

Issues: Group III Written Notice (failure to follow policy and instructions), Termination, and Retaliation; Hearing Date: 06/10/09; Decision Issued: 06/29/09; Agency: VDH; AHO: John V. Robinson, Esq.; Case No. 9017, 9018; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 07/14/09; Reconsideration Decision issued 08/05/09; Outcome: Original decision affirmed.**

**COMMONWEALTH OF VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

In the matter of: Case Nos. 9017 and 9018

Hearing Officer Appointment: May 15, 2009

Hearing Date: June 10, 2009

Decision Issued: June 29, 2009

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of her employment effective July 14, 2008, pursuant to a Group III Written Notice issued on July 14, 2008 by Management of the Department of Health (the “Department” or “Agency”), as described in the Grievant’s two (2) Grievance Form As dated July 15, 2008. In one Form A the Grievant alleges unlawful termination and in the other Form A the Grievant alleges retaliation by the Agency. By Consolidation Ruling of Director dated May 11, 2009 (the “Ruling”), the Director of the Virginia Department of Employment Dispute Resolution (“EDR”) consolidated both grievances into a single hearing for the reasons given in the Ruling. Accordingly, both the unlawful termination and the retaliation grievances were heard in the same hearing.

The hearing officer was appointed on May 15, 2009. The hearing officer scheduled a pre-hearing telephone conference call at 10:00 a.m. on May 18, 2009. The Grievant, the Agency’s advocate and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant confirmed and clarified that she is challenging the issuance of the Group III Written Notice for the reasons provided in her Grievance Form As and is seeking as relief reinstatement and expungement of the disciplinary action, with restoration of all salary and benefits. The hearing officer explained to the Grievant and the Grievant understood that the hearing officer lacks the power to order the Agency to discipline a certain person or certain persons if the Grievant’s allegations concerning Agency retaliation are ultimately upheld by the hearing officer and the Grievant understood this. Following the pre-hearing conference, the hearing officer entered on May 18, 2009 a Scheduling Order, which is incorporated herein by this reference.

In this proceeding the Agency bears the primary burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. The Grievant bears the burden of proving by a preponderance of the evidence her claims of retaliation.

At the hearing, the Grievant represented herself and the Agency was represented by its Advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely exhibits 1-8 in the Agency's exhibit binder and exhibits A-K in the Grievant's exhibit binder.<sup>1</sup>

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

### APPEARANCES

Representative for Agency  
Grievant  
Witnesses

### FINDINGS OF FACT

1. The Grievant was a forensic autopsy technician ("AT"), formerly employed by the Agency at a facility which received dead bodies for autopsies, processed them and then released them (the "Facility").
2. The Grievant was so employed in July, 2008.
3. The Grievant was first hired by the Department on approximately October 25, 2006. AE 8.
4. As an AT, the Grievant's duties included assisting the Assistant Chief Medical Examiner (the "Assistant Chief") in the completion of autopsies. AE 5. One of the core responsibilities of the Grievant related to release of bodies:  

"admits and releases bodies"; "release and log-out the correct body to the funeral home"; "verify release documents"; ". . .admitting and releasing bodies. Any other duties as assigned." AE 5.
5. On June 16, 2008, a decomposed body which was not yet ready to release pursuant to Facility policy, was released to a funeral home. The Lead Medicolegal Death Investigator at the Facility (the "Lead Investigator") reported the misadventure to the Facility's Central District Administrator (the

---

<sup>1</sup> References to the grievant's exhibits will be designated GE followed by the exhibit letter. References to the agency's exhibits will be designated AE followed by the exhibit number.

- “Administrator”) and to the Grievant and another AT. Both ATs left the Administrator’s Office stating it was not their problem.
6. Fortunately, the Administrator was able to pay the funeral home for the cost of bringing the body back to the Facility before cremation.
  7. The Assistant Chief and the Administrator discussed the matter and decided that it was necessary to meet with morgue staff as soon as possible about their behavior and attitude. AE 6.
  8. Accordingly, a meeting was held with the two ATs on June 17, 2008 and they were warned that releasing a body to the wrong funeral home was a major disciplinary infraction which could result in a person losing their job.
  9. The Assistant Chief explained that while the stern warning was given, no one was disciplined for the incident on June 16, 2008, because there were multiple failures at the Facility including errors by both physicians and ATs.
  10. In violation of instructions and Agency policy, on July 3, 2008 at 1:46 p.m., the Grievant under her log-in name in the computer system indicated that an unidentified body was “ready for release.”
  11. On July 3, 2008 at 12:27 p.m., a trainee AT under the supervision of the Grievant, again in violation of instructions and Agency policy, changed the status of release of a different unidentified body to “ready to release”.
  12. On July 4, 2008, the Grievant with the assistance of two other MDs (the “MDs”) who helped the Grievant move the heavy 400 lb. body, placed the decedent in a remains pouch (a “body bag”). It was the responsibility of the AT to ensure that the ankle tag on the body and the tag on the body bag match. However, the Grievant placed the wrong identification tag on the body bag. As a result of the Grievant’s error the wrong body was released from the Facility to a funeral home. The MDs only helped the Grievant move the body and did not identify the body or tag the body.
  13. Fortunately, the funeral director had known the decedent when he was alive and alerted the Agency to the mix-up.
  14. The Grievant’s failure to follow her supervisor’s instructions and policy was sufficiently egregious as to impact the credibility of the operations of the Facility. This finding is discussed in greater detail below.
  15. At the hearing, the unrefuted and unchallenged testimony of the Lead Investigator was consistent with her statement of July 14, 2008, as follows:

[The Grievant] then stated “Well, I made a little boo-boo over the weekend.” [The Grievant] shrugged her shoulders as she said this and laughed. [The Grievant] continued to advise us that she had placed the wrong decedent into a body bag. The wrong decedent had then been released to a Funeral Home. I asked her how it got caught, and she advised that the Funeral Director was friends with the decedent that he was supposed to be preparing and knew that the body in the bag was not the man that he knew.

[Another Medicolegal Death Investigator] then asked [Grievant] how she could have made that mistake when one of those decedents was approximately 400 lbs. [The Grievant] laughed and advised that it must have been a problem with the new fellows.

AE 4.

16. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.
17. The Department’s actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
18. Concerning her retaliation claim, the Grievant failed to prove the causal link between her filing her EEO Complaint of discrimination (GE B) and the Agency’s disciplinary action which the Grievant challenges in this proceeding. This finding is discussed in greater detail below.
19. The Department’s actions concerning this grievance were reasonable and consistent with law and policy.
20. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

#### APPLICABLE LAW, ANALYSIS AND DECISION

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 her 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).

*Va. Code* § 2.2-3000(A) 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the "SOC"). 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.

Pursuant to the SOC, the Grievant's infraction could clearly constitute a Group II offense. AE 7.

The SOC provides, in part, as follows:

**Group II Offense:**

Offenses in this category include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws.

- See attachment A for examples of Group II Offenses.

AE 7.

In turn, Attachment A provides, in part, as follows:

## **Group II**

This level generally includes acts of misconduct of a more serious nature that significantly impact agency operations.

Examples: Failure to follow supervisor's instructions or comply with written policy.

AE 7.

The Grievant has argued that only a Group II Written Notice and not a Group III Written Notice with termination is appropriate. However, the SOC expressly contemplate that an offense listed as a Group II may constitute a Group III offense where it can have a severe adverse effect on the Agency. Here, the Agency articulated a strong case as to why the offense of releasing the wrong body to a funeral home should constitute a level III offense, notably the exposure to significant civil liability, significant adverse publicity, lack of credibility in law enforcement and court proceedings, etc. The Agency's characterization of the offense as a Level III offense with concomitant termination of the Grievant's employment is entitled to deference from this hearing officer.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. However, the Grievant bears the burden of persuasion concerning her claim of retaliation.

The Grievant has alleged retaliation but has failed to carry her burden of proof in this regard. An agency may not retaliate against its employees. To establish retaliation, a grievant must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)* (2) suffered a materially adverse action; *See EDR Ruling Nos. 2005-1064, 2006-1169 and 2006-1283* 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 raises a sufficient question as to whether 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. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2, 2007) and *EDR Ruling No. 2007-1561 and 1587, page 5* (June 25, 2007).

The Grievant maintains that the Agency retaliated against her for the filing of her EEO Discrimination Complaint. The filing was made June 25, 2008 and clearly constitutes a protected activity. The Grievant also suffered a materially adverse action when she received the Group III Written Notice and her employment was terminated. However, the hearing officer finds that the Grievant's filing of the EEO Complaint did not cause the Agency to take the disciplinary action but rather Grievant's role in wrongly identifying the 400 lb. body which

resulted in the release of the wrong body to the funeral home caused the Agency to take the disciplinary action against the Grievant. Accordingly, the Grievant failed to prove this causation element of her retaliation claim.

Additionally, concerning the Group III Written Notice, the Agency has articulated and proven by overwhelming evidence legitimate, non-retaliatory reasons for its actions necessary to maintain orderly operations.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1988).

The Department did consider mitigating factors including the Grievant's past service but the seriousness of the infraction with the potentially disastrous consequences to the Agency's operations precluded a lesser sanction. The Agency's mitigation analysis deserves deference from the hearing officer and is within the permissible zone of reasonableness.

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The action taken by Management was entirely appropriate under the circumstances and is in accordance with applicable policy and law.

### DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the Group III Written Notice, terminating the Grievant's employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant in this proceeding is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.



## 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. 14<sup>th</sup> Street, 12<sup>th</sup> 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, Main Street Centre, 600 East Main Street, Suite 301, Richmond, Virginia 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 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.

ENTER:

---

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail and/or facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

**COMMONWEALTH OF VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

In the matter of: Case Nos. 9017 and 9018

Hearing Officer Appointment: May 15, 2009

Hearing Date: June 10, 2009

Original Decision Issued: June 29, 2009

Review Decision Issued: August 5, 2009

**ISSUES**

The Virginia Department of Employment Dispute Resolution's ("EDR") Rules for Conducting Grievance Hearings (the "Rules") provide that the hearing officer's decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision (Rules, Section VII):

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 ("DHRM"). 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. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with the grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the hearing 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, 600 East Main Street, Suite 301, Richmond, Virginia 23219 or faxed to (804) 786-0111.

If multiple requests for administrative review are pending, a hearing officer's decision on reconsideration or reopening should be issued before any decisions are issued by the DHRM Director or the EDR Director. Rules, Section VII.

## DECISION

In her request to reconsider the decision, the grievant has not offered any probative newly discovered evidence. Similarly, the grievant has not presented probative evidence of any incorrect legal conclusions by the hearing officer as the basis for such a request.

Hearing officers are authorized to make “findings of fact as to the material issues in the case” (*Va. Code § 2.2-3005.1(C)*) and to determine the grievance based “on the material issues and grounds in the record for those findings.” *Grievance Procedure Manual § 5.9.*

In cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. *Rules for Conducting Grievance Hearings § VI(B).*

Accordingly, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances. *Grievance Procedure Manual § 5.8.* Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses’ credibility, and make findings of fact. As long as the hearing officer’s findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer concerning those findings.

In making her arguments, the Grievant appears to contest the hearing officer’s findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer’s authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. *Rules for Conducting Grievance Hearings § VI(B).*

Based upon a reconsideration of the hearing record, including his notes, exhibits and certain tapes of the hearing, the hearing officer is satisfied that sufficient evidence supports the hearing officer’s decision. A reconsideration decision is more limited in its scope of review than an original decision, particularly where no new evidence, etc. is asserted by the Grievant. However, while not required to rewrite his original decision all over again, the hearing officer will make the following comments to the Grievant’s motion.

At the hearing, on cross-examination, the Grievant was asked by the Agency’s Advocate what responsibility the Grievant had at the time to know whether the right body was in the right bag. The Grievant answered with words to the effect that “If I am placing a body in a bag, if I am tagging a body, then that body is my responsibility.” Tape 2B. The Grievant also admitted on cross-examination that she placed the body in the bag. These admissions or declarations

against interest constitute exceptions to the hearsay rule and, in any event, hearsay evidence is admissible in administrative proceedings.

The Lead Investigator testified credibly and consistently with her signed written statement of July 14, 2008:

[The Grievant] then stated “Well, I made a little boo-boo over the weekend.” [The Grievant] shrugged her shoulders as she said this and laughed. [The Grievant] continued to advise us that she had placed the wrong decedent into a body bag. The wrong decedent had then been released to a Funeral Home. I asked her how it got caught, and she advised that the Funeral Director was friends with the decedent that he was supposed to be preparing and knew that the body in the bag was not the man that he knew.

[Another Medicolegal Death Investigator] then asked [Grievant] how she could have made that mistake when one of those decedents was approximately 400 lbs. [The Grievant] laughed and advised that it must have been a problem with the new fellows.

AE 4.

These statements to the Investigators also constitute admissions of a party opponent and declarations against interest and, accordingly, are probative as exceptions to the hearsay rule.

The Assistant Chief testified that the security personnel are lesser trained and have no computer access, so this argument is a red herring. As stressed in the original decision, the Grievant’s EWP clearly specified the core responsibility of the Grievant related to release of bodies:

“admits and releases bodies”; “release and log-out the correct body to the funeral home”; “verify release documents”; “. . . admitting and releasing bodies. Any other duties as assigned.” AE 5.

The Grievant did not object to the unavailability of a witness named on the Grievant’s witness list (“NA”) at the hearing and the hearing officer closed the administrative record. Tape 2B. Nevertheless, the hearing officer subsequently scheduled a post-hearing conference call to discuss the NA issue. The Agency’s Advocate, the Grievant and the hearing officer participated in the call at 10:00 a.m. on June 19, 2009, which was recorded. Tape 3. During the call, the Grievant said that State Administrator RA had misled NA that she did not have to testify. The Advocate said that she understood that the Agency had not misled NA.

In any event, the Grievant stated in the conference call that NA would merely have testified to the same things as the Assistant Chief and the Chief Medical Examiner and would not have added anything new concerning the previous erroneous body releases. Based on the

hearing officer's closure of the administrative record, the cumulative nature of the proposed testimony, the lack of any objection at the hearing, the Grievant's poor planning in only calling NA shortly before the hearing and for the other reasons stated by the hearing officer on the record (Tape 3), the hearing officer decided not to reopen the hearing.

For the reasons provided herein, the hearing officer hereby denies the Grievant's request for reconsideration directed to him and hereby affirms his decision that the Agency has met its burden of proving by a preponderance of the evidence that the issuance of the Group III Written Notice and termination of employment was warranted and appropriate under the circumstances.

### **APPEAL RIGHTS**

The hearing officer attaches hereto and incorporates herein Section VII of the Rules.

ENTER:

---

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List.