Issues: Two Group III Written Notices with termination (violation of agency's Outside Employment Policy, and unauthorized access of multiple customer accounts); Hearing Date: 02/21/06; Decision Issued: 02/24/06; Agency: Dept. of Taxation; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8268; Outcome: Employee granted partial relief; **Administrative Review: HO Reconsideration Request received 03/10/06; Reconsideration Decision issued 03/22/06; Outcome: Original decision affirmed (employee granted partial relief); Addendum Decision addressing attorney's fees issued 03/22/06; Second Addendum addressing attorney's fees issued 04/19/06; Administrative Review: EDR Ruling Request received 03/09/06; EDR Ruling No. 2006-1308 issued 03/24/06; Outcome: Matters of policy to be reviewed by DHRM - Original decision affirmed; Administrative Review: DHRM Ruling Request received 04/06; DHRM Ruling issued 11/17/06; Outcome: Remanded to HO; Second Reconsideration Decision issued 12/06/06; Outcome: Original decision reversed – Agency upheld in full. Award of attorney's fees rescinded. Judicial Review: Richmond Circuit Court; Outcome: EDR and DHRM exceeded authority. Original decision of 02/24/06 reinstated [CL06-7676-3] issued 03/30/07.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 8268

Hearing Date: February 21, 2006
Decision Issued: February 24, 2006

PROCEDURAL HISTORY

On November 18, 2005, Grievant was issued two Group III Written Notices of disciplinary action with removal for conduct occurring between March 20, 2002 and May 18, 2005.

On December 1, 2005, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 5, 2006, the grievance was qualified for a hearing. The Hearing Officer received the assignment from the Department of Employment Dispute Resolution on January 24, 2006.

A pre-hearing conference was held telephonically on February 2, 2006. The hearing was scheduled and held on February 21, 2006, by agreement at the office of the appointed hearing officer.

APPEARANCES

Grievant
Counsel for Grievant
Two witnesses for Grievant
Advocate for Agency
Representative for Agency
Two witnesses for Agency

ISSUES

Was the grievant's conduct described in the two Group III Written Notices issued on November 18, 2005 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?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence. GPM § 9.

The grievant submits that, under the circumstances presented, the standard of proof should be the criminal standard of beyond a reasonable doubt. I find that the burden of proof is not varied by the nature of the circumstances.

FINDINGS OF FACT

After reviewing the evidence presented, the Hearing Officer finds that the pertinent facts giving rise to this disciplinary action largely are not in dispute.

The grievant has worked as a collector with the Virginia Department of Taxation since 1989, and his most recent employment evaluation was satisfactory. On November 18, 2005, the Agency issued two Group III Written Notices to the Grievant for conduct occurring between March 20, 2002 and May 18, 2005. One written notice is based on the allegation that the grievant violated the agency's Outside Employment policy by assisting or preparing income tax returns for compensation. The other written notice is based on the Grievant's alleged unauthorized access of multiple taxpayer accounts.

The disciplinary action for each was suspension from October 31, 2005 through November 14, 2005 and termination from employment, effective November 18, 2005.

The agency's investigator received an anonymous tip that the Grievant had been preparing income tax returns for compensation. After receiving the anonymous tip, the agency's investigator learned that the Grievant had been involved as a defendant in a civil action brought by plaintiff, DB. The Grievant and DB had been intimate but the relationship turned sour. The Grievant prevailed in the civil action. The investigator interviewed the plaintiff and learned that she claimed to have paid the Grievant with two checks for preparation of her income tax returns for two separate years. The plaintiff, DB, also gave the investigator information that the Grievant accessed the agency's tax data. The investigator then conducted a search of the Grievant's access to data and identified instances of alphabetical searches that are not typically

utilized for assisting taxpayers with their accounts. Other than for DB, the record showed no apparent reason or motive for accessing others' tax data.

The agency's collections manager testified to the method of phone queues and the typical manner of accessing taxpayer information when responding to taxpayers' inquiries, and that alphabetical searches, like that identified as having been done by the Grievant, are not used for that purpose.

The agency's assistant commissioner testified to his conclusions made from the allegations and available information, and that the Grievant did not present sufficient rebuttal evidence throughout the investigation and grievance steps. The assistant commissioner stated that the information presented gave him reason to believe the Grievant prepared income tax returns for compensation and accessed various taxpayer accounts for no apparent reason. The Grievant was not given permission for this type of outside employment. Both types of conduct are termination offenses. Because of the integrity issue involved, the assistant commissioner testified that mitigating circumstances did not play a role in the termination decision. (The written notices contain no reference to mitigating circumstances.)

The Grievant testified that checks from DB were for expenses related to his procuring services to take care of DB's home and vehicles, which services he coordinated as an element of his relationship with DB.

DB was not called as witness, either in person, by telephone, or by affidavit. While her allegation and information, including her unsigned income tax returns, were admitted into evidence,[1] the Grievant showed credibility concerns with DB's information. No explanation was proffered as to why DB was unavailable for testimony. DB's information was critical to the agency's contentions based on her information, but her absence left the agency's case short of its burden of proof.

Of the 12 documentary exhibits offered by the agency, all were admitted except for no. 7. No. 7 was refused because the agency had not identified to the Grievant the identity of the taxpayer whose data was accessed.[2] The Grievant offered exhibits A, B, C and D, which were admitted into the grievance record.

The Grievant testified that he assisted DB in the preparation of her income tax returns, as he also did for other friends, including his two witnesses, both of whom are agency employees. The Grievant insisted that he never performed these services for compensation. The Grievant admitted that he accessed taxpayer information for DB to determine any outstanding penalties and interest owed, so he could properly assist with her income tax returns. The Grievant also testified that his apparently unusual access of taxpayer information could have been related to special projects in which he was checking the accuracy of the agency's conversion from one

[1] The documents within the agency's exhibit 4 were admitted as the basis for the investigator's testimony, but not for the truth of their content.

[2] In all circumstances, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge. *O'Keefe v. U.S.P.S.*, 318 F.3d 1310, 1315 (Fed. Cir. 2002).

computer accounting system to another. The Grievant denied any improper access of taxpayer data.

A senior tax collection representative testified that he has known the Grievant since the Grievant started working for the agency. He testified that he asked the Grievant to assist him with his income tax returns, without compensation. He also testified that there were some problems with conversion of the data from one computer accounting system to the new one, and that he believed the Grievant was working on special projects related to the conversion process.

Another co-worker collector testified that she also had the Grievant assist her with her income tax returns, without compensation. She also testified that there were some problems with the data conversion.

The Grievant's direct supervisor was not a witness at the hearing.

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, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[3]

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

[3] § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.

Resource Management 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.

Unacceptable employee behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B). 7 Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

The agency's Outside Employment Policy, effective September 1, 1995, requires that all outside employment (for compensation), including self-employment, be approved by the appropriate Tax Assistant Commissioner and the Human Resources Director.

The addendum to Standards of Conduct Pertaining to Tax Information Confidentiality, effective July 1, 1999, provides that intentional access and/or disclosure of taxpayer information for non-work related reasons or personal use of such information specifically constitutes a Group III infraction. However, accessing or disclosing taxpayer information at the request of friends or relatives is specifically identified as an example of a Group II offense.

The Use of Internet and Electronic Communication Systems Policy, effective April 15, 2005, prohibits employees from performing work for profit using Department of Taxation resources.

DECISION

I find the agency has failed to bear its burden of proving its disciplinary action was within its discretion, both in imposing the Group III Written Notice and the termination of employment for unauthorized outside employment. In making this decision, I find that the evidence involving DB was insufficient to prove, by a preponderance of the evidence, that the Grievant performed outside work for compensation. While the Grievant admitted to assisting his friends with preparation of income tax returns, there was no other direct evidence of prohibited outside employment for compensation. Assistance to others without compensation is not prohibited. Accordingly, the Group III Written Notice alleging the outside work for compensation is dismissed.

As to the Group III Written Notice of accessing multiple taxpayer accounts for unauthorized, non-work related reasons, I reduce the offense to a Group II Written Notice. The Grievant admitted to accessing taxpayer information for his friend, DB, and I find the access of the information was for a non-work related reason. The access was for the Grievant's assistance to his friend, DB, in the preparation of her income tax returns. The other shown instances of

access of information do not show that any information was necessarily accessed for non-work related reasons. The Grievant set forth some plausible, work related, explanations for why he may have accessed the identified taxpayer information. There is no evidence that the Grievant disclosed the accessed information to any third parties.

While off duty assistance, without compensation, to friends and others is permitted, accessing the taxpayer database for that activity is a non-work related activity. In essence, that is taking advantage of the Grievant's state position for a non-work related purpose. This is a serious offense because it does create the appearance of an abuse of this trusted position and provides the friend or family member with preferential treatment by a state employee—treatment and access the general public does not enjoy. Accordingly, the issuance of the Group III Written Notice with removal is reduced to a Group II Written Notice, with ten days suspension without pay.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for outside employment is reversed. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for access of multiple taxpayer accounts is reduced to a Group II Written Notice, with suspension of ten workdays without pay. The Agency is ordered to reinstate Grievant to his former position, or if occupied, to an objectively similar position.[4] He is to be awarded full back pay (minus the ten days suspension) from which any interim earnings must be deducted (which include unemployment compensation and other income earned or received to replace the loss of state employment). The Grievant is to be restored to full benefits and seniority. Grievant is further entitled to recover a reasonable attorney's fee, which cost shall be borne by the agency.[5]

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorney's fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

[4] *See Virginia Department of Taxation v. Daugherty*, 250 Va. 542, 463 S.E.2d 847 (1995).
[5] Va. Code § 2.2-3005.1.A & B.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. 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.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main Street, Suite 400, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests 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.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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 DHRM, 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

_____

Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONSIDERATION OF
DECISION OF HEARING OFFICER

In the matter of: Case No. 8268

Hearing Date: February 21, 2006

Decision Issued: February 24, 2006

Reconsideration Request Received: March 10, 2006

Reconsideration of Decision Issued: March 22, 2006

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.[6]

OPINION

The agency requests reconsideration of the February 24, 2006, decision on the basis that the hearing officer improperly interpreted agency policy in rendering the decision. On March 10, 2006, the agency submitted its appeal to the hearing officer via facsimile transmission and electronic mail. The grievant objects to the appeal on the grounds that it was filed untimely and that the agency failed to provide a copy of its appeal to the grievant. I find the filing on March

[6] § 7.2 Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004.

10, 2006 is timely, however, there is no indication that the agency provided a copy of its appeal to the grievant, as required by § 7.2 of the Grievance Procedure Manual. Thus, the appeal is defective.

Despite the defective nature of the appeal, I will address the merit of the appeal, and I find no basis to disturb or reverse the initial decision.

The agency's appeal specifically addresses the Group III Written Notice for accessing taxpayer accounts for unauthorized, non-work-related reasons. The agency asserts the hearing officer erred by reducing the offense to a Group II Written Notice. The agency argues that the hearing officer misinterpreted the agency's "Addendum to the Standards of Conduct Pertaining to Tax Information Confidentiality Effective July 1, 1999," differentiating between actions that constitute Group II level offenses and Group III offenses. In the agency's addendum, Group II offenses fall under the general heading: "Failure to exercise due diligence in the safeguard of confidentiality of tax information." The first example is: "Accessing or disclosing taxpayer information at the request of friends or relatives." This example, according to the agency, was intended to show employees that they should not disclose information to their friends or relatives who contact them instead of going through the appropriate channels (the Customer Service Center) to get the information.

The agency's position on why it contended the grievant's conduct comprised a Group III level offense was fully considered from evidence adduced at the evidentiary hearing. I find that the claimant's conduct complained of falls within the specific description of the Group II offense of accessing taxpayer information at the request of friends or relatives. The agency's evidence did not prove more than that. I did find the offense was serious, but the agency's description of Group II is a clearly described one. The agency must be charged with drafting the examples of the offenses, and any ambiguity should be held against the agency. However, I find the Group II offense described by the agency is not ambiguous, and I found the misconduct proved fell squarely within the specific Group II offense of accessing taxpayer information for friends or relatives.

In summary, I find no provisions, statutes, regulations, or judicial decisions as a basis to challenge the hearing officer's conclusions of law. The agency takes issue with the hearing officer's Opinion and would characterize the facts as a more severe violation of agency policy. The agency's 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.

DECISION

The agency has not established an incorrect legal conclusion. The hearing officer has carefully considered the agency's arguments and concludes that there is no basis to change the Decision issued on February 24, 2006.

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.[7]

Cecil H. Creasey, Jr.
Hearing Officer

[7] 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 the matter of: Case No. 8268

Hearing Date: February 21, 2006

Decision Issued: February 24, 2006

Addendum Issued: March 22, 2006

DECISION OF HEARING OFFICER ON
AWARD OF ATTORNEY'S FEES

In the matter of: Case No. 8268

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.[8] 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.[9]

DISCUSSION

[8] Va. Code § 2.2-3005.1.A.

[9] § 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.

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 grievant, grievant submitted a petition for attorney's fees for services rendered by his attorney from November 28, 2005 through March 1, 2006. No agency response to the petition was received. Upon review of the attorney hours indicated, and the issues involved in the matter, I approve 40 hours of attorney time.

AWARD

The grievant is awarded attorneys' fees incurred from November 28, 2005 through the date of the hearing, February 21, 2006, in the amount of $4,800 (40 hours x $120.00 per hour).[10]

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.

Cecil H. Creasey, Jr.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM NO. 2
TO
DECISION OF HEARING OFFICER

In the matter of: Case No. 8268

Hearing Date: February 21, 2006

Decision Issued: February 24, 2006

Addendum Issued: March 22, 2006

Addendum No. 2 Issued: April 19, 2006

DECISION OF HEARING OFFICER ON
AWARD OF ATTORNEY'S FEES

In the matter of: Case No. 8268

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.[11] For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an

[11] Va. Code § 2.2-3005.1.A.

order that the agency reinstate the employee to his or her former (or an objectively similar) position.[12]

Following the issuance of the original grievance decision, the agency requested reconsideration by the hearing officer and an administrative review by the Department of Employment Dispute Resolution (EDR). The grievant, by counsel, filed a responsive brief to the hearing officer.

On March 22, 2006, the hearing officer issued his decision on reconsideration, denying the agency's request. Also, on March 22, 2006, the hearing officer issued an addendum to the decision granting the grievant attorney's fees in the amount of $4,800. On March 24, 2006, EDR issued its ruling that it lacked authority to review the hearing officer's interpretation of agency policy.

Grievant's counsel was under the impression that the agency also filed an appeal with the Department of Human Resources Management (DHRM), but there is no record of the agency making a timely appeal to DHRM. Grievant's counsel, however, submitted a brief to DHRM defending the hearing officer's grievance decision.

There are two additional petitions for attorney's fees submitted to the hearing officer, dealing with grievant's counsel's response to the agency's request for reconsideration to the hearing officer and the agency's (non-existant) appeal to DHRM.

DISCUSSION

Following the reconsideration decision denying the agency's request, the grievant filed a supplemental request for attorney's fees, dated March 24, 2006. No response has been received by the agency. The time allowed for the agency to appeal to the Department of Human Resources Management has now expired without any such appeal, and that renders ripe the grievant's pending request for further attorney's fees.

Based on the issues presented in the agency's request for reconsideration and the issues as briefed by grievant's counsel, I hereby increase the previously awarded attorney's fees by an additional three hours at $120/hour, for a cumulative total of $5,160. Since there was no appeal filed by the agency with DHRM, I will not award any attorney's fee regarding the grievant's response to DHRM.

AWARD

The grievant is awarded total attorneys' fees incurred from November 28, 2005 through March 22, 2006, in the amount of $5,160 (43 hours x $120.00 per hour).[13]

[12] § 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.

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.

Cecil H. Creasey, Jr.
Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Department of Taxation
November 17, 2006

The agency has requested an administrative review of the hearing officer's February 24, 2006, decision in Case No. 8268. The agency objects to the hearing officer's decision on the basis that the hearing officer misinterpreted agency policy in rendering his decision. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this administrative review request.

FACTS

The Department of Taxation employed the grievant as a collector with the agency. The agency issued the employee two Group III Written Notices on November 18, 2005, one "based on the allegation that the grievant violated the agency's Outside Employment policy by assisting or preparing income tax returns for compensation," and the other for the grievant's alleged "unauthorized access of taxpayer's accounts." On that same date, the grievant was terminated from employment.

The grievant filed a grievance and the hearing officer issued a decision dated February 24, 2006, in which he rescinded the Group III Written Notice for unauthorized outside employment and reduced the other Group III Written Notice to a Group II Written Notice. The decision also ordered that the agency reinstate the grievant. In response to a request from the agency, the hearing officer reconsidered his decision. He reaffirmed his original decision in this case. The agency also requested administrative reviews from the Department of Employment Dispute Resolution regarding the hearing officer's interpretation of agency policy.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular

mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The singular issue before the DHRM is the hearing officer's interpretation of the agency's (TAX) Addendum differentiating between actions that constitute Group II level offenses and Group III level offenses. Summarily, the agency contends that the hearing officer erred by reducing the offense from a Group III Written Notice to a Group II Written Notice. In accordance with the TAX Addendum, Group II offenses fall under the general heading: "Failure to exercise due diligence in the safeguard of confidentiality of tax information." The first example is: "Accessing or discussing taxpayer information at the request of friends or relatives." The example provided in training goes like this: *a friend calls an employee and asks to check on the status of a refund; the employee should not access the taxpayer database to look this up, unless it is a specific part of his job duties. Instead, such requests should be referred to the Contact Center.*

Also in the Addendum, Group III level offenses fall under the general heading "Intentional access and/or disclosure of taxpayer information for non-work related reasons or personal use of such information." The first example of inappropriate behavior is: "Accessing or disclosing taxpayer information, including that of another TAX employee for non-work related reasons."

In the present case, the hearing officer determined that there was insufficient evidence to support the allegations the agency made against the grievant as related to performing outside work without getting permission. He rescinded the Group III Written Notice that was issued for that charge. Concerning the agency's allegation that the grievant improperly accessed a taxpayer's records for non-job-related reasons, the hearing officer determined that the agency's policy did not show a clear distinction between a Group III Written Notice and a Group II Written Notice; therefore, he reduced the discipline action from a Group III Written Notice with termination to a Group II Written Notice with reinstatement and a 10-day suspension. In his decision, the hearing officer stated, "…I find the access of the information was for a non-work-related reason. The access was for the Grievant's assistance to his friend, DB, in the preparation of her income tax returns. The other shown instances of access of information do not show that any information was necessarily accessed for non-work-related reasons. The Grievant set forth some plausible, work-related explanations for why he may have accessed the identified taxpayer information. There is no evidence that the Grievant disclosed the information to any third parties."

Our review of the relevant TAX policy reveals that the example offered to support a Group II Written Notice and the example offered to support a Group III Written Notice are discernable. More specifically, TAX's policy gives the following to describe a Group II Written Notice: ***Failure to exercise due diligence in the safeguard of confidentiality of tax information,*** and lists as an example, ***Accessing or disclosing taxpayer***

information at the request of friends or relatives. Tax's policy gives the following to describe a Group III Written Notice: ***Intentional access and/or disclosure of taxpayer information for non-work related reasons or personal use of such information,*** and lists as an example, ***Accessing or disclosing information, including that of another TAX employee, for any non-work related reasons.***

In the instant case, the example supporting a Group III Written Notice is based on assessing or disclosing information, including that of another TAX employee, for any non-related reasons. In his decision, the hearing officer stated, "The Grievant admitted to assessing taxpayer information for his friend, DB, and I find the access was for a non-work related reason." Thus, it is clear that based on the evidence, the hearing officer concluded that the grievant accessed the TAX employee's records for a non-work related reason. Therefore, this Agency has determined that the hearing officer erred when he reduced the disciplinary action from a Group III Written Notice with termination to a Group II Written Notice with reinstatement and a 10-day suspension. DHRM is directing that the hearing officer reconsider his decision and revise it to be consistent with the provisions of policy as spelled out in the TAX Addendum.

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Ernest G. Spratley
Manager, Employment
Equity Services

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ON REMAND
DECISION OF HEARING OFFICER

In the matter of: Case No. 8268

Hearing Date: February 21, 2006

Decision Issued: February 24, 2006

Reconsideration Request Received: March 10, 2006

Reconsideration of Decision Issued: March 22, 2006

Remand from Department of Human Resource Management Received: November 22, 2006

Remand Decision Issued: December 6, 2006

APPLICABLE LAW

The Grievance Procedure Manual provides that a hearing officer's original decision is subject to three types of administrative review. A party may make more than one type of request for review. However, all requests 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. Requests may be initiated by electronic means such as facsimile or e-mail. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests must be provided to the other party and to the EDR Director. [1]

[1] § 7.2 Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004.

The Agency sought review by the Department of Employment Dispute Resolution (EDR), and its request was denied by decision dated March 24, 2006. In that decision denying the request, EDR stated that the agency could make a written request to the DHRM Director, which request must be received within 15 calendar days of the date of EDR's ruling. The Grievance Procedure Manual provides that the DHRM and EDR Directors should issue written decisions on requests for administrative review within 30 calendar days of receiving the request or within 15 calendar days of receiving the hearing officer's decision on a request for reconsideration or reopening, whichever is longer.[2]

In his response to DHRM's decision, dated November 22, 2006, the Grievant has challenged the timeliness of the Agency's request for review made to DHRM more than 15 days following the hearing officer's decision. EDR has held in the past that timely claims made to the wrong party may proceed. *See* EDR Rulings 2000-008 (grievance initiated timely with the wrong party) and 2000-131 (request for administrative review sent to wrong agency). *See also* EDR Ruling Numbers 2003-124, 2004-870, 2005-1053, 2006-1228, and 2006-1383. The Grievant has also challenged the extended time DHRM has taken to issue its decision. The Grievant's objections and exceptions are noted for the record, but this hearing officer is without jurisdiction to overrule the policy determination from EDR on timeliness of requesting administrative review. Thus, the hearing officer makes no determination on that issue.

Nevertheless, the Agency pursued a request for administrative review by DHRM, the details of which are not before this hearing officer. DHRM's decision, dated November 17, 2006, and received by the hearing officer on November 22, 2006, deemed the hearing officer erred by reducing the charged Group III offense down to a Group II offense. The Department of Human Resource Management (DHRM) has ordered the hearing officer to revise the decision to conform to its interpretation of applicable policy. A hearing officer lacks any jurisdiction to overrule DHRM.

Administrative review decisions issued by the Directors of DHRM and EDR are final and nonappealable. If the DHRM or EDR Director orders the hearing officer to revise his decision, the hearing officer must do so and should issue a written decision within 15 calendar days of receiving the order.[3]

OPINION

The Grievant was initially charged with two Group III offenses. The Group III offense for outside employment was reversed, and that decision should now be final. The second Group III offense, for accessing taxpayer information for unauthorized, non-work related reasons, was reduced to a Group II offense. At that level of offense, reinstatement was necessarily provided with the most severe discipline. This second Group III that was reduced to a Group II offense is the subject of the remand from DHRM. The findings of fact made by the hearing officer in prior

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2 § 7.2 Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004.

3 § 7.2 Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004.

decisions will not be repeated here. As previously stated, the agency's burden is to show upon a preponderance of evidence that the termination of the grievant's employment was warranted and appropriate under the circumstances.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

While off duty assistance, without compensation, to friends and others is permitted, accessing the taxpayer database for that activity is a non-work related activity. In essence, that is taking advantage of the Grievant's state position for a non-work related purpose. As held previously, this is a serious offense because it does create the appearance of an abuse of this trusted position and provides the friend or family member with preferential treatment by a state employee—treatment and access the general public does not enjoy.

Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The normal disciplinary action for a Group III offense is a Written Notice and removal from state employment. The *Standards of Conduct* policy provides for the reduction of discipline if there are 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.

The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgment in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no evidence of mitigating circumstances to reduce the disciplinary action. There was no evidence presented that would mitigate the claimant's conduct in accessing taxpayer information for his friend, and the discipline imposed earlier was not mitigated. While this hearing officer previously considered such conduct a Group II offense and imposed the most severe discipline allowed for a Group II, DHRM has ruled otherwise—that the offense is a Group III.

Accordingly, because DHRM has deemed the Grievant's conduct of assisting his friend by accessing her taxpayer account is definitively a Group III offense, this hearing officer is without jurisdiction to disregard that determination. Thus, the Agency's action in this regard is upheld.

DECISION

The Agency's action in assessing a Group III offense, for accessing taxpayer accounts, with termination of employment is upheld, and all previous decisions otherwise in this grievance are rescinded and superseded. The findings of facts are unaffected by this remanded decision, and the Grievant has not substantially prevailed. In light of this decision, the awards of attorney's fees must also be rescinded.

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 DHRM, 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.[4]

Cecil H. Creasey, Jr.
Hearing Officer

[4] 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).