Issue: Group III Written Notice (excessive unauthorized leave); Hearing Date: 12/04/07; Decision Issued: 12/07/07; Agency: DCR; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8728; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: EDR Administrative Review Request received 12/20/07; EDR Ruling #2008-1896 issued 14/16/08; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 12/17/07; DHRM Ruling issued 04/23/08; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case Nos. 8728

Hearing Date: December 4, 2007
Decision Issued: December 7, 2007

PROCEDURAL HISTORY

On July 20, 2007, Grievant, an agency accountant, was issued a Group III Written Notice of disciplinary action based on the Grievant's unauthorized absences from work over the course of a year (2006). Grievant was required to reimburse for the unauthorized leave the amount of $9,697.75, based on over 397 hours of unaccounted leave. Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On October 31 2007, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution. The hearing was scheduled for the first date available for the parties and their representatives. On December 4, 2007, the hearing was held at the Agency's headquarters. For good cause shown, including the availability of the parties and their representatives, the timeline for completing the hearing and opinion was extended.

Both sides submitted exhibit notebooks with numbered exhibits that were, without objection from either side, admitted into the grievance record and will be referred to as Agency's or Grievant's Exhibits, numbered respectively, as necessary to explain this decision.

APPEARANCES

Grievant
Counsel for Grievant
Advocate for Agency
Representative for Agency
Three witnesses for Agency (including Agency Representative)

ISSUES

Whether Grievant should receive a Group III Written Notice of disciplinary action.

The Grievant requests reduction of the Written Notice and a reduction in the determined amount of unauthorized leave for reimbursement.

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.

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

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Agency Exhibit 9.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in

the interest of maintaining a productive and well-managed work force." Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

Facts

The Written Notice described the nature of the offense as follows, in pertinent part:

> Upon receipt of a Fraud Hotline complaint regarding [the Grievant's] work hours, the [Agency's] Internal Auditor conducted an audit of the arrivals and departures at the [Grievant's] parking lot from January 3, 2006 through December 15, 2006, the finding of 397.02 work hours cannot be accounted for through documented supervisory approved leave slips nor by any assigned job duty, which would have required [the Grievant] to arrive late or leave early. These unauthorized absences are so excessive (close to 10 workweeks of unauthorized and unaccounted for absences) as to suggest an apparent fraudulent use of paid state time, which equals $9,697.75 of over compensation.

Agency Exhibit No. 1.

The Agency's internal auditor testified to the receipt of the Fraud Hotline complaint, and the decision to audit the Grievant's secure parking lot access records to examine the Grievant's working hours. The Grievant's direct supervisor testified that she was aware of rumors of the Grievant taking unauthorized leave from work, but that the location of the Grievant's office, combined with the supervisor's other duties, made it difficult to "catch" the Grievant's unauthorized comings and goings. In a prior year, the supervisor previously counseled the Grievant on proper leave documentation and work hours expectation. The Grievant is an exempt, salaried employee, expected to work at least 40 hours per week, and his job was an office job over the course of 2006, not requiring off site duties.

The Agency's HR Director testified that he considered evidence presented by the Grievant, such as computer records showing that the Grievant had worked on documents on certain days when the parking lot records indicated absence, and those days were "credited" to reduce the number of unaccounted for hours. The HR Director offered to attempt research of electronic e-mail records if the Grievant wanted to pursue that angle to show actual presence at work contrary to the parking lot audit. The HR Director testified that the Grievant did not so elect. The Grievant testified that his information was that the e-mail records were unavailable.

The Grievant contends that he always completed his assigned work before leaving, other employees acted similarly, and that some instances of the parking lot audit can be accounted for by his letting his son take the car or when he moved his car to a street space for ease of exit. The grievance record indicates that the Grievant alleged that the Agency was guilty of retaliation

and/or discrimination against him, but he presented no testimony or evidence of retaliation at the actual grievance hearing.

The Grievant testified that he was aware that he should have been at work at least 40 hours each week. The Grievant admitted that he routinely left work early or arrived late, without permission or taking formal leave, but he asserted that the parking lot audit was not a true or fair measure of his missed time. The Grievant estimates that the true number of hours is about 100.

The Grievant's supervisor and the HR Director both testified that they carefully considered termination of the Grievant over this offense and the magnitude of the hours involved. They both testified that they considered a Group I or Group II offense, and believed, after consultation with the Attorney General's office that a Group III was appropriate. In fact, they testified that they could have elected to issue more than one group notice for multiple offenses instead of issuing just one. They both testified that they considered mitigating circumstances in electing not to terminate the Grievant. They considered as mitigating circumstances the Grievant's many years of service and his "contributor" performance ratings. The Agency issued the written notice promptly after conclusion of the internal investigation.

The Grievant contends that the proper level of discipline should be no greater than Group II. The Grievant points to the enumerated Group I offense of abuse of state time and the Group II offense of leaving the work site during work hours without permission. The Agency relies on the extent of the offense as tantamount to fraud, falsifying records, etc. The Standards of Conduct, in enumerating examples of the group offenses, expressly states that the listings are not all-inclusive, but are intended as examples. The Standards of Conduct specifically state

> any offense that, in the judgment of agency heads, undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.

Merits of Offense

The material facts are not disputed. The Grievant only disputes the number of hours calculated by the Agency's method using the parking lot records. While the Grievant contends that the number of unaccounted for hours for which he took unauthorized leave should be 100, that number, alone, is significant enough to warrant severe discipline. The Grievant's evidence on the extent of the hours calculated is not sufficient to rebut the Agency's presentation of evidence. The Agency presented a reasonable, credible basis for calculating the number of unauthorized hours taken by the Grievant. The Agency gave credit for instances shown by the Grievant of actual presence at work, such as modifying a computer document. I find that the Agency succeeded in proving (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy.

While difficult for the Grievant to recreate his year's worth of missed time, he conceded that there were not a great number of instances when his son might have taken his car from the lot while the Grievant remained at work, or of when the Grievant may have moved his car from the lot to a street parking space while remaining at work. I find the Agency met its burden of proof (more probable than not) of the unauthorized leave contained in the written notice. The Agency used a reasonable, credible means of establishing the Grievant's comings and goings provided by the secured parking lot access records. Further, I find that the Agency appropriately levied a Group III Written Notice because of the sheer magnitude of the number of hours missed during a year. I would find a Group III appropriate even for 100 hours of unauthorized leave.

Mitigation

The normal disciplinary action for a Group III offense is a Written Notice and termination. The Grievant submits that mitigating factors of otherwise commendable performance and his tenure of good standing should mitigate the discipline to a less severe level. The Agency witnesses testified credibly as to their mitigation against termination. This offense, while written up as one Group III, could conceivably support multiple Group offenses. The Agency exhibited measured restraint in issuing one written notice, and the Group III is an appropriate category given the extent of the hours missed (even considering the offense as one of 100 hours).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). EDR's Hearing Rules provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or … an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.

Hearing Rules § VI.B.1 (alteration in original). Therefore, if the agency succeeds in proving (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. Hearing Rules § VI.B. [1]

1 *Cf.* Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

In this case, the first two elements have been met. Regarding the third, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness. Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. Finally, I find that the discipline was not tainted by improper motive, such as retaliation or discrimination. In this case, the Agency's action in assessing a Group III offense and reimbursement is within the bounds of specific policy.

DECISION

For the reasons stated herein, I uphold the Group III Written Notice, required reimbursement, and other elements of the written notice as issued.

APPEAL RIGHTS

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

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

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

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

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

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-day period, in which the appeal

must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the Department
of Conservation and Recreation

April 24, 2008

The grievant has requested an administrative review of the hearing officer's decision in Case No. 8728. He based his appeal on several issues, among them the hearing officer has exceeded his authority by not complying with the provisions of state law, policies, and procedures. The agency head of the Department of Human Resource Management has requested that I respond to this appeal. The Department of Human Resource Management will not interfere with the application of this decision for the reasons stated below.

FACTS

The grievant is employed as an accountant senior by the Department of Conservation and Recreation (DCR). Based on a call to the Fraud, Waste and Abuse Hotline that he was abusing work time, the DCR conducted an audit on the times he entered and exited the parking lot and the times he entered and exited the building in which he worked. As a result of the audit, it was determined that the grievant, by either arriving late to work or leaving early, had used nearly 400 hours for which he could not account as being related to work outside his office. Management officials issued to the grievant a Group III Written Notice, modified his work schedule and directed that he reimburse the agency for the unaccounted for time. He was charged with the following:

> Upon receipt of a Fraud Hotline complaint regarding Sundersingh Bala's work hours, the DCR Internal Auditor conducted an audit of the arrivals and departures at the Monroe Building Parking Lot 05 from January 03, 2006 through December 15, 2006, the finding of 397:02 work hours cannot be accounted for through documented supervisory approved leave slips nor by any assigned job duty, which could have required Mr. Bala to arrive late or leave early. These unauthorized absences are so excessive (close to 10 workweeks of unauthorized and unaccounted absences) as to suggest an apparent fraudulent use of paid state time, which equals $9,697.75 of over compensation. (Please see attached spreadsheet that enumerates each workday, the arrival and departure times of building access identification card #26256, issued by the Virginia Department of General Services, Division of Engineering and Buildings (DGS), which according to DGS records is assigned to Sundersingh Bala.)

The grievant challenged the disciplinary action by filing a grievance. When he did not get relief through the management steps of the grievance procedure, he requested a hearing. In a decision dated December 7, 2007, the hearing officer upheld the agency's disciplinary action.

The hearing officer stated, in part, "I find the Agency met its burden of proof (more probable than not) of the unauthorized leave contained in the written notice. The Agency used a reasonable, credible means of establishing the Grievant's comings and goings provided by the secured parking lot access records. Further, I find that the Agency appropriately levied a Group III Written Notice because of the sheer magnitude of the number of hours missed during a year. I would find a Group III appropriate even for 100 hours of unauthorized leave."

The grievant raised the following in his appeal:

1. The Agency's action is not consistent with law and policy.
2. The Agency's discipline exceeds the limits of reasonableness.
3. The Hearing Officer favored the Agency and was biased.
4. The Hearing Officer ignored the Grievant's requests, the evidence produced for reduction of the Group III Written Notice, and the reduction in the determined amount of unauthorized leave for reimbursement.
5. The Grievant was singled out because of his national origin.
6. The Hearing Officer has no authority to make policies, rules, or issue punishments.

The Department of Human Resource Management will address only the policy issue, item numbers one and two listed above. All other items were addressed by the Department of Employment Dispute Resolution in an April 16, 2008, ruling.

The relevant policy is the Department of Human Resource Management's Policy No. 1.60 that states 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. The examples are not all-inclusive. Agencies may supplement this policy as they need or desire, as long as such a supplement is consistent with DHRM Policy 1.60.

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 action constitutes 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 this Agency or the agency in which the grievance is filed. Any challenge to the hearing decision must cite the inconsistency in the interpretation or application of 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 or procedure.

It is beyond dispute that the grievant committed the violation as charged by DCR management officials. The question is whether the disciplinary action exceeded the limits of reasonableness and if the hearing officer's decision was consistent with law and policy. This Agency has no authority to address matters of law. Therefore, we will address only the policy issue.

The Standards of Conduct policy (Policy No. 1.60) provides examples of offenses for agencies to consider for Group I, II or III written notices. However, DHRM has always noted that these examples are not all-inclusive and should only serve as illustrations of minimum expectations for acceptable workplace conduct and performance. The grievant is correct that attendance issues are addressed under the examples for Group I (Tardiness; poor attendance; abuse of state time) and Group II (leaving work without permission; failure to report to work as scheduled without proper notification to supervisor) written notices. The policy also provides that in extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. In this particular case, the agency spent considerable effort in gathering evidence which overwhelmingly supported that the grievant committed the violations with which he was charged. DCR also provided the benefit of any doubt to grievant and reduced the number of questionable hours that he was not at work. Even with the reduction, the number of work hours that could not be accounted for was 397.02, and the monetary impact was $9,697.75, an amount that must be repaid to the Commonwealth. The number of hours represents 19 percent of the work year. This offense was considered to be so egregious that it could have resulted in termination. Thus, this Agency has no basis to interfere with the application of this hearing decision.

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Ernest G. Spratley, Assistant Director
Office of Equal Employment Services