

Issues: Group III Written Notice (failure to follow policy, misuse of State equipment, abuse of State time); Hearing Date: 05/08/08; Decision Issued: 05/09/08; Agency: Dept. of Health Professions; AHO: Carl Wilson Schmidt, Esq.; Case No. 8824, 8833; Outcome: Partial Relief; **Administrative Review: DHRM Review Request received 05/22/08; DHRM Admin Review Ruling issued 06/18/08; Outcome: HO's decision affirmed; Attorney's Fee Addendum issued 07/03/08;**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8824 / 8833

Hearing Date: May 8, 2008
Decision Issued: May 9, 2008

PROCEDURAL HISTORY

On October 12, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow established written policy, unauthorized use and misuse of State property in the operation of a personal business, and abuse of State time.

On November 19, 2007, 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 she requested a hearing. On March 14, 2008, the EDR Director issued Ruling Number 2008-1860, 2008-1940, and 2008-1941. That ruling qualified Grievant's July 2, 2007 grievance alleging workplace harassment, discrimination, and retaliation. The ruling also consolidated the July 2, 2007 grievance with the November 19, 2007 grievance. On March 31, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 8, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether the Agency retaliated against Grievant or failed to comply with State policy?

BURDEN OF PROOF

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. The burden of proof is on Grievant to show by a preponderance of the evidence that the Agency retaliated against her and acted contrary to State policies. 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.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Health Professions employed Grievant as an Assistant Accounting Director until her removal effective October 12, 2007. The Organizational Objective and Purpose of Grievant's Position was:

Ensures compliance with federal state and agency regulations for all financial functions in the Accounting Unit with an emphasis on revenue accounting. Provides oversight and direction over the daily operations of the revenue section through independent decisions, application the professional judgment, and knowledge of agency policies and plans. Responsible for the accurate and timely recording of the agency's revenue transactions. Serves, in conjunction with the Fiscal Officer, as the liaison

to the external state central service agencies. Plans and monitors as well as analyzes and evaluates financial and administrative activities for the Accounting Unit. Coordinates efforts with the Budget Manager and Accounts Payable Supervisor. Assists in the preparation of schedules and working papers that document and provide clear audit trails. Assists the Accounting Director in a variety of financial and operational functions.¹

Grievant's Supervisor evaluated Grievant's work performance in November 2006 and gave Grievant an overall rating of Strong Contributor.² No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On January 13, 2005, the Human Resource Director sent Grievant a letter offering her employment with the Agency. The letter stated, in part:

As provided in DHP Directive 87-9, an employee may engage in outside employment provided that prior approval has been granted by the Director. Should you be otherwise employed and desire to continue that employment you should seek approval prior to accepting this position within the Department. However, approval will not be granted to an employee to work in any capacity where the employer is regulated by the Department, or in any position requiring that the employee be licensed, certified or registered by a health regulatory board.³

On April 1, 2006, Grievant received a business license to operate a personal service business to provide custom window treatments or complete interior design services. Grievant created a website as part of her business.

On June 13, 2007, Grievant sent an email to the employees in her unit asking, "Does anyone know a web designer? If so, please forward information." The email was received by Grievant's Supervisor. In the middle of July 2007, the Supervisor notified the Human Resource Director of the email. The Agency began an investigation.

As part of its investigation, the Agency reviewed the emails Grievant sent using her Agency email account and using Agency computer equipment during work hours. The Agency discovered email exchanges relating to Grievant's private business over 17 months, beginning in late 2005 and ending in the middle of calendar year 2007. The email exchanges included agreements to purchase items specific to operating a window treatments/decorating business, securing assistance from multiple individuals in the design-layout-review of Grievant's personal service business website, frequent communication regarding the selection of fabric with what are referenced as customers and the use of Grievant's email address as a "respond to" request for activity specific to

¹ Agency Exhibit 4.

² Grievant Exhibit 1.

³ Agency Exhibit 7.

a personal service business. Additional emails from Grievant included referring individuals to websites to identify fabrics used to design either window treatments or other home decorating items and promoting Grievant's business to both State employees and those outside State government. Several emails also referenced agreements to prepare personal income taxes for both State employees and those outside State government. Grievant made no attempt to limit her email exchanges to lunch and break times.

As part of its investigation, and the Agency reviewed the websites visited by Grievant using her Agency-issued computer during normal business operating hours between January 1, 2007 and June 30, 2007. The Agency found that Grievant visited over 1300 shopping websites and made over 4000 visits to websites listed as "other". Over 30 of these websites were viewed on a consistent basis that directly related to the operation of Grievant's personal service business. Grievant devoted a significant amount of work time to visit non-work-related websites.

CONCLUSIONS OF POLICY

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."⁴ 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."

DHRM Policy 1.60, Standards of Conduct, provides:

Employees may not engage in any other employment in other agencies, outside of state service, in any private business, or in the conduct of professions, either:

- during the hours for which they are employed to work; or
- outside their work hours if such employment is deemed by employing agencies to affect employees' work performance or to be in violation of the Virginia Conflict of Interests Act.

Employees are required to notify agencies of outside employment according to agency policies. Agencies may deny employee requests for engaging in outside employment

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

No property belonging to or under contract to the Commonwealth may be used for outside employment activities.⁵

The Agency adopted Directive 6.2, Outside Employment, to "ensure that outside employment of agency personnel does not conflict with the mission of the agency." This policy provides:

No employee shall engage in any other employment in another agency or outside the state service in any private business, or in the conduct of a profession during the work hours for which they are employed, or outside such hours in a manner that its effects are deemed by the department is likely to effect their usefulness as an employee or that is likely to be in violation of the Virginia Conflict of Interest Act.

Each employee must obtain approval for any employment outside the Department. Employment that inhibits an employee's performance or adversely affects public confidence in the government of this Commonwealth or the functions of this Department will not be approved.⁶

Grievant acted contrary to the Standards of Conduct and the Agency's policy regarding outside employment because she operated a private business, licensed on April 1, 2006, without obtaining the Agency's permission. In addition, she used equipment, namely her computer, for her personal business. Failure to follow established written policy is a Group II offense under the Standards of Conduct.

DHRM Policy 1.75 permits State employees to use the internet for personal use within certain parameters as follows:

Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's Internet access or electronic communication systems is permitted; however, personal use is prohibited if it:

- interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
- adversely affects the efficient operation of the computer system;
- violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law or guideline as set forth by local, State or Federal law. (See

⁵ Agency Exhibit 6.

⁶ Grievant Exhibit 2.

Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001.)

NOTE: Users employing the Commonwealth's Internet or electronic communication systems for personal use must present their communications in such a way as to be clear that the communication is personal and is not a communication of the agency or the Commonwealth.

The Agency has established that Grievant's personal use of the Internet sometimes was more than occasional and incidental. For example, on April 27, 2007, at 10:49 a.m. Grievant used the Agency's computer to access websites that were not job-related. She continued accessing personal websites until 4:41 p.m. On May 4, 2007, at 12:08 p.m. Grievant began accessing websites that were not job-related. She continued doing so until 3:37 p.m. Given the number of hours on those two days that Grievant accessed non-job related websites, Grievant's use was more than occasional and incidental. The Agency has also established that Grievant used the Agency's electronic communication systems for personal use without making it clear that the communication was personal and not a communication from the Agency. Grievant's emails to customers of her business and others contained a signature tag describing her title as "Assistant Accounting Director". Accordingly, Grievant acted contrary to DHRM Policy 1.75.

"Failure to ... comply with established written policy" is a Group II offense. The Agency contends Grievant should receive a Group III Written Notice for violating DHRM Policy 1.75, not a Group II Written Notice. Under some circumstances, violating DHRM Policy 1.75 can be a Group III offense. DHRM Policy 1.75 states:

Violations of this policy must be addressed under Policy 1.60, Standards of Conduct Policy, or appropriate disciplinary policy or procedures for employees not covered by the Virginia Personnel Act. The appropriate level of disciplinary action will be determined on a case-by-case basis by the agency head or designee, with sanctions up to or including termination depending on the severity of the offense, consistent with Policy 1.60 or the appropriate applicable policy.

The question becomes what evidence in this case shows that the appropriate level of discipline is a Group III Written Notice instead of a Group II Written Notice for acting contrary to established policy. The Agency did not present an estimation of the total amount of time Grievant devoted to viewing websites that were not job-related. The Agency did not distinguish between Grievant's usage of the computer during work hours as opposed to her lunchtime and break time. The Agency did not establish that Grievant visited websites containing offensive content. In short, the Agency has not presented sufficient evidence to justify deeming Grievant's behavior is a Group III offense instead of a Group II offense. Grievant's behavior was inappropriate but not so inappropriate that a first occurrence would warrant removal under the Standards of Conduct.

The Agency could have issued Grievant a Group II Written Notice for engaging in outside employment without permission and a second Group II Written Notice for violating DHRM Policy 1.75. Based upon the accumulation of discipline, namely two Group II Written Notices, the Agency could have removed Grievant from employment. Instead, the Agency chose to issue a Group III Written Notice for several separate offenses.⁷ An Agency may not take separate actions otherwise constituting Group II offenses and combine them into a single Group III offense. An agency may not do so for two reasons.

First, DHRM Policy 1.60 does not authorize this practice. DHRM Policy 1.60 authorizes discipline based on the accumulation of separate active written notices. However, it does not authorize accumulation of separate behavior into a single written notice with a higher level of discipline than would otherwise be permitted by policy.

Second, aggregating behavior in order to elevate the level of offense causes an extension of the active life of the disciplinary action. For example, if an employee were to receive two Group II Written Notices on a particular day, those notices would expire after three years. If the employee received a Group I Written Notice in the fourth year, the employee could not be removed based on the accumulation of active disciplinary action. On the other hand, if an agency aggregated two Group II Written Notices into a single Group III⁸ Written Notice⁹, and the employee received a Group I Written Notice in the fourth year, the employee could be removed from employment based on the accumulation of disciplinary action. In short, an employee receiving two or more Group II Written Notices is not in the same position as an employee receiving one Group III Written Notice.

The Group III Written Notice issued to Grievant must be reduced to a Group II Written Notice. A suspension of up to 10 days is appropriate upon the issuance of a Group II Written Notice. Grievant must be reinstated and awarded attorney's fees.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹⁰ (2) suffered a

⁷ The effect of the Agency's decision was to increase its burden to show evidence supporting a Group III offense instead of evidence supporting two Group II offenses.

⁸ The active life of a Group II Written Notice is three years. The active life of a Group III Written Notice is four years.

⁹ This illustration assumes the agency chose not to terminate the employee because of receiving two Group II Written Notices or receiving one Group III Written Notice.

¹⁰ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

materially adverse action¹¹; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.¹²

Grievant argued that the Agency retaliated against her because she filed a grievance on July 2, 2007. That grievance made allegations against Grievant's Supervisor. The Agency's investigation was triggered by an email Grievant sent June 13, 2007 to several staff, including the Supervisor. The Supervisor only reported Grievant's email to the Director of Human Resources in the middle of July 2007, after Grievant had filed her grievance against the Supervisor. Grievant has established that she engaged in a protected activity of filing a grievance. She suffered a materially adverse action because she received disciplinary action. Grievant, however, has not established a causal link between the adverse action and a protected activity. It is unclear whether the Supervisor knew Grievant had filed a grievance against her. Grievant alleged "discrimination or retaliation by immediate supervisor" and thus the grievance was not presented to the Supervisor. In addition, no evidence was presented that the Supervisor was involved in the decision-making process regarding whether disciplinary action should be taken, and if so, what level of discipline should be issued. Accordingly, Grievant has not established that the Agency retaliated against her.

Although Grievant's July 2, 2007 grievance was consolidated by the EDR Director with the disciplinary action, Grievant did not present any material evidence relating to that grievance. Accordingly, Grievant's request for relief pursuant to the July 2, 2007 grievance is denied.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."¹³ Under the *Rules for Conducting Grievance Hearings*, "[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

¹¹ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

¹² This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

¹³ *Va. Code § 2.2-3005.*

the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action below a Group II Written Notice with suspension.

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

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II Written Notice with a 10 work day suspension. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency should reduce the amount of back pay to account for the 10 work day suspension.

Grievant's request for relief pursuant to the July 2, 2007 grievance is denied.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 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 all of your appeals to the other party and to the EDR Director. 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. 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.¹⁴

[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/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁴ 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 the
Department of Health Professions

June 18, 2008

The agency has requested an administrative review of the hearing officer's decision in Case No. 8824/8833. The agency is challenging the decision because it feels that the decision is inconsistent with the policies of the Commonwealth. For the reason stated below, this Agency will not interfere with the application of this decision. The agency head of the Department of Human Resource Management has requested that I respond to this appeal.

FACTS

Until she was terminated, the Virginia Department of Health Professions employed the grievant as an Assistant Accountant Director. According to the hearing decision, the duties and responsibilities of her position were as follows:

Ensures compliance with federal, state and agency regulations for all financial functions in the Accounting Unit with an emphasis on revenue accounting. Provides oversight and direction over the daily operations of the revenue section through independent decisions, application of professional judgment, and knowledge of agency policies and plans. Responsible for the accurate and timely recording of the agency's revenue transactions. Serves, in conjunction with the Fiscal Officer, as the liaison to the external state central service agencies. Plans and monitors as well as analyzes and evaluates financial and administrative activities for the Accounting unit. Coordinates efforts with the Budget Manager and Accounts Payable Supervisor. Assists in the preparation of schedules and working papers that document and provide clear audit trails. Assists the Accounting Director in a variety of financial and operational functions.

According to the hearing officer's Findings of Fact, at the time of hire, the agency sent the grievant an offer letter which spelled out, in part, the conditions and criteria that govern outside employment. This included securing permission to hold an outside job and what constitutes conflict of interest. On April 1, 2006, the grievant was granted a business license to operate a personal business. On June 13, 2007, she sent an email to unit employees asking, "Does anyone know a web designer?" In July 2007, the grievant's supervisor sent the email to the human resource director and an investigation was conducted. Based on the investigation, it was

determined that the grievant owned and operated an outside business and had used her state supplied electronic equipment to send to customers and other individuals advertisements related to her personal business. The records showed also that she spent an inordinate amount of work time on websites which may or may not have been related to her state job.

She was issued a Group III Written Notice and removed from employment on October 12, 2007. The grievant filed a grievance to have the disciplinary action rescinded. When she did not get the relief she sought through the management steps, she asked to have her grievance heard by a hearing officer. She also had filed another grievance on the basis that she felt that agency officials had retaliated against her for having filed an earlier grievance related to internal alignment. The Department of Employment Dispute Resolution consolidated them so they could be heard by the same hearing officer.

In a decision dated May 9, 2008, the hearing officer reduced the Group III Written Notice of disciplinary action with termination to a Group II Written Notice with up to a ten-day suspension, reinstatement to her former position and backpay. She was denied any relief on the retaliation grievance.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, **Standards of Conduct**, 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. These examples are not all-inclusive. Section III.E. of that same policy states the following: (1) Employees may not engage in any other employment in other agencies, outside of state service, in any private businesses, or in the conduct of professions, either: (a) during working hours for which they are employed to work; (2) Employees are required to notify agencies of outside employment according to agency policies. (3) No property belonging to or under contract to the Commonwealth may be used for outside employment activities. Also, DHRM Policy No. 1.75, **Use of the Internet and Electronic Communications Systems**, establishes a policy for the use of the state's electronic communications systems for state agencies and their employees.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the issues in the case and to determine the grievance based on the evidence. 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 a particular mandate or provision in policy. The 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 evidence confirms that the grievant operated a personal business while she was employed by a state agency. She did not request nor did she receive permission from her agency to operate her personal business. The evidence further supports that the grievant conducted the affairs of her personal business during work hours and while using state owned equipment. It was determined that she spent more than “incidental and occasional personal use of the Commonwealth’s Internet access or electronic communications systems.” Thus, it is indisputable that the grievant’s conduct was in violation of DHRM Policy No. 1.60 and DHRM Policy 1.75.

Management officials aggregated the violations and concluded that the violations rose to the level of a Group III offense. Therefore, agency officials issued a Group III Written Notice and terminated the grievant from employment. The Department of Human Resource Management has consistently ruled, under Policy No. 1.60, that agencies are not permitted to aggregate separate behavior into a single Written Notice with a higher level of discipline than would otherwise be permitted by policy. Any of the above violations individually may rise to the level of a Group II offense, and issuing multiple Group II Written Notices could have resulted in the grievant’s termination. However, agency officials erroneously aggregated several Group II level offenses and elevated the disciplinary action to a Group III Written Notice with termination.

Concerning the level of disciplinary action for violating DHRM Policy No. 1.75, the hearing officer concluded that the evidence supported that the violation exceeded the “incidental and occasional personal use of the Commonwealth Internet access or electronic communications systems.” However, the evidence did not give an estimation of the time the grievant used for job-related business versus personal communication. In accordance with the cited policy, “the appropriate level of disciplinary action will be determined on a case-by-case basis by the agency head or designee, with sanctions up to or including termination depending on the severity of the offense, consistent with Policy 1.60 or the appropriate applicable policy.” In dealing with the violation on a case-by-case basis, the hearing officer determined that the evidence supported only a Group II Written Notice rather than a Group III Written Notice.

This Agency concurs with the hearing officer’s application and interpretation of DHRM and agency policy. Thus, we will not interfere with the execution of the hearing decision.

Ernest G. Spratley



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 8824 8833-A

Addendum Issued: July 3, 2008

DISCUSSION

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.¹⁵ 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.¹⁶

Grievant was reinstated to her position following the grievance hearing. Grievant's Attorney submitted an affidavit stating that he devoted 34.60 hours to represent Grievant. This amount of time is reasonable under the facts and circumstances of this grievance. The EDR Director has authorized reimbursement in the amount of \$131 per hour for time spent representing grievances who substantially prevail in a discharge grievance. Accordingly, Grievant should be awarded \$4,532.60. The Agency may pay these funds directly to Grievant's Attorney to satisfy this award.

AWARD

The Grievant is awarded attorneys' fees incurred from March 5, 2008 through May 12, 2008 in the amount of \$4,532.60.

¹⁵ Va. Code § 2.2-3005.1.A.

¹⁶ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer