

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 12/16/08; Decision Issued: 12/23/08; Agency: VSP; AHO: William S. Davidson, Esq.; Case No. 8985; Outcome: No Relief – Agency Upheld in Full; **Administrative Review:** **AHO Reconsideration Request received 01/05/09; Reconsideration Decision issued 01/08/09; Outcome: Original decision affirmed; Administrative Review:** **EDR Admin Review Request received 01/07/09; EDR Ruling #2009-2214 issued 02/06/09; Outcome: AHO's decision affirmed; Judicial Review:** **Appealed to Chesterfield County Circuit Court 02/09; Outcome: AHO's decision affirmed [CL09-498] issued 04/08/09; Judicial Review:** **Appealed to Court of Appeals on 05/07/09; Outcome: Circuit Court ruling affirmed on 11/30/09 [Record No. 0974-09-2]; Judicial Review:** **Appealed to U.S. Supreme Court on 09/13/10; Outcome pending.**

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 8985

Hearing Date: December 16, 2008  
Decision Issued: December 23, 2008

**PROCEDURAL HISTORY**

The Grievant received a Group II Written Notice on August 19, 2008 for:

Since December, 2007, you have failed to perform/complete assigned work to include, but not limited to, Firearms v1.7 release, Human Resources Alternative Work Schedule Management (AWSM), and Department of Motor Vehicles Safety Net Project in a satisfactory manner. Also, since December, 2007, you have failed to follow your supervisor's instructions regarding these assignments by not completing them in accordance with established development standards (JAVA Enterprise Edition STRUTS). I am combining these two offenses into a single offense which will be considered a Group II offense under General Order 19, Paragraph 13.b.(1) of the State Police Manual for "Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy."

Pursuant to the Group II Written Notice, the Grievant had this Written Notice placed in his file. The Grievant timely filed a grievance to challenge the Agency's actions. On November 20, 2008, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On December 16, 2008, a hearing was held at the Agency's location.

**APPEARANCES**

Agency Representative  
Agency Advocate  
Grievant  
Witnesses

**ISSUE**

1. Did the Grievant fail to follow a supervisor's instructions and to perform assigned work or otherwise comply with applicable established written policy?

**AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in Tatum v. VA Dept of Agriculture & Consumer Servs., 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

### **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. 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 Agency provided the Hearing Officer with a notebook containing eight (8) tabbed sections and that binder was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a spiral binder containing nine (9) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

The Grievant is a senior programmer/analyst for the Agency. In that capacity, he was expected to be able to initiate technology projects, to help establish the parameters of the project and to be involved in the actual programming for the project. Commencing in October or November of 2007, the Grievant's supervisors began receiving complaints regarding his job

performance. Pursuant thereto, the Grievant met with his immediate supervisor and that supervisor's supervisor to discuss performance issues. Those discussions entailed the Grievant's expansion of the scope of work assignments unnecessarily and his failure to follow instructions from his supervisors regarding programming and other tasks.<sup>1</sup> The Grievant was given a Notice of Improvement Needed/Substandard Performance Notice, dated December 20, 2007.<sup>2</sup>

On April 7, 2008, the Grievant met with the same two supervisors to discuss his continuing expansion of the scope of work assignments without authorization, his failure to follow the instructions of his supervisor regarding programming, his failure to follow up with his supervisor when the task was completed or he encountered difficulties and his failure to complete assignments on schedule.<sup>3</sup> Pursuant thereto, he received a second Notice of Improvement Needed/Substandard Performance Notice.<sup>4</sup>

On May 8, 2008, the Grievant again met with his immediate supervisor regarding his inability to perform his tasks in a timely and competent manner. At this time, his thirty (30) day Performance Plan of April 7, 2008 was extended until Friday, May 30, 2008. The Grievant was put on Notice that if his performance did not improve to at least a contributor level, then his employment would be terminated.<sup>5</sup>

The Hearing Officer heard testimony from several Agency witnesses who worked with the Grievant and all unanimously concurred that the Grievant did not perform his work in a timely fashion and often attempted to expand the scope of his work beyond the specific instructions that he had been given. Within the Agency's evidence are numerous examples of the Grievant's work performance where he was unable to complete his work in even a remotely timely fashion. When the Grievant testified, it appeared that he simply felt that the Agency was asking him to perform his tasks in a way that was contrary to the way that he, not the Agency, thought the task should be performed. The Grievant seemed incapable of understanding that the Agency determines what the scope of the assignment is and how it is to be carried out. Accordingly, the Hearing Officer finds that the Grievant has violated Agency General Order 19, Paragraph 13.b.(1), wherein he has failed to follow his supervisor's instructions and he has failed to perform assigned work or otherwise comply with established written policy.<sup>6</sup>

### **MITIGATION**

*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

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<sup>1</sup> Agency Exhibit 1, Tab 4, Sub-tab "12/20/2007 Performance Plan (90 day)," Page 1

<sup>2</sup> Agency Exhibit 1, Tab 4, Sub-tab "12/20/2007 Performance Plan (90 day)," Page 2

<sup>3</sup> Agency Exhibit 1, Tab 4, Sub-tab "4/7/2008 Performance Plan (30 day)," Page 1

<sup>4</sup> Agency Exhibit 1, Tab 4, Sub-tab "4/7/2008 Performance Plan (30 day)," Page 2

<sup>5</sup> Agency Exhibit 1, Tab 4, Sub-tab "5/8/2008 Performance Plan Extension," Page 1

<sup>6</sup> Agency Exhibit 1, Tab 2, Page 8

accordance with rules established by the Department of Employment Dispute Resolution...”<sup>7</sup> 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 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. The Agency clearly considered the fact that the Grievant has no prior disciplinary actions for mitigation.

### **DECISION**

For reasons stated herein, the Hearing Officer finds that the Agency did meet its burden of proof regarding the issuance of a Group II Written Notice.

### **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 14<sup>th</sup> Street, 12<sup>th</sup> 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

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<sup>7</sup>Va. Code § 2.2-3005

of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
600 East Main Street, Suite 301  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>8</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>9</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]

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William S. Davidson  
Hearing Officer

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<sup>8</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>9</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS

**DECISION OF HEARING OFFICER**

In re:

Case No: 8985

Hearing Date:	December 16, 2008
Decision Issued:	December 23, 2008
Reconsideration Request Received:	January 5, 2009
Response to Reconsideration:	January 8, 2009

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.<sup>10</sup>

OPINION

The Grievant seeks reconsideration of the Hearing Officer's decision based on newly discovered evidence and the allegation of an incorrect legal conclusion in the Hearing Officer's original Decision. The Grievant offers as newly discovered evidence six (6) potential documents and/or entries which are to be found on the hard drive of his desktop computer. The Grievant does not actually have these documents but in his request for reconsideration, he states that, all of these documents, "can be located from the desktop computer which was in the office [of the Grievant] before the hearing date, December 16, 2008."

The use of after discovered or newly discovered evidence that was not available at the time of the trial or hearing is a concept that has been well-discussed and defined by the Courts of the Commonwealth of Virginia. A motion to reconsider or to grant a new trial based on newly discovered evidence is a matter submitted to the sound discretion of the Circuit Court (herein the "Hearing Officer") and will be granted only under unusual circumstances after particular care and caution has been given to the evidence.<sup>11</sup>

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<sup>10</sup> §7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

<sup>11</sup> Commonwealth v. Tweed, 264 Va. 524, 528, 570 S.E. 2d 797, 800 (2002); Stockton v. Commonwealth, 227 Va. 124, 149, 314 S.E. 2d 371, 387 (1984).

A moving party's burden of proof before the Circuit Court based on newly discovered evidence is well established. The moving party must establish that such evidence:

- (1) Appears to have been discovered subsequent to the trial; (2) could not have been secured for use at the trial in the exercise of reasonable diligence by the movant; (3) is not merely cumulative, corroborative or collateral; and (4) is material, and such as should produce opposite results on the merits of another trial.<sup>12</sup>

The Director of EDR issued an opinion on October 9, 2008 regarding new evidence. In that opinion, the Director held in part as follows:

...Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence." Newly discovered evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the trial ended. However, the fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party must show that

- (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.<sup>13</sup>

The Grievant has made no reasonable proffer to the Hearing Officer as to why this evidence could not have been secured prior to the hearing. Indeed, the Grievant affirmatively states that all of this evidence was contained within the memory of his desktop computer prior to the hearing date of December 16, 2008. Accordingly, not only was the Grievant aware of this evidence, but the Grievant affirmatively chose not to produce this evidence at the hearing.

Accordingly, there is no basis for the Hearing Officer to reconsider his opinion.

### DECISION

The newly discovered evidence, for which the Grievant requested that the Hearing Officer re-open the hearing, is and was not newly discovered evidence. The Grievant was in possession of this evidence prior to the original hearing and was aware of its existence prior to the original

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<sup>12</sup> Odum v. Commonwealth, 225 Va. 123, 130, 301 S.E. 2d 145, 149 (1983).

<sup>13</sup> Administrative Review of Director, Ruling No. 2009-2110, dated October 9, 2008,



hearing. The Hearing Officer concludes that there is no basis to change the Decision issued on December 23, 2008.

### APPEAL RIGHTS

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

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or 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.<sup>14</sup>

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William S. Davidson  
Hearing Officer

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<sup>14</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).

**VIRGINIA:**

**IN THE CIRCUIT COURT OF CHESTERFIELD COUNTY**

**PHANENDHARNADH L. N. KONE,**

**Grievant/Appellant,**

**v.**

**Case No.: CL09-498**

**VIRGINIA DEPARTMENT OF STATE POLICE,**

**Agency/Appellee.**

**FINAL ORDER**

This matter came before the Court on April 1, 2009, at or about 11:00 a.m., as an appeal of a decision of a hearing officer under the Grievance Procedure for State Employees pursuant to Virginia Code § 2.2-3006(B). At the hearing, the Grievant/Appellant, Mr. Phanendharnadh L. N. Kone, appeared *pro se* and the Agency/Appellee, the Virginia Department of State Police, was represented by undersigned counsel.

Having reviewed the record and considered the arguments of the parties and/or counsel, the Court finds that the Grievant/Appellant has failed to reference, cite and/or otherwise identify any statute (and/or other legislation), judicial precedent and/or accepted legal principle in support of his claim that the decision of the hearing officer was "contradictory to law" – as required by Virginia Code § 2.2-3006(B) for the reversal of that decision.

Accordingly, it is hereby ADJUDGED, ORDERED and DECREED that this appeal is DISMISSED and that the decision of the hearing officer in Grievance Case No. 8985 (issued December 23, 2008) is AFFIRMED.

Pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the endorsement of the Grievant/Appellant is hereby dispensed with.

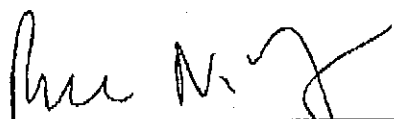
The Clerk is hereby directed to send a certified copy of this Final Order to all counsel of record and *pro se* parties upon entry hereof.

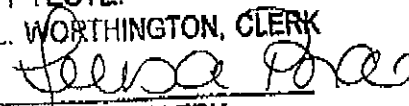
Entered this 8<sup>th</sup> day of APRIL, 2009

  
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JUDGE

I ASK FOR THIS:

All purposes of the instant cause having been accomplished, the Court does further ORDER that the matter be stricken from the active docket of this Court and filed among the ended causes.

  
\_\_\_\_\_  
Ronald N. Regnery (VSB #37453)  
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Counsel for Agency/Appellee  
Virginia Department of State Police

A COPY TESTE:  
JUDY L. WORTHINGTON, CLERK  
BY   
\_\_\_\_\_  
DEPUTY CLERK