial days on July 7 and 8, 2005.

By July 6, 2005, a VITA director had become involved. He e-mailed one of grievant's subordinates about the unpaid invoices and "raised heck".<sup>14</sup> The subordinate promptly brought the matter to the attention of the agency's Executive Director. When grievant returned to work full time on July 12, 2005, the Executive Director met with grievant about the unpaid invoices. Grievant acknowledged that he knew the bills had not been paid. The Director told grievant, "I want the invoices paid if we do owe money to someone." He also told grievant he would be disciplined the following day if he didn't have any explanation for his failure to pay the bills.

The following day, the Executive Director issued a Group II Written Notice to grievant, as well as a Notice of Improvement Needed/Substandard Performance. The latter document included an Improvement Plan that directed grievant to "create an improved invoice tracking system to ensure that no invoice extends past the due date for payment and begin using same by August 15, 2005."<sup>15</sup>

Grievant was assigned his Pegasus user name and verification code on July 14, 2005.<sup>16</sup> By early August, he had not yet paid the invoices which then totaled over \$77,000. At this point, the VITA Director e-mailed the VDFP agency head directly asking for his help in getting the invoices paid.<sup>17</sup> On August 17, 2005, grievant told the Executive Director that the tracking system (see preceding paragraph) was not completed but that he had been discussing it with his staff. Grievant also acknowledged that the VITA invoices had still not been paid. Later that day, grievant brought spreadsheets to the Director claiming that the tracking system had been in place since March 2005; the Director found grievant's system to be incomplete. Also later that day, grievant took payment IATs to the person who actually processes payments. Grievant told the Director that he had received his Pegasus user name and verification code "months ago" but did not activate it and the account closed automatically for lack of use.<sup>18</sup>

On August 18, 2005, the Executive Director issued the second Group II Written Notice to grievant. The IATs were not finally paid to VITA until August 19, 2005 because grievant had not given complete information to the person who pays the invoices.<sup>19</sup> It took repeated intervention by the Director on August 18 &

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<sup>13</sup> Agency Exhibit 5. Grievant's Leave Reporting Forms, 2005.

<sup>14</sup> Agency Exhibit 13. E-mail from VITA Director to VITA Financial Systems Manager, August 5, 2005.

<sup>15</sup> Agency Exhibit 7. *Notice of Improvement Needed/Substandard Performance*, July 13, 2005.

<sup>16</sup> Agency Exhibit 13. E-mail from VITA to grievant, July 14, 2005.

<sup>17</sup> Agency Exhibit 13. E-mail from VITA Director to VDFP agency head, August 8, 2005.

<sup>18</sup> Agency Exhibit 12. Executive Director's Supplemental Information Sheet, August 18, 2005.

<sup>19</sup> Established by the testimony and evidence of the Executive Director, and by the testimony of VITA's Assistant Comptroller.

19, 2005 to finally resolve the matter.<sup>20</sup> As part of the second disciplinary action, the Director imposed a 10-day suspension (unpaid) from August 22 through September 2, 2005. He also gave grievant administrative leave (paid) for 1.5 days on August 18 & 19, 2005.

Grievant admittedly had a messy office which appears to everyone else to be disorganized (although grievant asserts that he knows where everything is). In late July and early August 2005, employees had complained to the Executive Director that they had observed unopened mail on grievant's desk. In addition, at this time the agency was involved in financial issues with other agencies. For these reasons, and because grievant was out on suspension for two weeks, the Executive Director asked the Chief Deputy Director to have grievant's office organized and checked for unopened mail. The task was delegated to two employees who spent two full days going through the office and organizing it. During this time, the employees discovered unopened business mail on grievant's desk,<sup>21</sup> approximately 4,900 unopened e-mail messages in grievant's computer,<sup>22</sup> and a drawer of unused cell phones and pagers on which monthly bills were being paid by the agency.<sup>23</sup>

The Executive Director evaluated this information in conjunction with comments of the Auditor of Public Accounts made during a meeting of the two agency heads in early August. The Auditor had met with the VDFP Executive Director to discuss the agency's budget preparation and tracking processes. The Auditor pointed out deficiencies in grievant's treatment and handling of several budgetary items, stating that at least one aspect of his budgeting was not a prudent fiscal practice. The Auditor concluded that grievant was not qualified to manage the budget and fiscal responsibilities of the agency.<sup>24</sup> As a result of all of the above, the Executive Director issued a Group I Written Notice for unsatisfactory work performance to grievant on September 22, 2005 and removed him from employment due to the accumulation of active disciplinary actions.

### 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

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<sup>20</sup> Agency Exhibit 12. Executive Director's Supplemental Information Sheet.

<sup>21</sup> Agency Exhibit 16. Unopened correspondence with envelopes.

<sup>22</sup> Agency Exhibit 17. Snapshot of Deleted items file in grievant's Outlook folder.

<sup>23</sup> Agency Exhibit 18. Listing of cell phones and pagers.

<sup>24</sup> Agency Exhibit 19. Memorandum from Chief Deputy Director to Executive Director, August 8, 2005.

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, such as an allegation of retaliation, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.<sup>25</sup>

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 promulgated *Standards of Conduct* Policy No. 1.60. 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. Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature, and are such that an accumulation of two Group II offenses normally should warrant removal from employment.<sup>26</sup> Failure to follow supervisory instructions, and failure to perform assigned work are two examples of a Group II offense. Unsatisfactory work performance is a Group I offense.

#### Group II – failure to perform assigned work - June 22, 2005

The evidence is sufficient to demonstrate that grievant failed to perform assigned work. It is undisputed that grievant was the manager responsible for assuring that invoices from VITA were paid within 30 days (10 days beginning in April 2005). It is also undisputed that VITA invoices from December 2004 through May 2005 were not paid at the time of this disciplinary action. While

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<sup>25</sup> § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.

<sup>26</sup> Agency Exhibit 8. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

grievant could delegate the actual paperwork to a subordinate, it was his duty to assure that timely payments were made. In the case of VITA invoices, his role was pivotal because VITA had established a notification system whereby grievant was the agency's sole designated receiver of invoices. Grievant knew that, and he knew that unless he took action to review and approve the invoices, they would not be paid.

Grievant suggests that his offense should be no more than a Group I for unsatisfactory work performance. While minor, occasional failures to perform work satisfactorily generally result in Group I Written Notices, the offense in this case was more serious for five reasons. First, grievant had already been placed on written notice in his November 2004 performance evaluation that repeated failure to meet required deadlines was Below Expectations. Given this evaluation, grievant knew that he should be particularly conscious of deadlines in order to achieve minimum expected performance standards. His failure to pay VITA bills for a period of six months goes beyond mere unsatisfactory work. Second, grievant was, by his own admission, aware that these bills had not been paid. In the face of this knowledge, his failure to promptly resolve whatever concerns he may have had about the bills cannot be said to be without willfulness. Accordingly, grievant's failure to pay the invoices reflects a conscious decision not to take action that he knew should be taken, thereby making the offense a *knowing* failure to perform assigned work.

Third, grievant asserts that he had difficulty obtaining his Pegasus authorization. While this was not specifically disputed by the agency, the fact is that he had been given written instructions on at least two, and more probably three, occasions. If he was having a problem, it was his obligation to contact whomever he needed to in order to get the matter resolved promptly. It is not a sufficient excuse to say one couldn't get authorization, unless one can show that he took all possible steps to resolve the problem and reached an impasse. Here, grievant did not show that he called anyone or asked for help to get the authorization problem resolved until April 2005. Fourth, when grievant received the necessary instructions in April, he still did not pay the invoices. He has not explained why he could not have paid the invoices at that time. Grievant said he wanted "hard copies." VITA had e-mailed the bills and detail lists to him; grievant could have easily printed out hard copies from those e-mails but did not do so.

Finally, grievant had been told in his performance evaluation that his prior failures to comply with deadlines had resulted in embarrassment to the agency. Grievant was notified on June 15, 2005 (before his medical absence) that VITA wanted payment before the end of June because the fiscal year ended on June 30, 2005. Even after receiving this obviously urgent request, grievant took no action to pay the bills, even though this was eight days before his full-time sick leave began on June 23<sup>rd</sup>. In this case, grievant's failure to pay the invoices resulted in VITA personnel having to refer the matter to high-level management. When that person contacted VDFP, the matter was then brought to the attention of the VDFP agency head. It should not have been necessary for routine bills to reach such a high management level in two agencies before they were paid.

Grievant argues that his absence for surgery in late June-early July should be a mitigating circumstance. It is agreed that grievant was unable to address this issue during the time he was absent due to surgery. However, his failure to pay bills extended back into late 2004 - several months prior to grievant's medical problem. Grievant has not shown that his medical problem was a factor in his failure to pay bills from December 2004 through May 2005.

Grievant suggested that he had concerns about the accuracy of the VITA invoices. However, grievant has not shown that any of the bills were anything other than totally accurate. Further, he has not demonstrated that he actually investigated any of the bills before they were finally paid. Other than asking for hard copies (which he could have printed out himself from the e-mail transmissions), grievant has not shown that he took any definitive action to see that the bills were promptly paid.

Grievant also suggested that paying VITA bills promptly should not have been an issue because VDFP's internal "prompt pay" requirement applied only to bills from private sector vendors – not to IATs from other state agencies. The fact that VDFP's internal goal did not include IATs is irrelevant because the agency's internal goal does not take precedence over the agreement between VDFP and VITA to pay its invoices within a specified time limit. Accordingly, it is equally important to pay all bills promptly whether from private sector vendors or from other state agencies.

After considering all of the above factors, it is concluded that the offense was a knowing failure to perform assigned work – a Group II offense.

#### Group II – failure to perform assigned work – August 8, 2005

As a result of both the disciplinary action and the Notice of Improvement Needed/ Substandard Performance issued to grievant on July 13, 2005, he knew that prompt payment of the VITA invoices was a high priority issue. Grievant asserts that he assigned this task to a subordinate who subsequently resigned on July 22, 2005. However, the subordinate had given two weeks notice of her resignation and, therefore, grievant knew she would be leaving. As a supervisor, grievant may delegate responsibilities to subordinates but that does not absolve him of the responsibility to assure that the task is completed. When assigning the task to someone he knew would be leaving, grievant knew, or reasonably should have known, that he would have to monitor her progress closely to assure that the invoices were promptly paid. Alternatively, grievant could have delegated the task to another subordinate. Grievant failed to avail himself of either alternative.

In his written attachment to the grievance of the second disciplinary action, grievant fails to explain what, if anything, he did between July 13<sup>th</sup> and August 17<sup>th</sup> to facilitate payment of the invoices. Based on the lack of testimony or evidence for this time period, it is concluded that grievant did not do anything

until August 17<sup>th</sup>, when he took incomplete information to the person who actually processes the payments.

Grievant argues that he was not at full strength when he returned to work on July 12, 2005. Presumably, grievant's physician had released him to return to work (grievant has not shown otherwise). Grievant returned to work of his own volition and there is no evidence that he was pressured to return before he felt well enough to do so. Therefore, while grievant may not have felt as well as he would have liked, the decision to return to work was grievant's alone. This is not a legitimate excuse for failing to complete what was obviously a very high priority responsibility.

Grievant's failure to complete a required tracking system and pay the invoices constitute both a failure to perform assigned work and a failure to follow his supervisor's instructions – a Group II offense.

### Retaliation

In his second grievance, grievant speculated that the second disciplinary action *may* have been retaliatory because of grievant's filing of his first grievance. Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.<sup>27</sup> To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Generally, protected activities include use of or participation in the grievance procedure, complying with or reporting a violation of law to authorities, seeking to change a law before the General Assembly or Congress, reporting a violation of fraud, waste or abuse to the state hotline, or exercising any other right protected by law.

Grievant easily meets the first two prongs of the test because he had previously filed a grievance and, he subsequently received another disciplinary action. Thus, he had engaged in protected activity, and he subsequently suffered an adverse employment action. However, grievant has not shown that there was any connection between the two activities. He merely speculates in his written grievance that there *may* have been retaliation; there is more to proving retaliation than merely speculating. Moreover, the agency has shown that it had a legitimate, nonretaliatory, business reason for issuing the second disciplinary action. Grievant's failure to comply with supervisory instructions that were unambiguously stated in the Notice of Improvement Needed was a sufficient nonretaliatory reason to issue discipline. Therefore, grievant has not proven the third prong of the test and has failed to prove the allegation of retaliation.

### Group I – unsatisfactory work performance – discovered August 29, 2005

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<sup>27</sup> EDR *Grievance Procedure Manual*, p.24.

Having a messy desk and office by itself is not necessarily an indicator of unsatisfactory work performance. In fact, there are people who have what appears to be totally disorganized offices but who are somehow able to perform their work satisfactorily. In this case, however, other problems surfaced during the cleanup of grievant's office. First, unopened mail dating back as far as 2002 was found on grievant's desk. Grievant attempts to minimize the importance of some of the mail by saying that correspondence from the workers' compensation carrier is often just reviewed and then immediately destroyed.<sup>28</sup> However such a facile dismissal obfuscates the salient issue; *without opening the mail, grievant could not have known the contents*. Without opening the mail, grievant could not have known whether the contents were routine or whether they contained information that required action. For example, the letter of January 2002 provides instructions to the agency needed to access future reports.<sup>29</sup> Another letter from December 2004 notified an employee that it was important for her to contact the workers' compensation carrier.<sup>30</sup> Typically, the agency would follow up by contacting the employee to assure that she had received the correspondence and contacted the carrier. Another 2004 letter, from the Virginia State Police, notified grievant of a training program and directs him to contact a specific person in order to confirm who from VDFP will be attending the training.<sup>31</sup> Without opening such mail, it is understandable that grievant missed deadlines.

Second, there were 4,900 unopened e-mails in grievant's Outlook folder. A "snapshot" of the deleted items file in grievant's mailbox shows a large number of unopened e-mails and a few opened e-mails. Grievant had two explanations for the unopened e-mails. He stated that sometimes he would delete without opening e-mail he recognized to be duplicative of a subsequently received message. This explanation is plausible but, in all likelihood, would only apply to a relatively small proportion of the total e-mail received. Grievant also claimed that when he received a new laptop computer in the summer of 2005, the installing technician had told him that previously opened email might show as unopened. This explanation is less plausible, especially without any testimony or evidence to corroborate it, because it does not explain why some e-mails show as having been opened while others do not. In addition, grievant's laptop is plugged into a docking station and his Outlook files are stored on a LAN server. Therefore, using a different laptop should not have affected files on the server. Nonetheless, without expert testimony on this issue from either party, the unopened e-mail must be assigned less evidentiary weight because of unanswered questions about the available data.

Third, the agency found in grievant's office a large number of unused cell phones and pagers for which the agency has been paying charges, in some

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<sup>28</sup> The agency maintains that such correspondence should have been placed in employee personnel files.

<sup>29</sup> Agency Exhibit 16. Letter from workers' compensation carrier to grievant, January 10, 2002.

<sup>30</sup> Agency Exhibit 16. Letter from workers' compensation carrier to employee, with copy to grievant, December 15, 2004.

<sup>31</sup> Agency Exhibit 16. Letter from Virginia State Police, December 16, 2004.

cases for many months. During the hearing, the agency identified five cell phones that were not in use but were being paid for each month. Grievant explained that three of the phones were retained as "hot phones" kept in reserve as spares for emergency situations or in case someone's phone broke down. The agency identified five pagers that had not been assigned to anyone for some time yet were being paid for; grievant had no explanation for these. Accordingly, the preponderance of evidence establishes that grievant was not carefully tracking cell phone and pager usage or ordering cessation of service charges when the phones were turned in as not needed.

Finally, in addition to the three problem areas discussed above, the agency considered as a fourth factor the expert opinion of the Auditor of Public Accounts that grievant was not qualified to handle this agency's budget and fiscal responsibilities. This factor alone would be sufficient to justify the written notice. If the agency failed to take action after receiving such an opinion from an outside expert, agency management might be deemed not to be fulfilling its managerial responsibilities. In any case, the four factors taken together easily justify a Group I Written Notice for unsatisfactory work performance. If further support is needed, one need only consider that these four factors reinforce and corroborate some of the deficiencies noted in grievant's 2004 performance evaluation.

### DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on July 13, 2005 is hereby UPHELD.

The Group II Written Notice and ten-day suspension issued on August 18, 2005 is hereby UPHELD.

Grievant has not borne the burden of proof to show that the second disciplinary action was retaliatory.

The Group I Written Notice and removal from employment due to the accumulation of disciplinary actions effective September 22, 2005 is hereby UPHELD.

### APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you 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. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>32</sup> You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>33</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

*S/David J. Latham*

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<sup>32</sup> 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).

<sup>33</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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David J. Latham, Esq.  
Hearing Officer