

Issue: Group III Written Notice with termination (misuse of state funds); Hearing Date: 05/25/06; Decision Issued: 06/08/06; Agency: DMV; AHO: Sondra K. Alan, Esq.; Case No. 8330; Outcome: Employee granted partial relief; **Administrative Review: HO Reconsideration Request received 06/21/06; Reconsideration Decision issued 07/20/06; Outcome: Original decision reversed, agency upheld in full; Administrative Review: EDR Ruling Request received 06/21/06; EDR Ruling No 2006-1384 issued 08/01/06; Outcome: HO's reconsideration decision affirmed; Administrative Review: DHRM Ruling Request received 06/21/06; DHRM Ruling issued 12/18/06; Outcome: Issue is now moot. HO's Reconsideration Decision affirmed.**

## DECISION OF HEARING OFFICER

In re:

Case No. 8330

Hearing Date: May 24, 2006  
Decision Issued: June 8, 2006

### PROCEDURAL ISSUES

Grievant received a written notice of termination dated December 1, 2005.<sup>1</sup> On January 17, 2006, Grievant filed an expedited grievance. The second step meeting was held on February 23, 2006 with an opinion letter issued March 14, 2006 which upheld the first determination.<sup>2</sup> On March 21, 2006, through her attorney, Grievant requested a hearing before a hearing officer which was qualified on April 3, 2006 and received by the hearing officer on April 17, 2006. A pre-hearing conference was scheduled for May 2, 2006 and rescheduled for May 10, 2006. The hearing commenced on May 24, 2006 at 11:15am.

### APPEARANCES

Agency's advocate  
Agency representative  
3 witnesses for Agency  
Grievant's attorney  
Grievant

### ISSUES

Did Grievant violate any written standards of conduct or other written policy of the Agency? Did the Agency take appropriate disciplinary action? Was the discipline properly classified? Should mitigating circumstances be taken into account?

### FACTS

Grievant was a 25 year employee of her Agency and held the position of assistant manager. On October 12<sup>th</sup>, 13<sup>th</sup>, and 14<sup>th</sup>, 2005, Grievant put personal checks in her cash drawer and withdrew an identical amount of cash. Copies of the fronts and backs of each of these three checks were submitted as evidence.<sup>3</sup> Two of the three checks were stamped by the

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<sup>1</sup> Agency Exhibit L

<sup>2</sup> Agency collective Exhibit M

<sup>3</sup> Agency Exhibit C, check fronts

bank as “insufficient funds” and returned to the Agency. The third check also apparently bounced. Grievant handled these check transactions in her own cash drawer and supplied false data on the back of the checks.<sup>4</sup> Also, in order for her cash drawer to be balanced, Grievant had to supply false information to the transaction sheet.<sup>5</sup> Grievant may also have engaged in this practice prior to October 2005 but her checks were unnoticed.

When questioned regarding her personal checks, Grievant told the investigator the first check was written as an accommodation loan to an Agency customer, another check was written to cover a shortage in her cash drawer for the date it was written. Neither of these statements were true and were later recanted by Grievant.<sup>6</sup> All checks were either eventually honored by the bank or reimbursed to the Agency.

Grievant also borrowed large sums of money from fellow employees who were her subordinates.

On November 9, 2005, Grievant received a letter from her superior as a result of an investigation into Grievant’s activities and placed on administrative leave.<sup>7</sup>

The letter stated that failure to comply with established policy is a group two offense and misuse of state funds is a group three offense. She was invited to respond to the letter and was told she was on administrative leave. On, December 1, 2005, Grievant received a formal Written Notice stating that she was terminated under one Group III action which was described as “misuse of state funds” which infraction is listed as an example of a Group II (e) offense.<sup>8</sup> The Notice stated that her work history was considered but did not mitigate the action. After filing a grievance, Grievant had a meeting with her district manager on February 23, 2006 for a second step resolution meeting. By letter issued March 14, 2006 the original disciplinary action was upheld stating the reasons being that she had taken cash from her cash drawer and had borrowed funds from a fellow employee.<sup>9</sup>

Oral testimony confirmed that any checks that were “floated” by Grievant were either cashed by the bank or reimbursed by Grievant. Grievant testifies she was a 25 year term employee with a good record which statement was not disputed. She further testified she had long term financial difficulties regarding her late husband’s estate and was depressed by her father’s illness at the time of the incidences. She presented a letter that she was currently seeking professional counseling.<sup>10</sup> Grievant stated her mother was now handling her financial affairs.

#### APPLICABLE LAW

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<sup>4</sup> Agency Exhibit C, check backs

<sup>5</sup> Agency collective Exhibit D

<sup>6</sup> Agency Exhibit B, page 3 “interview with Grievant”

<sup>7</sup> Agency Exhibit J

<sup>8</sup> Agency Exhibit K, Standards of Conduct policy 1.60 V.B.2(e), page 6 of manual

<sup>9</sup> Agency Exhibit M

<sup>10</sup> Grievant Exhibit 1

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 her evidence first and must prove her claim by a preponderance of the evidence.<sup>11</sup>

To establish procedures on Standard of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Virginia 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.

In considering disciplinary actions, a hearing officer should consider that Agencies may issue a written notice for an offense not specifically listed in the Standards of Conduct.<sup>12</sup> In all circumstances, however, the employee must receive notice of the charge in sufficient detail to allow the employee to provide an informed response to the charge.<sup>13</sup> Mitigating circumstances should be considered.<sup>14</sup>

#### OPINION

There is overwhelming evidence that Grievant did, in fact, commit egregious behavior during her employment. She did, in fact, do the acts reported on her Written Notice. In addition, she did falsify records and make personal transactions, both of which were either a Group III offense or against Agency policy as a lesser offense. However, her Written Notice did not charge these offenses. The act of which she was formally accused, *misuse of state funds*,

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<sup>11</sup> §5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

<sup>12</sup> Agency Exhibit K, Standards of Conduct, policy 1.60 V.A., page 5 of manual

<sup>13</sup> EDR Rules for Conducting Grievance Hearings VI B, Disciplinary Actions

<sup>14</sup> EDR Rules for Conducting Grievance Hearings VI B (1) Disciplinary Actions

was defined as a Group II offense.<sup>15</sup> The Agency points out that the list of offenses are only examples and, *if not listed, the offense may be viewed according to its severity.*<sup>16</sup> However, at no point was a Written Notice given or amended stating anything other than a clear Group II charge that was called a Group III action.

While the mitigating fact that she had been a good employee for 25 years may have been in her favor, the facts presented by Grievant of her lack of financial management skills certainly shed no positive light on her situation. That all cash property of the Agency was returned supports the charge that the property was misused and not stolen, but is not a considered mitigating circumstance in this case.

### DECISION

The Group III disciplinary action is reversed and a Group II Notice as defined in the Written Notice given to Grievant is upheld. The Agency may impose any and all sanctions available for a Group II action. Since the maximum pay withholding for a Group II action is 10 days, all remaining back pay and benefits shall be reinstated. Grievant's reinstatement to an employment position should take into account Grievant's lack of ability to handle financial affairs.

### APPEAL RIGHTS

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

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director  
Department of Human Resource Management  
101 N. 14<sup>th</sup> St, 12<sup>th</sup> Floor  
Richmond, VA 23219

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

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

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<sup>15</sup> Agency Exhibit K, Standards of Conduct Policy 1.60 V.B.(2)(e)

<sup>16</sup> Agency Exhibit K, Standards of Conduct Policy 1.60 V.A.

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

You may request a judicial review if you believe the decision is contradictory to law.<sup>17</sup> You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>18</sup>

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

#### Judicial Review of Final Hearing Decision

Within thirty (30) 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.

#### Attorney's Fees

An attorney who represents a Grievant may under certain circumstances apply for attorney's fees within **fifteen (15) calendar days** of the date the decision was issued. The Agency may contest the request.<sup>19</sup>

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/sig/

Sondra K. Alan, Hearing Officer

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<sup>17</sup> An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation, or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

<sup>18</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

<sup>19</sup> EDR Rules for Conducting Grievance Hearings VI D

DECISION OF HEARING OFFICER

In re:

Case No. 8330

Hearing Date: May 24, 2006  
Decision Issued: June 8, 2006

Reconsideration Decision Issued: July 20, 2006

APPEARANCE BY BRIEF

Brief by Agency Advocate received 6/26/06<sup>20</sup>  
Reply Brief by Grievant's attorney received 7/3/06<sup>21</sup>

RECONSIDERATION DECISION

Grievance Procedure Manual §7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ..." to grant the request. The Hearing Officer grants the Agency's request for reconsideration.

The *Rules for Conducting Grievance Hearings* state:

In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

In support of this principal, the *Rules* cite O'Keefe v. USPS, 318 F.3d 1310 (Fed. Cir. 2002). In O'Keefe, the agency removed an employee with the general charge of "improper conduct/fraudulent use of personal identifiers." The Court reversed the agency's action because the facts and reasons for the removal were not written in the Notice of Proposed Removal given to the employee.

The only question to be addressed in this reconsideration is this:

Did the Grievant receive sufficient notice in her Written Notice to know the facts and reasons for her removal?

It has already been established that the Agency has some discretion to decide the nature and severity of the employee's malfeasance. The action or event of which the employee

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<sup>20</sup> Exhibit A to Reconsideration

<sup>21</sup> Exhibit B to Reconsideration

is accused need not be one illustrated by example in the Standards of Conduct.<sup>22</sup> While not stated in the manual, it stands to reason that if an already established misconduct is alleged, the Agency should strive to use the already established illustration. Most Agencies make a rule that all employees are to read the Standards of Conduct as an incident of their employment. This puts employees on notice of which actions they may consider offensive and what discipline is to be expected from offensive behavior. "New" categories of misconduct are always going to present problems of notice.

In the herein case, the Agency had ample opportunity to use well established criteria. For instance, calling each of the three misuses of checks in the cash drawer as a Group II "misuse of state property" offense<sup>23</sup> would have been three Group II offenses and would have been equivalent to a Group III discipline, or the "Falsifying any records..."<sup>24</sup> alone would have been an established Group III action.

All state agencies are in a contract-bound relationship with their employees and should realize that although they have the power to create a new offense category, it should be done most sparingly, very carefully worded, and an explanation given for why creation of a new category is absolutely necessary.

The Agency's Advocate's request for reconsideration contains the argument that there is a distinction between the words "property" and "funds." In this light, it appears a new example has been created in the Group III category of "Misuse of State Funds." The explanation of this offense in Grievant's Written Notice was "on October 12, October 13, and October 14, 2005, you placed your personal checks in your cash drawer and then withdrew the cash. These checks were returned for insufficient funds. Additionally, you admitted to this activity 'two or three' other times ...."<sup>25</sup> This should be sufficient notice of the offense for Grievant to defend herself.

The Agency further believes that additional offenses could be added at any time so long as there is "sufficient notice" before the hearing. The Agency apparently wished to bring an additional offense of "borrowing from a subordinate" as a cause of action. Additional charges outside the Written Notice will not be considered as a valid reason to discharge this Grievant. While it is not unheard of to add additional offenses after the initial Written Notice, this too creates confusion and issues of notice. This Hearing Officer would recommend when additional charges are brought, an Amended Written Notice should be issued to the Grievant.

Because the Agency does have the power to create definitions of unique offenses and decide upon the severity of the offense and further, because the agency has adequately made the distinction between "funds" and "property" and further, because the employee's behavior was egregious as stated in the original opinion, the Hearing Officer Opinion of June 8, 2006 is reversed and the Group III discipline action is **upheld**.

## APPEAL RIGHTS

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<sup>22</sup> Standards of Conduct, 1.60 V.A.

<sup>23</sup> Standards of Conduct 1.60 VB2e

<sup>24</sup> Standards of Conduct 1.60 VB3b

<sup>25</sup> Agency Exhibit L Written Notice of 12-1-05



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 office has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty (30) 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

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Sondra K. Alan, Hearing Officer

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Motor Vehicles  
December 18, 2006

The agency, through its representative, has requested an administrative review by the Department of Human Resource Management of the hearing officer's decision in Case Number 8330. The agency objects to the hearing officer's decision because the agency contends that the hearing officer's decision is inconsistent with state and agency policy and, more particularly, does not comply with the Standards of Conduct. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this administrative review request.

FACTS

The Department of Motor Vehicles (DMV) employed the grievant as an Assistant Manager in a small branch office (4 employees). The services provided by the customer service center of that office provides driver, dealer, motor carrier, vehicle registration, titling, tax collection and other DMV services. The grievant's duties included understanding and ensuring compliance with agency accountability procedures for daily processing, inventory control and administrative functions. In addition to her teller duties, she was to ensure the proper processing, settling and auditing of monies and transactions.

According to the evidence, on October 12, 13 & 14, 2005, the grievant placed personal checks in her cash drawer in the amounts of \$125, \$100, and \$50, respectively. She then took an equivalent amount of cash from the drawer, effectively using the agency as a check cashing conduit. There were insufficient funds to cover the checks so they were returned by the bank to the agency's central office. Because the checks "bounced", the central office contacted the grievant's supervisor who promptly sent an email to her supervisor – the district manager. A subsequent investigation revealed that over several months, the grievant had been writing personal checks and cashing them through her DMV cash drawer.

Based on the above, and other findings, the agency placed the grievant (the assistant manager) on administrative leave by giving her a due process letter advising her of the allegations. The grievant attempted to justify her actions but the agency did not feel that the justifications were sufficient and issued to her a Group III Written Notice with termination for misuse of state funds. She filed a grievance and the hearing officer issued a decision in which

she reduced the disciplinary action to a Group II Written Notice with reinstatement and appropriate backpay. The relevant policy, the Department of Human Resource Management's Policy No.1.60, states that 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. However, these examples are not all-inclusive.

### DISCUSSION

A hearing officer is 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.

In the present case, the hearing officer determined that there was sufficient evidence to support the allegations the agency made against the grievant and for taking disciplinary action. There is indisputable evidence that on three occasions, October 12, 13 & 14, 2005, the grievant placed personal checks in her cash drawer in the amounts of \$125, \$100, and \$50, respectively. She then took an equivalent amount of cash from the drawer, effectively using the agency as a check cashing conduit. The evidence also supports that on other occasions she had borrowed money from subordinate employees. However, because the Standards of Conduct policy lists ***misuse of funds*** as a Group II Written Notice, the hearing officer reduced the disciplinary action to correspond to that level of discipline.

The DMV requested that the hearing officer reconsider the decision and in the reconsideration decision she reversed her original decision. In her reconsideration decision, the hearing officer stated that one issue needed to be addressed –

whether the grievant received sufficient notice in her Written Notice to know the facts and reasons for her removal. She issued her reconsideration decision and upheld the Group III Written Notice with termination. In her reconsideration decision she stated the following:

Because the Agency does have the power to create definitions of unique offenses and decide upon the severity of the offense and further, because the agency has adequately made a distinction between “funds” and “property” and further, because the employee’s behavior was egregious as stated in the original opinion, the Hearing Officer’s Opinion of June 8, 2006 is reversed and the Group III discipline action is **upheld**.

Because the hearing officer has reversed her original opinion, the request by DMV to have this Agency issue an administrative decision is moot and need not be addressed further.

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Ernest G. Spratley  
Manager, Employment  
Equity Services