Issue: Group III Written Notice with termination (improper use of State vehicle and preferential treatment of family member); Hearing Date: 03/29/06; Decision Issued: 04/05/06; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8298; Outcome: Employee granted partial relief; **Administrative Review: HO Reconsideration Request received 04/19/06; Reconsideration Decision issued 05/02/06; Outcome: Original decision affirmed; Fees Addendum issued 05/11/06; Administrative Review: EDR Ruling Request received 04/19/06; EDR Ruling issued 06/27/06 [2006-1375]; Outcome: Remanded to hearing officer for clarification; no change in outcome of decision; Revised Decision issued 07/10/06; Administrative Review: DHRM Ruling Request received 04/19/06; Outcome: Revised decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8298

Hearing Date: March 29, 2006
Decision Issued: April 5, 2006

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Human Resource Manager
Representative for Agency
Four 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?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group III Written Notice issued for improper use of a state vehicle and preferential treatment of his spouse.[1] As part of the disciplinary action, grievant was removed from state employment effective June 30, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2] The Virginia Department of Transportation (Hereinafter referred to as "agency") employed grievant as a general administration manager for two years.[3] Grievant had previously been employed with other state agencies for 16 years.

In October 2004, the state Department of Internal Audit received a hotline complaint that grievant had been commuting to work in a state-owned vehicle, used his influence to employ his spouse and child in subordinate positions within his department, gave his spouse preferential treatment, improperly created new positions, abuse of authority in the hiring process, and misuse of travel funds. An internal auditor conducted a thorough investigation of the allegations between February and June 2005. The investigator interviewed relevant employees, conducted surveillance of grievant's vehicle usage, reviewed his vehicle logbook, reviewed non-revenue card data, and reviewed VDOT Smart Tag computer records. Of six allegations, the auditor found that four were unsubstantiated and that only commuting in a personal vehicle, and abuse of position by hiring his spouse and son and preferential treatment of his spouse were substantiated charges.[4] Grievant admitted to the investigator that he had been commuting in the state vehicle.

Grievant was hired by the agency as a toll facilities administrative director in September 2003. When the agency's Chief Financial Officer hired grievant, the agency had been under a cloud because of mismanagement and waste. She told grievant that she had high ethical standards and that she expected grievant to perform his responsibilities without any impropriety or appearance of impropriety. Soon after beginning his employment, grievant found that the toll facilities had been mismanaged, that many employees had poor work ethics, and that considerable change was needed to make the operation more efficient. In December 2003, he proposed to his supervisor a reorganization plan for the toll facilities that included a combination of new positions, role changes and reporting changes.[5] When he implemented these changes and tightened work hour requirements, some employees became disgruntled.

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[1] Agency Exhibit 2. Group III Written Notice, issued June 30, 2005.

[2] Agency Exhibit 2. Grievance Form A, filed October 26, 2005. [NOTE: Although grievant filed his grievance more than 30 days after the event that formed the basis of this dispute, the Director of the Department of Employment Dispute Resolution (EDR) ruled that, given the unique circumstances of this case, grievant could file his grievance within 30 days of the Director's Ruling. EDR *Compliance Ruling of Director*, Number 2006-1113, September 26, 2005.]

[3] Grievant Exhibit 8. Grievant's Employee Work Profile Work Description, July 1, 2003.

[4] Agency Exhibit 2. Memorandum from investigator's supervisor to Internal Audit Director, June 20, 2005.

[5] Grievant Exhibit 7. Memorandum from grievant to his supervisor, December 31, 2003.

The toll facilities operate 24 hours per day, seven days per week. During his first several months on the job, grievant was called back to work a number of times during off-duty hours and on weekends to address various emergency situations. Six state vehicles are assigned to the toll facilities operation for maintenance and other business purposes. One vehicle is assigned primarily for use by the director and other administrative staff. By February 2004, grievant decided to begin taking the state car home every night in case he was called back to the facilities while off duty. Grievant did not obtain the required written approval (see discussion of law, *infra*) necessary to commute in a state vehicle. He did not review the applicable statute, the Department of General Services Office of Fleet Management Services (DGS OFMS) Policies and Procedure Manual, or the State Travel Regulations.

One of grievant's direct subordinates (business manager) noticed that grievant had begun commuting in the state vehicle. She advised him that he must have written permission to commute in a state vehicle. Grievant thanked her for the information but did not obtain authorization. During the same time period (February 2004), grievant told the district equipment manager that grievant's supervisor (Director of Finance and Revenue) had given him verbal permission to commute in the state vehicle. The district equipment manager told grievant that: 1) the Finance Director did not have authority to grant permission for commuting; 2) that grievant should obtain written authority from the Secretary of Transportation, the VDOT Commissioner, and the Fleet Administrator; and 3) that only one employee in the entire agency (the Commissioner) had received such authorization. He also suggested to grievant that if he took the state vehicle home at night for business reasons that he should maintain a logbook to track mileage and the reason for each trip. Grievant continued to commute in the state vehicle until May 2005.[6] At times, he took employees to lunch in the state vehicle. When his employment ended, the agency computed the mileage grievant had commuted in the vehicle and grievant repaid the agency $991.80.[7]

In April 2004, grievant decided to hire an administrative assistant on a contract basis from a temporary employment agency used by VDOT. Grievant told the business manager he thought his wife would be a good person for the position. Grievant knew that having his wife work at the toll facilities would create an unfavorable perception among other employees.[8] The business manager advised grievant that the agency does not hire relatives to work at the same facility. Grievant asked the business manager to e-mail the Director of Finance (grievant's supervisor) for permission. Subsequently, the Director of Finance approved the hiring of grievant's spouse. When she granted permission to hire, she cautioned grievant to assure that he was not his wife's direct or immediate supervisor. Grievant's spouse applied to the temporary employment agency and

[6] Grievant Exhibit 4. Vehicle Log for vehicle driven by grievant. February 2004 – June 2005. See also Agency Exhibit 8, VDOT Smart Tag records, October 2004 – March 2005.
[7] Grievant Exhibit 5. Grievant's personal check to the agency, July 1, 2005.
[8] Agency Exhibit 2. p.2, Letter from grievant to Chief Financial Officer, June 29, 2005.

was the only person the agency sent to the toll facility for an interview. The business manager conducted an interview and found grievant's spouse qualified for the position. Grievant did not give the business manager any instructions for the interview. The business manager was assigned as grievant's wife's immediate or direct supervisor.

Grievant's spouse began work on April 26, 2004 in the office at toll facility A. At this time, grievant was working approximately equal amounts of time at both toll facility A and toll facility B. Within approximately one month, grievant's spouse arranged for a transfer to toll facility B. Following that move, grievant began to work primarily at toll facility B and only occasionally visited toll facility A. In late 2004 and early 2005, grievant's supervisor began to receive complaints of favoritism and low morale at the toll facilities. Some employees felt that grievant's spouse received preferential treatment with regard to working hours, long lunch periods, and other issues. While grievant's wife's immediate supervisor was the business manager, grievant would give his wife work assignments from time to time. In one instance, grievant's wife worked directly with him in preparation for a conference in November 2004. If the business manager gave an assignment to grievant's wife that the wife disagreed with, she would speak with grievant who would sometimes countermand the business manager.

During the summer of 2004, grievant's son was employed as a custodian at the toll facility from May 1, 2004 through August 13, 2004. Grievant's son was hired on a temporary contract basis through the same temporary employment agency that grievant's wife had utilized.

In February 2005, grievant's supervisor learned that she should not have given permission for grievant's spouse to be employed in the toll facility because grievant was in his wife's chain of command. The supervisor immediately rescinded her prior approval and directed that the employment relationship be terminated.[9] The contract for grievant's wife's employment was terminated and she last worked on February 18, 2005.

In March 2005, grievant began to seek other employment by making applications for several government positions.[10] On or about June 16, 2005, grievant received an offer of employment from another state agency with an effective hire date of July 1, 2005.[11] On June 16, 2005, grievant submitted his resignation to be effective on June 30, 2005.[12] The agency's investigation was completed on June 20, 2005; a decision was made to discipline and remove grievant from employment, notwithstanding his impending resignation. In the due process discussions leading up to termination of employment, the agency told

[9] Grievant Exhibit 1. Memorandum from supervisor to grievant, February 22, 2005.
[10] Grievant Exhibit 10. Application letters, March – April 2005.
[11] Grievant Exhibit 11. Letter from grievant's current employer, March 13, 2006.
[12] Grievant Exhibit 6. Memorandum from grievant to his supervisor, June 16, 2005.

grievant that his resignation would state "resignation in lieu of termination."[13] He was removed from state employment effective June 30, 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:

> 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 employee must present his evidence first and must prove his claim by a preponderance of the evidence.[14]

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 III offenses include acts and behavior of such a serious

[13] Agency Exhibit 2. E-mail from Chief Financial Officer to Internal Audit Director, June 27, 2005.
[14] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.

nature that a first occurrence normally should warrant removal.[15] Failure to comply with established written policy is a Group II offense.

The Department of General Services Office of Fleet Management Services provides vehicles to authorized state employees for use in conducting official state business. As specified in Va. Code § 2.2-1179, fleet vehicles may not be used for commuting unless such use is required with respect to the duties of the employee **and** approved by the appropriate Cabinet Secretary, agency head, and the Fleet Administrator.[16] Commuting is defined as "Use of a state-owned or leased vehicle by an employee for travel between home and office, while not in 'travel status'.[17]

The State Travel Regulations provide that, "Round-trip mileage traveled routinely by the employee and his residence and base point incurred on a scheduled workday is considered commuting mileage. Commuting mileage and other commuting costs incurred on normal workdays are considered a personal expense and are not reimbursable."[18] All state employees who operate state vehicles are responsible to be familiar with the State Travel Regulations; the Regulations are available on the Internet.

Grievant acknowledged that he drove the state vehicle home on almost a daily basis and was thereby utilizing it for commuting purposes most of the time. Occasionally, he would be called back to the toll facilities during off-duty time and such trips would, therefore, be work-related and justifiable. However, it is undisputed that the majority of grievant's trips to and from his residence in the state vehicle were, in fact, personal commuting. When confronted about this, grievant ceased using the vehicle to commute and later reimbursed the agency for the commuting mileage during 2004-2005.

As a long-time state employee who had operated state vehicles before being hired by VDOT, grievant knew, *or reasonably should have known*, that operators of state vehicles are accountable for operating state vehicles in accordance with State Travel Regulations and DGS policy. Here, not only is grievant a state employee but he managed an operation that had control over six state vehicles. As manager, he had a duty and responsibility to assure that all vehicles under his control were used in accordance with established written policy and only for official state business. Grievant asserts that he had verbal permission from his supervisor to commute; however, the supervisor stated that grievant never discussed the issue of commuting in a state vehicle.[19] Grievant could have asked his supervisor to testify to corroborate his assertion but he did

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[15] Agency Exhibit 3. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.
[16] Agency Exhibit 4. Section 8.A, *Office of Fleet Management Services Policies and Procedure Manual.*
[17] Agency Exhibit 4. Section 1.A, *Ibid*.
[18] State Travel Regulations, July 1, 2004.
[19] Agency Exhibit 2. Memorandum from Internal Audit Director to Chief Financial Officer, June 21, 2005.

not do so. Since grievant did not request her presence at the hearing, it is presumed that her testimony would not have been favorable to grievant. Moreover, two agency employees in positions of responsibility had told grievant that he must obtain written authorization pursuant to the DGS policy in order to commute in a state vehicle. One of those employees was an equipment manager outside of grievant's division who had no reason to falsify his testimony. His testimony was clear, credible, and consistent.

Grievant felt that his unique position was sufficient justification to warrant commuting in the state vehicle. Because he was called back to work occasionally during off-duty time, grievant felt it was reasonable to use the state vehicle for this purpose. Assuming that grievant's rationale was a reasonable one, the fact remains that most of the time, he was simply commuting back and forth without any work-related reason. Since he did not have written authorization to do so, his commuting was a failure to comply with established written policy.

Va. Code § 2.2-3106 provides that no employee of state government shall have a personal interest in a contract with the governmental agency of which he is an employee, other than his own contract of employment.[20] This statute applies to an employee's personal interest in additional contracts of employment with his own governmental agency that accrue to him because of a member of his immediate family if the employee exercises any control over the employment or the employment activities of the member of his immediate family or the employee is in a position to influence those activities.[21] The Fourth Circuit of the U. S. Court of Appeals has addressed anti-nepotism rules in governmental agencies and concluded that such rules effectuate rational and laudable goals, including: avoiding conflicts of interest between work-related and family-related obligations; reducing favoritism or its appearance; and preventing family conflicts from affecting the workplace.[22]

The agency concluded that grievant abused his position by hiring his wife and son to work as contract employees and that he treated his wife preferentially. A preponderance of evidence establishes that grievant was not directly involved in the hiring process. A contract agency sent grievant's wife, and later his son, to the agency for interviews which were conducted by one of grievant's subordinates. Nonetheless, grievant knew that both his wife and son were going

[20] Agency Exhibit 5. Va. Code § 2.2-3106. See also p. 30, Department of Human Resource Management (DHRM) *Employee Handbook* which addresses Nepotism stating, "The Code of Virginia (§ 2.2-3106) prohibits (as a conflict of interests) supervision by an employee of a member of his or her immediate family. Immediate family includes the spouse and any other person residing in the same household as the employee who is a dependent of the employee or of whom the employee is a dependent. (See the Conflict of Interests Act in the Code of Virginia, § 2.2-3100 and following.)"

[21] "Personal interest" means a financial benefit accruing to an employee or to a member of his immediate family. Such interest shall exist by reason of, *inter alia*, salary paid by a governmental agency that exceeds $10,000 annually. Va. Code § 2.2-3101.

[22] *Waters v. Gaston County*, 57 F.3d 422 (4th Cir. 1995).

to be interviewed and knew that they were about to be hired. He did not take any action to prevent the hiring. He did state to the interviewer that his wife would be a good asset for the agency. Giving a positive endorsement of a candidate to a subordinate *before* the interview constitutes undue influence. In effect, grievant gave his subordinate, in a not very subtle manner, her marching orders. Any subordinate in such a position would be very unlikely not to hire the boss's wife.

The evidence with regard to the hiring of grievant's son is less clear. The investigator spoke with the regional vice president of the temporary employment agency who stated that grievant specifically recommended that his son be hired for the janitorial position. An account representative for the employment agency asserted that grievant did not offer him any incentive or pressure to hire his son. The account representative, however, acknowledged that he was not directly involved in the hiring of grievant's son. Accordingly, he was unaware of what may have been discussed with the vice president. There is no evidence to suggest that the investigator had any interest in this case and therefore, the statement he obtained from the vice president is given equal weight with the account representative's testimony. Because there is no preponderance of evidence regarding the use of influence in hiring grievant's son, this allegation is considered unproven.

Finally, the agency alleged that grievant treated his wife preferentially during her employment. First, grievant was alleged to have influenced the transfer of his wife from toll facility A to toll facility B. Grievant denied any such influence. Moreover, the agency's witness (business manager) corroborated that the transfer was initiated by grievant's wife and that the business manager approved it. Second, some employees complained that the timesheets for grievant's wife were not always signed by her supervisor but rather by other supervisors. Grievant satisfactorily explained that this was permissible because the wife's supervisor verified time worked and verbally approved others to sign the timesheets. Third, employees complained that grievant's wife was allowed to work unusual hours rather than the standard 8:15 a.m. to 5:00 p.m. Grievant provided ample evidence to show that his wife was paid only for hours actually worked and offered unrebutted testimony that some other employees had also worked odd hours when necessitated by work demands.

The evidence does not support a conclusion that grievant treated his wife preferentially. However, it is undisputed that after grievant's wife transferred to toll facility B, grievant also began to spend the majority of his workdays at facility B. While this does not, by itself, constitute preferential treatment, it contributed to an appearance of preferential treatment among employees. Given grievant's position, and his unpopularity with employees because of changes he made, the *appearance* of impropriety was as much of a problem as if there had been actual impropriety. The appearance of favoritism is one of the reasons that the anti-nepotism statute was enacted. Even if grievant treated her exactly like every other employee, the perception will be that she is treated preferentially and that leads to low morale, disgruntled employees, and, as in this case, hotline calls. Grievant should not have employed immediate family members in positions over

which he had indirect supervisory authority not only because of the statutory prohibition but because of the appearance of impropriety that inevitably occurred.

Grievant speculates that the two hotline calls that precipitated an investigation into his behavior (and a third call to his current employer after his employment with VDOT ended) were made by two disgruntled employees at the toll facilities. Although grievant may be correct in his speculation, the issue in this case is whether grievant committed the offenses cited by the agency, and if so, what is the appropriate level of discipline. The undisputed evidence establishes that some of the charges made in the hotline calls were false and, in some cases, without any factual basis. In fact, the third hotline call appears to have been made with malice since it involved the totally false claim that grievant had not told his new agency about his termination from VDOT.

In conclusion, grievant committed two offenses. First, he used a state vehicle for personal commuting in direct violation of established written policy. While grievant asserts that his supervisor gave him permission to do so, a preponderance of evidence establishes that grievant was told that his supervisor had no authority to give him permission, and he was advised specifically what he would have to do to obtain such authority. Moreover, as a high-level manager, grievant is responsible to follow all applicable policies. Claiming ignorance of the policy is not a sufficient excuse. Failure to comply with established written policy is a Group II offense.

Second, grievant violated the nepotism statute and state policy by employing in subordinate positions both his wife and his son. This in turn led to a perception among subordinates that he was treating his wife preferentially. While this offense also constitutes a failure to follow policy, the offense is more serious because, as a high-level manager, grievant is held to a higher standard than non-supervisory/managerial employees. The Standards of Conduct do not include this specific offense among the examples listed in the policy. The offense is, however, at the least, a Group II offense for failing to comply with established written policy.

Mitigation

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. In this case, grievant has a total of 18 years of state employment and an otherwise satisfactory work record – both of which constitute mitigating circumstances. In addition, the fact that grievant's supervisor authorized the hiring of grievant's wife constitutes a significant mitigating circumstance. Even though grievant should have known about the law, he took the reasonable precaution of first asking for approval from his

immediate supervisor. When she granted permission to hire, grievant reasonably assumed that it would be acceptable as long as he complied with her admonition to make sure that he was not the direct or immediate supervisor.

Given these mitigating circumstances, and in the absence of any aggravating circumstances, it is concluded that a reduction in discipline is warranted. Although the violation of the nepotism statute might be a Group III offense in other circumstances, grievant's heavy reliance on his supervisor's approval to hire his spouse and the other mitigating circumstances discussed above are sufficient reason not to impose a Group III Written Notice. Accordingly, both offenses are deemed failures to comply with established written policy.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice for misuse of a state vehicle and nepotism is hereby REDUCED to a Group II Written Notice with ten days suspension.

Because grievant resigned from employment, his personnel record shall be changed to reflect "Resignation" as the reason for separation.

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.[23] 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.[24]

In the instant case, grievant had previously notified the agency that his resignation would be effective on June 30, 2005 – the same date on which the agency removed him from employment. Grievant affirmed that he does not want to be reinstated. Accordingly, but for grievant's resignation, this decision normally would have ordered the agency to reinstate grievant because grievant substantially prevailed in this discharge grievance. Therefore, grievant is entitled to recover a reasonable attorney's fee, which cost shall be borne by the

[23] Va. Code § 2.2-3005.1.A.

[24] § 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.

agency.[25] Grievant's attorney is herewith informed of his obligation to timely submit a fee petition to the Hearing Officer for review.[26]

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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 14th St, 12th floor
> Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

> Director
> Department of Employment Dispute Resolution
> 830 E Main St, Suite 400
> Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[27] You must file a notice of appeal with the clerk of the circuit court in the

[25] Va. Code § 2.2-3005.1.A & B.

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

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[28]

[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]

_____
David J. Latham, Esq.
Hearing Officer

[27] 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).

[28] 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: 8298

Hearing Date:	March 29, 2006
Decision Issued:	April 5, 2006
Reconsideration Request Received:	April 19, 2006
Response to Reconsideration:	May 2, 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.[29]

OPINION

The agency has requested reconsideration of the hearing officer's decision on a narrow technical issue. The hearing decision reduced the disciplinary action from a Group III Written Notice with removal from employment to a Group II Written Notice with ten days suspension. The agency requests that the decision be revised because, in view of grievant's resignation effective on the day of his removal, the agency is unable to effectuate a period of suspension.

When the hearing officer issued the decision, he recognized that the agency would be unable to impose a suspension since grievant had already voluntarily left the agency. Nonetheless, a hearing decision must be made based upon a reasoned

[29] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

evaluation of what level of discipline is *appropriate to the offense.* A disciplinary action consisting of only a written notice suggests that the offense is less serious than if the discipline includes both a written notice and a suspension. In this case, after careful consideration, the hearing officer concluded that the appropriate disciplinary action should include a suspension as well as a written notice. The grievant's personnel record should reflect the actual discipline imposed by the hearing officer. It would be inappropriate for the hearing officer to reduce the level of discipline merely because the agency is unable to effectuate a portion of the discipline for technical reasons.[30]

The hearing officer has no basis to dispute the conclusion of the Department of Human Resource Management that there is no provision to implement the suspension. However, the discipline issued is appropriate to the offense and there is no substantive reason to reduce it.

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 argument and concludes that there is no basis to change the Decision issued on April 5, 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.[31]

David J. Latham, Esq.
Hearing Officer

[30] This situation is somewhat analogous to a multiple capital murder case in which several life sentences without possibility of parole are imposed on the guilty party. Obviously, it is impossible to serve more than one life sentence, but the pronounced punishment must be appropriate to the severity of the crimes committed.

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 8298

Hearing Date: March 29, 2006
Decision Issued: April 5, 2006
Addendum Issued: May 11, 2006

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.[32] 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.[33]

DISCUSSION

Following issuance of the hearing officer's decision which resulted in the grievant substantially prevailing on the merits of the grievance, grievant timely submitted a petition for attorney's fees. Grievant's petition includes attorneys' fees for services rendered by his attorney prior to the qualification of the grievance for hearing. Not all grievances proceed to a hearing; only grievances that challenge certain actions qualify for a hearing.[34] The hearing officer may award relief only for those issues that qualify for

[32] Va. Code § 2.2-3005.1.A.
[33] § 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.
[34] Va. Code § 2.2-3004.A. *See also* §4, Qualification for a Hearing, *Grievance Procedure Manual*, August 30, 2004.

hearing. Further, the statute provides that an agency is required to bear only the expense for the hearing officer and other associated *hearing* expenses including grievant's attorneys' fees.[35] Attorney fees incurred during the grievance procedure's Management Resolution Step stage are not expenses arising from the hearing. Accordingly, a hearing officer may award only those attorney fees incurred subsequent to qualification of the grievance for hearing and as a direct result of the hearing process.

The petition also includes a fee for attorney travel time. Time spent traveling to and from a hearing does not involve legal work, counsel, or attorney work product and is, therefore, not compensable. Accordingly, time billed as travel is not included in the award.[36] Grievant's attorney recognized that fees for services performed prior to qualification and travel time are not compensable under EDR rules and properly excluded them from his request. Therefore, grievant's attorney fees for services performed prior to qualification and travel are not included in the award.

AWARD

The petition for fees for travel and for services rendered prior to qualification is denied. The grievant is awarded attorney fees incurred from March 2, 2006 through April 7, 2006 in the amount of $4,284 (35.7 hours x $120.00 per hour).[37]

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.

David J. Latham, Esq.
Hearing Officer

[35] Va. Code § 2.2-3005.1.B.
[36] The hearing was seven hours.
[37] 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

REVISED DECISION OF HEARING OFFICER

In re:

Case No: 8298

Hearing Date:	March 29, 2006
Decision Issued:	April 5, 2006
Reconsideration Issued:	May 2, 2006
Addendum Issued:	May 11, 2006
Revised Decision Issued:	July 10, 2006

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Human Resource Manager
Representative for Agency
Four 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?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group III Written Notice issued for improper use of a state vehicle and preferential treatment of his spouse.[38] As part of the disciplinary action, grievant was removed from state employment effective June 30, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[39] The Virginia Department of Transportation (Hereinafter referred to as "agency") employed grievant as a general administration manager for two years.[40] Grievant had previously been employed with other state agencies for 16 years.

In October 2004, the state Department of Internal Audit received a hotline complaint that grievant had been commuting to work in a state-owned vehicle, used his influence to employ his spouse and child in subordinate positions within his department, gave his spouse preferential treatment, improperly created new positions, abuse of authority in the hiring process, and misuse of travel funds. An internal auditor conducted a thorough investigation of the allegations between February and June 2005. The investigator interviewed relevant employees, conducted surveillance of grievant's vehicle usage, reviewed his vehicle logbook, reviewed non-revenue card data, and reviewed VDOT Smart Tag computer records. Of six allegations, the auditor found that four were unsubstantiated and that only commuting in a personal vehicle, and abuse of position by hiring his spouse and son and preferential treatment of his spouse were substantiated charges.[41] Grievant admitted to the investigator that he had been commuting in the state vehicle.

Grievant was hired by the agency as a toll facilities administrative director in September 2003. When the agency's Chief Financial Officer hired grievant, the agency had been under a cloud because of mismanagement and waste. She told grievant that she had high ethical standards and that she expected grievant to perform his responsibilities without any impropriety or appearance of impropriety. Soon after beginning his employment, grievant found that the toll facilities had been mismanaged, that many employees had poor work ethics, and that considerable change was needed to make the operation more efficient. In December 2003, he proposed to his supervisor a reorganization plan for the toll facilities that included a combination of new positions, role changes and reporting

[38] Agency Exhibit 2. Group III Written Notice, issued June 30, 2005.
[39] Agency Exhibit 2. Grievance Form A, filed October 26, 2005. [NOTE: Although grievant filed his grievance more than 30 days after the event that formed the basis of this dispute, the Director of the Department of Employment Dispute Resolution (EDR) ruled that, given the unique circumstances of this case, grievant could file his grievance within 30 days of the Director's Ruling. EDR *Compliance Ruling of Director*, Number 2006-1113, September 26, 2005.]
[40] Grievant Exhibit 8. Grievant's Employee Work Profile Work Description, July 1, 2003.
[41] Agency Exhibit 2. Memorandum from investigator's supervisor to Internal Audit Director, June 20, 2005.

changes.[42] When he implemented these changes and tightened work hour requirements, some employees became disgruntled.

The toll facilities operate 24 hours per day, seven days per week. During his first several months on the job, grievant was called back to work a number of times during off-duty hours and on weekends to address various emergency situations. Six state vehicles are assigned to the toll facilities operation for maintenance and other business purposes. One vehicle is assigned primarily for use by the director and other administrative staff. By February 2004, grievant decided to begin taking the state car home every night in case he was called back to the facilities while off duty. Grievant did not obtain the required written approval (see discussion of law, *infra*) necessary to commute in a state vehicle. He did not review the applicable statute, the Department of General Services Office of Fleet Management Services (DGS OFMS) Policies and Procedure Manual, or the State Travel Regulations.

One of grievant's direct subordinates (business manager) noticed that grievant had begun commuting in the state vehicle. She advised him that he must have written permission to commute in a state vehicle. Grievant thanked her for the information but did not obtain authorization. During the same time period (February 2004), grievant told the district equipment manager that grievant's supervisor (Director of Finance and Revenue) had given him verbal permission to commute in the state vehicle. The district equipment manager told grievant that: 1) the Finance Director did not have authority to grant permission for commuting; 2) that grievant should obtain written authority from the Secretary of Transportation, the VDOT Commissioner, and the Fleet Administrator; and 3) that only one employee in the entire agency (the Commissioner) had received such authorization. He also suggested to grievant that if he took the state vehicle home at night for business reasons that he should maintain a logbook to track mileage and the reason for each trip. Grievant continued to commute in the state vehicle until May 2005.[43] At times, he took employees to lunch in the state vehicle. When his employment ended, the agency computed the mileage grievant had commuted in the vehicle and grievant repaid the agency $991.80.[44]

In April 2004, grievant decided to hire an administrative assistant on a contract basis from a temporary employment agency used by VDOT. Grievant told the business manager he thought his wife would be a good person for the position. Grievant knew that having his wife work at the toll facilities would create an unfavorable perception among other employees.[45] The business manager advised grievant that the agency does not hire relatives to work at the same facility. Grievant asked the business manager to e-mail the Director of Finance (grievant's supervisor) for permission. Subsequently, the Director of Finance

[42] Grievant Exhibit 7. Memorandum from grievant to his supervisor, December 31, 2003.
[43] Grievant Exhibit 4. Vehicle Log for vehicle driven by grievant. February 2004 – June 2005. See also Agency Exhibit 8, VDOT Smart Tag records, October 2004 – March 2005.
[44] Grievant Exhibit 5. Grievant's personal check to the agency, July 1, 2005.
[45] Agency Exhibit 2. p.2, Letter from grievant to Chief Financial Officer, June 29, 2005.

approved the hiring of grievant's spouse. When she granted permission to hire, she cautioned grievant to assure that he was not his wife's direct or immediate supervisor. Grievant's spouse applied to the temporary employment agency and was the only person the agency sent to the toll facility for an interview. The business manager conducted an interview and found grievant's spouse qualified for the position. Grievant did not give the business manager any instructions for the interview. The business manager was assigned as grievant's wife's immediate or direct supervisor.

Grievant's spouse began work on April 26, 2004 in the office at toll facility A. At this time, grievant was working approximately equal amounts of time at both toll facility A and toll facility B. Within approximately one month, grievant's spouse arranged for a transfer to toll facility B. Following that move, grievant began to work primarily at toll facility B and only occasionally visited toll facility A. In late 2004 and early 2005, grievant's supervisor began to receive complaints of favoritism and low morale at the toll facilities. Some employees felt that grievant's spouse received preferential treatment with regard to working hours, long lunch periods, and other issues. While grievant's wife's immediate supervisor was the business manager, grievant would give his wife work assignments from time to time. In one instance, grievant's wife worked directly with him in preparation for a conference in November 2004. If the business manager gave an assignment to grievant's wife that the wife disagreed with, she would speak with grievant who would sometimes countermand the business manager.

During the summer of 2004, grievant's son was employed as a custodian at the toll facility from May 1, 2004 through August 13, 2004. Grievant's son was hired on a temporary contract basis through the same temporary employment agency that grievant's wife had utilized.

In February 2005, grievant's supervisor learned that she should not have given permission for grievant's spouse to be employed in the toll facility because grievant was in his wife's chain of command. The supervisor immediately rescinded her prior approval and directed that the employment relationship be terminated.[46] The contract for grievant's wife's employment was terminated and she last worked on February 18, 2005.

In March 2005, grievant began to seek other employment by making applications for several government positions.[47] On or about June 16, 2005, grievant received an offer of employment from another state agency with an effective hire date of July 1, 2005.[48] On June 16, 2005, grievant submitted his resignation to be effective on June 30, 2005.[49] The agency's investigation was completed on June 20, 2005; a decision was made to discipline and remove

[46] Grievant Exhibit 1. Memorandum from supervisor to grievant, February 22, 2005.
[47] Grievant Exhibit 10. Application letters, March – April 2005.
[48] Grievant Exhibit 11. Letter from grievant's current employer, March 13, 2006.
[49] Grievant Exhibit 6. Memorandum from grievant to his supervisor, June 16, 2005.

grievant from employment, notwithstanding his impending resignation. In the due process discussions leading up to termination of employment, the agency told grievant that his resignation would state "resignation in lieu of termination."[50] He was removed from state employment effective June 30, 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:

> 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 employee must present his evidence first and must prove his claim by a preponderance of the evidence.[51]

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

[50] Agency Exhibit 2. E-mail from Chief Financial Officer to Internal Audit Director, June 27, 2005.
[51] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.

provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.[52] Failure to comply with established written policy is a Group II offense.

The Department of General Services Office of Fleet Management Services provides vehicles to authorized state employees for use in conducting official state business. As specified in Va. Code § 2.2-1179, fleet vehicles may not be used for commuting unless such use is required with respect to the duties of the employee **and** approved by the appropriate Cabinet Secretary, agency head, and the Fleet Administrator.[53] Commuting is defined as "Use of a state-owned or leased vehicle by an employee for travel between home and office, while not in 'travel status'.[54]

The State Travel Regulations provide that, "Round-trip mileage traveled routinely by the employee and his residence and base point incurred on a scheduled workday is considered commuting mileage. Commuting mileage and other commuting costs incurred on normal workdays are considered a personal expense and are not reimbursable."[55] All state employees who operate state vehicles are responsible to be familiar with the State Travel Regulations; the Regulations are available on the Internet.

Grievant acknowledged that he drove the state vehicle home on almost a daily basis and was thereby utilizing it for commuting purposes most of the time. Occasionally, he would be called back to the toll facilities during off-duty time and such trips would, therefore, be work-related and justifiable. However, it is undisputed that the majority of grievant's trips to and from his residence in the state vehicle were, in fact, personal commuting. When confronted about this, grievant ceased using the vehicle to commute and later reimbursed the agency for the commuting mileage during 2004-2005.

As a long-time state employee who had operated state vehicles before being hired by VDOT, grievant knew, *or reasonably should have known*, that operators of state vehicles are accountable for operating state vehicles in accordance with State Travel Regulations and DGS policy. Here, not only is grievant a state employee but he managed an operation that had control over six state vehicles. As manager, he had a duty and responsibility to assure that all vehicles under his control were used in accordance with established written policy and only for official state business. Grievant asserts that he had verbal permission from his supervisor to commute; however, the supervisor stated that grievant never discussed the issue of commuting in a state vehicle.[56] Grievant

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[52] Agency Exhibit 3. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.
[53] Agency Exhibit 4. Section 8.A, *Office of Fleet Management Services Policies and Procedure Manual.*
[54] Agency Exhibit 4. Section 1.A, *Ibid*.
[55] State Travel Regulations, July 1, 2004.
[56] Agency Exhibit 2. Memorandum from Internal Audit Director to Chief Financial Officer, June 21, 2005.

could have asked his supervisor to testify to corroborate his assertion but he did not do so. Since grievant did not request her presence at the hearing, it is presumed that her testimony would not have been favorable to grievant. Moreover, two agency employees in positions of responsibility had told grievant that he must obtain written authorization pursuant to the DGS policy in order to commute in a state vehicle. One of those employees was an equipment manager outside of grievant's division who had no reason to falsify his testimony. His testimony was clear, credible, and consistent.

Grievant felt that his unique position was sufficient justification to warrant commuting in the state vehicle. Because he was called back to work occasionally during off-duty time, grievant felt it was reasonable to use the state vehicle for this purpose. Assuming that grievant's rationale was a reasonable one, the fact remains that most of the time, he was simply commuting back and forth without any work-related reason. Since he did not have written authorization to do so, his commuting was a failure to comply with established written policy.

Va. Code § 2.2-3106 provides that no employee of state government shall have a personal interest in a contract with the governmental agency of which he is an employee, other than his own contract of employment.[57] This statute applies to an employee's personal interest in additional contracts of employment with his own governmental agency that accrue to him because of a member of his immediate family if the employee exercises any control over the employment or the employment activities of the member of his immediate family or the employee is in a position to influence those activities.[58] The Fourth Circuit of the U. S. Court of Appeals has addressed anti-nepotism rules in governmental agencies and concluded that such rules effectuate rational and laudable goals, including: avoiding conflicts of interest between work-related and family-related obligations; reducing favoritism or its appearance; and preventing family conflicts from affecting the workplace.[59]

The agency concluded that grievant abused his position by hiring his wife and son to work as contract employees and that he treated his wife preferentially. A preponderance of evidence establishes that grievant was not directly involved in the hiring process. A contract agency sent grievant's wife, and later his son, to the agency for interviews which were conducted by one of grievant's

[57] Agency Exhibit 5. Va. Code § 2.2-3106. See also p. 30, Department of Human Resource Management (DHRM) *Employee Handbook* which addresses Nepotism stating, "The Code of Virginia (§ 2.2-3106) prohibits (as a conflict of interests) supervision by an employee of a member of his or her immediate family. Immediate family includes the spouse and any other person residing in the same household as the employee who is a dependent of the employee or of whom the employee is a dependent. (See the Conflict of Interests Act in the Code of Virginia, § 2.2-3100 and following.)"

[58] "Personal interest" means a financial benefit accruing to an employee or to a member of his immediate family. Such interest shall exist by reason of, *inter alia*, salary paid by a governmental agency that exceeds $10,000 annually. Va. Code § 2.2-3101.

[59] *Waters v. Gaston County*, 57 F.3d 422 (4th Cir. 1995).

subordinates. Nonetheless, grievant knew that both his wife and son were going to be interviewed and knew that they were about to be hired. He did not take any action to prevent the hiring. He did state to the interviewer that his wife would be a good asset for the agency. Giving a positive endorsement of a candidate to a subordinate *before* the interview constitutes undue influence. In effect, grievant gave his subordinate, in a not very subtle manner, her marching orders. Any subordinate in such a position would be very unlikely not to hire the boss's wife.

The evidence with regard to the hiring of grievant's son is less clear. The investigator spoke with the regional vice president of the temporary employment agency who stated that grievant specifically recommended that his son be hired for the janitorial position. An account representative for the employment agency asserted that grievant did not offer him any incentive or pressure to hire his son. The account representative, however, acknowledged that he was not directly involved in the hiring of grievant's son. Accordingly, he was unaware of what may have been discussed with the vice president. There is no evidence to suggest that the investigator had any interest in this case and therefore, the statement he obtained from the vice president is given equal weight with the account representative's testimony. Because there is no preponderance of evidence regarding the use of influence in hiring grievant's son, this allegation is considered unproven.

Finally, the agency alleged that grievant treated his wife preferentially during her employment. First, grievant was alleged to have influenced the transfer of his wife from toll facility A to toll facility B. Grievant denied any such influence. Moreover, the agency's witness (business manager) corroborated that the transfer was initiated by grievant's wife and that the business manager approved it. Second, some employees complained that the timesheets for grievant's wife were not always signed by her supervisor but rather by other supervisors. Grievant satisfactorily explained that this was permissible because the wife's supervisor verified time worked and verbally approved others to sign the timesheets. Third, employees complained that grievant's wife was allowed to work unusual hours rather than the standard 8:15 a.m. to 5:00 p.m. Grievant provided ample evidence to show that his wife was paid only for hours actually worked and offered unrebutted testimony that some other employees had also worked odd hours when necessitated by work demands.

The evidence does not support a conclusion that grievant treated his wife preferentially. However, it is undisputed that after grievant's wife transferred to toll facility B, grievant also began to spend the majority of his workdays at facility B. While this does not, by itself, constitute preferential treatment, it contributed to an appearance of preferential treatment among employees. Given grievant's position, and his unpopularity with employees because of changes he made, the *appearance* of impropriety was as much of a problem as if there had been actual impropriety. The appearance of favoritism is one of the reasons that the anti-nepotism statute was enacted. Even if grievant treated her exactly like every other employee, the perception will be that she is treated preferentially and that leads to low morale, disgruntled employees, and, as in this case, hotline calls.

Grievant should not have employed immediate family members in positions over which he had indirect supervisory authority not only because of the statutory prohibition but because of the appearance of impropriety that inevitably occurred.

Grievant speculates that the two hotline calls that precipitated an investigation into his behavior (and a third call to his current employer after his employment with VDOT ended) were made by two disgruntled employees at the toll facilities. Although grievant may be correct in his speculation, the issue in this case is whether grievant committed the offenses cited by the agency, and if so, what is the appropriate level of discipline. The undisputed evidence establishes that some of the charges made in the hotline calls were false and, in some cases, without any factual basis. In fact, the third hotline call appears to have been made with malice since it involved the totally false claim that grievant had not told his new agency about his termination from VDOT.

In conclusion, grievant committed two offenses. First, he used a state vehicle for personal commuting in direct violation of established written policy. While grievant asserts that his supervisor gave him permission to do so, a preponderance of evidence establishes that grievant was told that his supervisor had no authority to give him permission, and he was advised specifically what he would have to do to obtain such authority. Moreover, as a high-level manager, grievant is responsible to follow all applicable policies. Claiming ignorance of the policy is not a sufficient excuse. Failure to comply with established written policy is a Group II offense.

Second, grievant violated the nepotism statute and state policy by employing in subordinate positions both his wife and his son. This in turn led to a perception among subordinates that he was treating his wife preferentially. While this offense also constitutes a failure to follow policy, the offense is more serious because, as a high-level manager, grievant is held to a higher standard than non-supervisory/managerial employees. The Standards of Conduct do not include this specific offense among the examples listed in the policy. The offense is, however, at the least, a Group II offense for failing to comply with established written policy.

Mitigation

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. In this case, grievant has a total of 18 years of state employment and an otherwise satisfactory work record – both of which constitute mitigating circumstances. In addition, the fact that grievant's supervisor authorized the hiring of grievant's wife constitutes a significant mitigating circumstance. Even though grievant should have known about the

law, he took the reasonable precaution of first asking for approval from his immediate supervisor. When she granted permission to hire, grievant reasonably assumed that it would be acceptable as long as he complied with her admonition to make sure that he was not the direct or immediate supervisor.

Given these mitigating circumstances, and in the absence of any aggravating circumstances, it is concluded that a reduction in discipline is warranted. Although the violation of the nepotism statute might be a Group III offense in other circumstances, grievant's heavy reliance on his supervisor's approval to hire his spouse and the other mitigating circumstances discussed above are sufficient reason not to impose a Group III Written Notice. Accordingly, both offenses are deemed failures to comply with established written policy. These offenses normally would justify a Group II Written Notice with 10-day suspension. However, because grievant was immediately hired by another state agency following his separation from VDOT, it is impossible for VDOT to impose a period of suspension.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice for misuse of a state vehicle and nepotism is hereby REDUCED to a Group II Written Notice.

Because grievant resigned from employment, his personnel record shall be changed to reflect "Resignation" as the reason for separation.

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.[60] 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.[61]

In the instant case, grievant had previously notified the agency that his resignation would be effective on June 30, 2005 – the same date on which the agency removed him from employment. Grievant affirmed that he does not want to be reinstated. Accordingly, but for grievant's resignation, this decision normally would have ordered the agency to reinstate grievant because grievant substantially prevailed in this discharge grievance. Therefore, grievant is entitled

[60] Va. Code § 2.2-3005.1.A.

[61] § 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.

to recover a reasonable attorney's fee, which cost shall be borne by the agency.[62] Grievant's attorney has already submitted a fee petition which was addressed in a Fee Addendum issued on May 11, 2006. Grievant's attorney is herewith informed that the agency is not obligated to make payment until such time as all administrative reviews have been decided in grievant's favor.[63]

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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 14th St, 12th floor
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

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[62] Va. Code § 2.2-3005.1.A & B.

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

You may request a judicial review if you believe the decision is contradictory to law.[64] 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.[65]

[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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David J. Latham, Esq.
Hearing Officer

[64] 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).

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Virginia Department of Transportation
July 11, 2006

The Department of Transportation (VDOT) has requested an administrative review of the hearing officer's decision in Case No. 8298. The grievant was issued a Group III Written Notice with termination. He filed a grievance to have the disciplinary action reversed. In a decision dated April 5, 2006, the hearing officer reduced the Group III Written Notice with termination to a Group II Written Notice with a ten-day suspension. VDOT officials contend that, because the grievant became employed at another agency before the hearing officer's decision had been issued, the ten-day suspension part of the hearing officer's decision could not be enforced. Agency officials requested that the hearing officer reconsider his decision. In his reconsideration decision the hearing officer did not change his original decision. Upon appeal by VDOT to the Department of Employment Dispute Resolution (EDR), EDR directed that the hearing officer revise his decision so it could be enforced. Accordingly, the hearing officer revised his decision. The agency head of the Department of Human Resource Management has asked that I respond to this request for an administrative review.

FACTS

The Virginia Department of Transportation employed the grievant as a toll facilities administrative director, hiring him as director in September 2003. Among the first things he did as director was to implement some changes and to tighten work hour requirements. This in turn caused some employees to become disgruntled. In April 2004, the grievant decided to hire an administrative assistant and accomplished that through an employment agency. The successful candidate was his wife who was hired by one of his subordinates and reported to that subordinate. Approximately a week later his son was hired through the same temporary agency to work at VDOT for the summer.

In the meantime, one of the grievant's subordinates noticed that the grievant was using a state vehicle to commute to work and advised him to secure written permission to use the vehicle for that purpose. He did not obtain that permission. Later the district equipment manager advised him that he needed to secure authorization to commute in the vehicle but he refused.

In October 2004, a hotline call to the state Department of Internal Auditors indicated that the grievant was using a state-owned vehicle to commute to work, had used his influence to employ his wife and son in subordinate positions in his department, gave his wife preferential treatment, improperly created new positions, abused his authority in the hiring process, and misused travel funds. An investigation was conducted and only two of the six charges were substantiated – use of a

state-owned vehicle for commuting without proper authorization, and violation of the nepotism statute and state policy by employing both his son and his wife in subordinate positions. The internal auditor's investigative report was completed on June 20, 2005 and a decision was made to discipline and remove the grievant from employment, effective June 30, 2005, notwithstanding his resignation.

Sometime in March 2005, the grievant began to seek employment elsewhere. On or about June 16, 2005, he received an offer of employment from another state agency and he accepted. He submitted his resignation on June 16, 2005, to be effective on June 30, 2005. During discussions leading up to his termination of employment, agency officials told him that his resignation would state "resignation in lieu of termination." The agency issued him a Group III Written Notice and separated him from state service, effective June 30, 2005. He filed a grievance and in a decision dated April 5, 2006, the hearing officer reduced the Group III Written Notice with termination to a Group II Written Notice with a ten-day suspension.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states as its objective, "It is the Commonwealth's objective to promote the well being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive.

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, the DHRM 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.

In the instant case, the hearing officer determined that, based on the evidence, the grievant had used a state-owned vehicle for commuting without proper authorization and had hired his wife and son to work in subordinate positions in his own department. These findings were the same as the two violations confirmed by the investigator from the Department of Internal Auditors.

Concerning mitigating factors, the hearing officer stated, in part, "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 record – both of which constitute mitigating circumstances. In addition, the fact that grievant's supervisor authorized the hiring of grievant's wife constitutes a significant mitigating circumstance…Given these mitigating circumstances, and in the absence of any aggravating circumstances, it is concluded that a reduction in discharge is warranted. Although the violation of the nepotism statute might be a

Group III offense in other circumstances, grievant's heavy reliance on his supervisor's approval to hire his wife and the other mitigating circumstances discussed above are sufficient reason not to impose a Group III Written Notice. Accordingly, both offenses are deemed failures to comply with established written policy." Thus, the hearing officer reduced the Group III Written Notice with termination to a Group II Written Notice with a ten-day suspension.

Concerning the ten-day suspension, the agency filed an appeal with DHRM and requested the hearing officer to reconsider his decision because the agency could not execute the ten-day suspension since the grievant is now employed at another state agency. In his reconsideration decision, the hearing officer stated, in part, "When the hearing officer issued the decision, **he recognized that the agency would be unable to impose a suspension since grievant had already voluntarily left the agency. (Emphasis Added)** Nonetheless, a hearing decision must be made based upon a reasoned evaluation of what level of discipline is *appropriate to the offense*. A disciplinary action consisting of only a written notice suggests that the offense is less serious than if the discipline includes both a written notice and a suspension. In this case, after careful consideration, the hearing officer concluded that the appropriate disciplinary action should include a suspension as well as a written notice. The grievant's personnel record should reflect the actual discipline imposed by the hearing officer. It would be inappropriate for the hearing officer to reduce the level of discipline merely because the agency is unable to effectuate a portion of the discipline for technical reasons." Thus, the hearing officer did not modify his original decision.

In the instant case, the hearing officer's decision to reduce the Group III with termination to a Group II with a ten-day suspension is within the scope of his authority and consistent with the Standards of Conduct policy. However, because the decision could not be fully executed by the agency, the Department of Employment Dispute Resolution directed the hearing officer to revise the decision so that the agency could execute it. The hearing officer, in turn, issued a revised decision in which the Group III Written Notice only was reduced to a Group II Written Notice. Thus, there is no need for the Department of Human Resource Management to intercede in this matter.

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