Issues: Group III Written Notice with termination (failure to report outside employment and falsifying records); Hearing Date: 04/24/07; Decision Issued: 04/26/07; Agency: Dept. of Mines, Minerals and Energy; AHO: David J. Latham, Esq.; Case No. 8567; Outcome: Employee Granted Full Relief. **Administrative Review: HO Reconsideration Request received 05/11/07; Outcome pending; Administrative Review: EDR Ruling Request received 05/11/07; Outcome pending; Administrative Review: DHRM Ruling Request received 05/11/07; DHRM Ruling issued 05/21/07; Outcome: HO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:
Case No: 8567

Hearing Date: April 24, 2007
Decision Issued: April 26, 2007

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Agency Party
Attorney for Agency
Three witnesses for Agency

ISSUES

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

FINDINGS OF FACT

Grievant filed a grievance from a Group III Written Notice for failing to notify the agency that he was engaged in outside employment and for

falsification of Conflict of Interest forms.[1] As part of the disciplinary action, grievant was removed from state employment effective January 22, 2007. At the second resolution step grievant provided evidence that he had not been engaged in outside employment and the agency removed that alleged offense from the Written Notice. The agency upheld the falsification of records charge and its decision to terminate grievant's employment. 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 Department of Mines, Minerals and Energy (Hereinafter referred to as "agency") has employed grievant as a mineral specialist for 22 years.

In July 2006, grievant learned of a recruitment notice[3] for a mineral mine inspector position and submitted his application. The only employment he listed in his application other than his agency position was two summer jobs with a coal mining company before he had been hired by the agency.[4] The law requires that mine inspectors shall hold a certificate as a mine foreman and, a certificate as a mine inspector issued by the Board of Mineral Mining Examiners.[5] In order to be either a foreman or a mine inspector, the law also requires that Board of Mineral Mining Examiners may require certification of the applicant.[6] Applicants for a foreman certificate shall have had at least five years of experience at mineral mining or other experience deemed appropriate by the Board of Mineral Mining Examiners.[7] The Code further provides that applicants for certification as a surface foreman shall possess five years mining experience, at least one year at a surface mineral mine, or equivalent experience approved by the agency's Division of Mineral Mining (DMM).[8]

During an initial interview for the position, and in discussions with the agency's certification program manager, grievant learned that his work experience would be insufficient to meet the five-year certification requirement. Grievant told the certification manager that he had performed unpaid work and observed his father at a mine in West Virginia. The manager advised grievant to submit work experience forms for all work experience, whether paid or unpaid, so that the agency could evaluate his actual experience and knowledge. Grievant followed the advice and filled out work experience forms for summer jobs he had with a trucking company in which his father was a part owner,[9] and for a coal company at which his father was a foreman;[10] both of these jobs were prior to grievant being employed by the agency. Grievant also submitted an experience form stating that he was intermittently assistant superintendent at a golf course

[1] Agency Exhibit 16. Group III Written Notice, January 22, 2007.
[2] Agency Exhibit 19. Grievance Form A, filed January 26, 2007.
[3] Agency Exhibit 1. Recruitment Notice, July 6, 2006.
[4] Agency Exhibit 2. Application for Employment, July 22, 2006.
[5] Va. Code § 45.1-161.292:11. Qualifications of mine inspectors generally.
[6] Va. Code § 45.1-161.292:19. Certification of certain persons employed in mineral mines; powers of Board of Mineral Mine Examiners.
[7] Va. Code § 45.1-161.292:29. Foreman certification.
[8] 4 VAC 25-35-60. Surface foreman.
[9] Agency Exhibit 12. Work Experience Form, trucking company.
[10] Agency Exhibit 13. Work Experience Form, coal company.

for a total of 19 months from 2004-2006.[11] Grievant submitted a fourth work experience form stating that he had been employed on three occasions for a total of eight months between 2001 and 2006 as an equipment operator at a surface mine in West Virginia where his father was then foreman.[12] Even though grievant was not paid at either the golf course or the West Virginia mine, he put in his time at those jobs only on weekends, holidays, or when using annual leave.

Because both of the latter two jobs appeared to be outside employment while grievant was employed with the agency, the forms were referred to the director of grievant's current division to determine whether there was anything improper. The agency then contacted the surface mine company and was advised by letter that a person with grievant's name had been employed there since 1990.[13] Based on that letter, the division director concluded that grievant had performed outside employment without permission and confronted grievant with the information on January 22, 2007. Grievant explained that the person who had been employed since 1990 at the coal mine was his father, who has the same first name as grievant. Notwithstanding this explanation, the division director immediately issued the disciplinary action and discharged grievant.

Subsequent to the termination of grievant's employment, the agency decided to check out grievant's explanation. It again contacted the coal company and learned that grievant was correct. The initial letter sent by the coal company had provided information about the employment record of grievant's father – not about grievant. The coal company verified that it had no record of grievant, that it was unaware of grievant's existence, and that he had never been employed by the company.[14] At the second step resolution meeting on February 5, 2007, grievant confirmed what the coal company's letter stated. Four days later, the division director wrote to grievant acknowledging that he had made an error.[15] He accepted the fact that grievant had not been employed by the coal company and was not in violation of the outside employment section of Policy 1.60.[16] However, the division director decided that termination of grievant's employment should stand because the work experience form stated that grievant was "employed as an equipment operator." Since grievant was, in fact, not "employed" because he was not paid, the director determined that the assertion was a falsification of a state document.

Grievant has two inactive disciplinary actions – a Group I Written Notice for a conviction of improper driving in a state vehicle,[17] and a Group III Written

[11] Agency Exhibit 15. Work Experience Form, golf course.
[12] Agency Exhibit 14. Work Experience Form, mining company in West Virginia.
[13] Agency Exhibit 16. Letter from mining company to agency, January 16, 2007.
[14] Agency Exhibit 17. Letter from mining company to agency, January 22, 2007.
[15] Agency Exhibit 18. Letter from division director to grievant, February 9, 2007.
[16] Agency Exhibit 27. Section III.E.1 & 2, Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.
[17] Agency Exhibit 21. Group I Written Notice, July 19, 1985.

Notice for failure to report damage to a state vehicle and attempting to repair the damage without permission.[18]

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.[19]

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

[18] Agency Exhibit 20. Group III Written Notice, November 1, 1995. [NOTE: Unproffered exhibit # 26 is an active Group II Written Notice. However, the agency acknowledged that it had rescinded this disciplinary action and only counseled grievant about the incident. Since this action has been rescinded, it should not have been submitted as potential evidence.]

[19] § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

nature that a first occurrence normally should warrant removal from employment.[20] The policy provides that one example of a Group III offense is falsification of state records or documents.

At the second resolution step, the agency revised the disciplinary action to reflect that grievant was not in violation of the prohibition against outside employment without permission. Because grievant was, in fact, not employed outside the agency, the Conflict of Interest forms were not falsified. These were the only two offenses cited on the Written Notice when grievant was removed from employment on January 22, 2007. When the agency recognized that neither of these charges had merit, it attempted to justify grievant's removal by asserting that the work experience form's statement that grievant was an equipment operator constitutes a falsification of a state document.

However, the unrebutted evidence established two facts that negate the agency's assertion. First, grievant did not sign the work experience form at issue. Grievant's father read and signed the form because he agreed with what his son had written on the form. Second, grievant's father testified that grievant had, in fact, operated equipment during his time at the mining operation and that the work performed by his son fit that job description better than any other description.

More significantly, the agency form given to grievant to verify his work experience does not specify that it is to be used only for *paid* work experience.[21] The agency did not contend that there is any separate form that should be used for *unpaid* work experience. When the certification program manager encouraged grievant to submit <u>all</u> of his work experience, he did not tell grievant to put his unpaid experience on a different form. In fact, the manager testified that his primary interest was to assess an applicant's actual work experience regardless of whether that experience was paid or unpaid. Accordingly, the form may be used for both *paid* and *unpaid* work experience. Given the limitations of the form, grievant cannot be held accountable for what his father agreed to when he signed and certified the form as correct. Moreover, grievant relied on the certification program manager's reassurance that work experience was the key – not whether it was paid. The agency has not demonstrated, by a preponderance of evidence, that grievant intentionally falsified the work experience forms.

The agency points out that grievant's applications for certification examination forms contain incorrect information which the agency considers to be a falsification of those documents.[22] Specifically, grievant has stated on each of the three applications that he was employed at a surface mineral mine for three years and six months. In fact, the total amount of time grievant was at the two mining operations and trucking company (according to the work certification

[20] DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.
[21] Agency Exhibit 29. Certification package given to grievant by agency.
[22] Agency Exhibits 4, 5, & 6. Application for Certification Examination, October 11, 2006, October 18, 2006, and October 26, 2006, respectively.

forms - Agency Exhibits 12, 13, & 14) was no more than one year and ten months. It is unclear why grievant's total was greater than the actual amount. Grievant asserts that he added up the time and arrived at his figure. The agency suggests this was a deliberate falsification; grievant maintains that it was a mathematical error.

The evidence does not resolve this issue. However, it appears more likely than not that it was not a deliberate falsification. Grievant knew that the application forms and the work experience review forms would both be reviewed by the certification manager. It would have been pointless to deliberately misstate information on the examination application forms when it could easily be cross-checked against the more detailed information on the work experience forms. It is probable that grievant miscalculated the total. In any case, the certification manager relied on the more detailed work experience forms to reach his assessment that grievant had insufficient work experience for certification.[23]

Moreover, the agency did not charge grievant in its Written Notice with falsification of the examination application forms. It did not raise this issue when it revised the Written Notice at the second resolution step. In fact, it appears that this issue was first raised during this hearing, thereby giving grievant no opportunity to prepare a defense. In view of the fact that grievant was not afforded appropriate due process on this issue, it would be inappropriate to uphold the disciplinary action for this alleged offense which was not raised until the hearing. Even if this offense could be added, it appears more likely than not that the misstatement was not deliberate for the reasons stated above.

The agency has challenged grievant's credibility by pointing out that 12 years ago grievant failed to report an accident with the agency vehicle. However, grievant was disciplined and suspended for that offense and there has not been any subsequent failure to report accidents. The agency also points to grievant's job application for the inspector position in which he stated that he had never been convicted of a moving traffic violation. In fact, grievant was disciplined 22 years ago for a conviction of a moving traffic violation. It is possible that, as grievant suggests, he had forgotten about that incident because it occurred so long ago. Moreover, the agency considered this offense to be among the least serious since it issued only a Group I Written Notice at the time. The agency has not asserted that this long inactive disciplinary action would have adversely affected his application for the inspector position if grievant had otherwise been qualified. Even if this were to be considered as an aggravating circumstance, it would be given relatively little weight because of its remoteness in time.

Finally, the agency notes that on his job application, grievant asserts that he supervises seven mineral specialists in his current position. In fact, grievant is not a supervisor, however, he was asked on occasion to be a temporary acting supervisor during the supervisor's absence. Since grievant was applying for a position within the agency, and since those reviewing his application are familiar

[23] Agency Exhibit 8. Letter from manager to grievant, January 11, 2007.

with grievant's mineral specialist position, they know that grievant is not a supervisor. This issue would be resolved during the interview process once grievant explained, as he testified during this hearing, that he was an acting supervisor on occasion. Thus, while grievant should have clarified his statement on the application form, the statement is not an aggravating circumstance.

DECISION

The disciplinary action of the agency is reversed.

The Group III Written Notice and grievant's removal from employment are hereby RESCINDED. Grievant is reinstated to his former position or, if occupied, to an objectively similar position. Grievant is awarded full back pay, and benefits and seniority are restored. The award of back pay must be offset by any interim earnings, and by any unemployment compensation received.

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.[24] 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.[25]

Therefore, grievant is entitled to recover a reasonable attorney's fee, which cost shall be borne by the agency.[26] Grievant's attorney is herewith informed of her obligation to timely submit a fee petition to the Hearing Officer for review.[27]

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.

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[24] Va. Code § 2.2-3005.1.A.

[25] § 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.

[26] Va. Code § 2.2-3005.1.A & B.

[27] *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.

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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[28] 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.[29] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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]

[28] 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).

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

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David J. Latham, Esq.
Hearing Officer

May 21, 2007

RE: Grievance v. Department of Mines, Minerals & Energy
Case No. 8567

The Agency head, Ms. Sara Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, as advised on pages 7 and 8 of the hearing decision, either party to the grievance may file for an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that 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.

In reference to item number 2 above, you have not identified any Department of Human Resource Management or Department of Mines, Minerals, and Energy policy with which the hearing officer's decision is inconsistent or violates. Rather, it appears that the issues you raised are related to how the hearing officer assessed the evidence and how much weight he placed on that evidence. The authority of DHRM is restricted to reviewing issues related to the application and interpretation of policy. Absent any identified, specific policy violation committed by the hearing officer in making his decision, this Agency has no basis to interfere with the application of this decision.

If you have any questions regarding this correspondence, please contact me at (804) 225-2136 or 1 (800) 533-1414.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity Services