

Issues: Group III Written Notice (gross negligence) and Termination; Hearing Date: 01/12/10; Decision Issued: 01/21/10; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9243; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 02/05/10; EDR Ruling #2010-2533 issued 04/02/10; Outcome: Referred to DHRM; Administrative Review: DHRM Ruling Request received 04/19/10; DHRM Ruling issued 05/27/10; Outcome: AHO's decision affirmed. Attorney's Fee Addendum issued 07/06/10 awarding \$19,191.50 to Grievant.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9243

Hearing Date: January 12, 2010
Decision Issued: January 21, 2010

PROCEDURAL HISTORY

On September 2, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for gross negligence.

On September 28, 2009, 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 December 7, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing the decision because of the unavailability of the parties. On January 12, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Attorneys
Agency Party Designee
Agency Representative
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?

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 Virginia Department of Transportation employed Grievant as a Traffic Controller at one of its Bridge Tunnels. The purpose of this position was:

Perform operational functions for the [Bridge Tunnel] such as traffic control, public safety, communications, removal of disabled vehicles and enforcement of facility regulations. This position is designated as essential and, as such, all duties associated with this job are required during emergency situations which may include but are not limited to inclement weather, disaster response and emergency operations. VDOT will determine when essential positions are required.

Grievant had been employed by the Agency for over 18 years prior to his removal effective September 2, 2009. Grievant was highly regarded by many of his coworkers who described him as hard-working, detail oriented, and a significant asset to the Agency's operations. Grievant's evaluations showed that he met the Agency's expectations every year of his employment. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Underneath the road surface of the Tunnel is a large air duct that extends from one end of the Tunnel to the other. A fire main is also located under the road surface. The fire main is a pipe containing water that extends from one end of the tunnel to the other. In the event of a fire inside the Tunnel, firefighters could draw water from the fire main to extinguish the fire.

When it rains, water often runs inside the Tunnel. Drains are located inside the Tunnel to collect the rain and prevent it from flooding the road surface. Drain pumps underneath the road surface collect any water accumulating inside the air duct under the road surface and pump the water up to the Tunnel entrances and outside of the Tunnel. Drain pumps 1, 2, and 3 are located near the Tunnel entrance. Drain pumps 4 and 5 are located closer to the mid-point of the Tunnel. They pump water towards drain pumps 1, 2, and 3 so that those pumps can remove the water from the Tunnel. In order to prevent excessive wear and tear, one drain pump will activate and then stop as another pump begins its cycle. A drain pump may operate for approximately 30 minutes before shutting off while another drain pump begins operating. If a drain pump operated for more than 30 minutes to an hour, this may indicate the pump or the pump system is not operating appropriately.

Grievant worked in the Control Room of the Bridge Tunnel. He was responsible for monitoring Control Panels such as CCTV monitors, CO Analyzers, fire alarms, traffic map boards, and active components and operations such as event fans, electrical distribution systems, drain pipe systems, cameras, and traffic signals. He was expected to monitor any alarms and lights located on the Control Panels and on the Electronic Control (EC) system. Grievant was responsible for reporting to his Supervisor any irregularities that he observed on the devices he was monitoring. Grievant sat at workstation desk 30. Directly in front of him was a monitor for the Electronic Control system. When a pump activated, an alert would appear on Grievant's screen. The alert read, "New Event Check Log". Grievant was expected to use his computer's mouse to click on the acknowledgment button to open another computer screen to reveal more details about the event. For example, if a drain pump began working, Grievant was expected to acknowledge that event and to make sure that the drain pump shut off within a reasonable period of time. Grievant was expected to use his judgment to consider whether the event was unusual and, if so, report the event to his Supervisor.

On July 1, 2009, at approximately 8:45 p.m., a brief but intense storm passed over the Bridge Tunnel. The storm lasted until approximately 9:30 p.m. The Bridge Tunnel receives electric power from sources on both the North and South sides of the Bridge Tunnel. The storm caused a power outage on the one side of the Bridge Tunnel. A Traffic Controller acknowledged the event in the Electronic Control system and assisted in ensuring that that the Bridge Tunnel began using power solely from the other side.

On July 1, 2009, a 52-year-old cast-iron fire main encased in concrete beneath the Tunnel's road surface burst.¹ Water began filling the underground duct.² At 9:12 p.m., fire pump number 4 began pumping. Fire pumps are used to boost water supply to the fire main.³ At 9:24 p.m., a Traffic Controller noticed that fire pump number 4 had

¹ The fire main probably broke sometime between 9 p.m. and 10 p.m. on July 1, 2009.

² Eventually over 1,000,000 gallons filled the duct.

³ Fire pumps are not the same as drain pumps.

activated and did not turn off as expected. An Agency supervisor notified the Agency's maintenance staff of the problem and asked for assistance. At 11:39 p.m., the Maintenance Tech reported to the Control Room and learned of the problem regarding the fire pump. He was told of the power outage and that the Control Room no longer had a water supply to its sinks and toilets. He inspected the fire pump system but could not determine the problem. He wanted to shut down the main fire system. He asked his supervisor if he could do so but was told the fire system had to continue to operate so that water could be provided in the event of a fire in the tunnel. The Maintenance Tech decided to shut down only fire pump number 4. He then left the Facility.

On July 2, 2009 at 2:02 a.m., drain pump number 5 begin running. An alert appeared on Grievant's Electronic Control system to indicate that drain pump number 5 had started. Grievant did not acknowledge and monitor the event and, thus, he did not realize that drain pump number 5 was operating. Under normal circumstances, drain pump number 5 would shut off automatically after operating from 30 minutes to an hour. Drain pump number 5 continued to operate through the remainder of Grievant's shift which ended at 6 a.m. An employee⁴ from the oncoming shift noticed that drain pump number 5 had been operating for a lengthy period of time and reported the matter to a supervisor. At 6:15 a.m., maintenance staff were notified of standing water at the lowest point of the Tunnel. The Tunnel was closed immediately. The incident closed a major interstate and cause travel delays for thousands of motorists. VDOT closed the road for more than eight hours on July 2 while crews addressed the flooding and began pumping water from the roadway.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."⁵ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

DHRM Policy 1.60 lists numerous examples of offenses. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.

On July 2, 2009, one of Grievant's duties was to monitor drain pump number 5. He should have observed the Electronic Control system and realize that drain pump

⁴ This employee was Grievant's replacement at desk 30.

⁵ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

number 5 begin working at 2:02 a.m. Grievant should have continued to monitor drain pump number 5 and realize that it remained working too long. When drain pump 5 did not turn off on a timely basis, Grievant should have informed the Supervisor to enable the Supervisor to provide that information to the maintenance staff. Grievant failed to perform his job duties on July 2, 2009. As a result, the Agency's maintenance staff was not given critical information to make an informed decision that may have led to the discovery of the broken fire main.

The Agency contends Grievant's behavior was gross negligence and that gross negligence rises to the level of a Group III offense. "Gross negligence" is not listed as an example of an offense in Attachment A DHRM Policy 1.60. When the Hearing Officer considers the "Examples of Offenses Grouped by Level" listed in Attachment A of DHRM Policy 1.60, Grievant's omission is best described as "unsatisfactory work performance".⁶ Unsatisfactory work performance is a Group I offense. The question becomes whether the Agency can elevate a Group I offense to a higher level, and if so, whether a Group I offense can be elevated to a Group III offense.

DHRM Policy 1.60(B)(2) provides:

Note: Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Refer to Attachment A for specific guidance.

Based on this language, it is clear that Grievant's omission may be elevated from a Group I offense to a higher level offense depending on the impact to the Agency. By failing to monitor the Electronic Control system, Grievant denied material information to Agency managers and maintenance staff. By failing to provide essential information, Grievant denied the Agency the opportunity to make an informed decision that may have enabled it to timely respond to the broken pipe and avoid closure of the Bridge Tunnel. The disciplinary action given to Grievant should be higher than a Group I Written Notice.

Attachment A DHRM Policy 1.60 provides:

*Note that in certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.) Similarly, in rare circumstances, a Group I may constitute a Group II where the agency can

⁶ If Grievant's omission had occurred on June 30, 2009, for example, that omission would have been a failure to perform his customary job duties. That omission would not have risen to a level higher than a Group I offense.

show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

This language suggests that in certain extreme circumstances, an Agency may elevate a Group I to a Group II offense and a Group II to a Group III offense. It does not appear to authorize an agency to elevate a Group I offense to a Group III offense. Accordingly, Grievant should receive a Group II Written Notice of disciplinary action.

Upon the issuance of a Group II Written Notice, an employee may be suspended for up to 10 workdays. Based on the severity of the consequences to the Agency, it is appropriate that Grievant be suspended for 10 workdays.

Grievant contends that the Electronic Control system failed to work properly on July 2, 2009 and did not generate an alert that drain pump 5 had stopped working. This argument is not supported by the evidence. Grievant responded to numerous alerts prior to the alert at 2:02 a.m. indicating that drain pump 5 had stopped. Grievant responded to numerous alerts occurring after 2:02 a.m. No credible evidence was presented to show that the Electronic Control system was without power or malfunctioning at approximately 2:02 a.m. The most logical conclusion to be drawn from the evidence is that the alert activated at 2:02 a.m. but Grievant failed to observe it.

Grievant argues that at least two other employees would have observed the alert if it had been shown on the Electronic Control system.⁷ These employees were working at different locations in the Control Room and may have been performing duties different from Grievant's duties. The failure of these other employees to observe that drain pump 5 had stopped is not a basis to conclude that the Electronic Control system was not working at 2:02 a.m. on July 2, 2009.

Grievant argues that he was distracted by an irate driver who contacted the Control Room to complain. To the extent this driver distracted Grievant, Grievant should have known to return to his desk and review the automatic log generated by the Electronic Control system and determine if he missed any alerts for which he was responsible.

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...."⁸ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any

⁷ Grievant was mentoring a trainee during parts of his work shift. Grievant's desk is located near two other desks that were manned off and on by other employees.

⁸ *Va. Code § 2.2-3005.*

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, 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 further the disciplinary action.

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 he 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 workday 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 consider the ten workday suspension when determining the amount of back pay.

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
600 East Main St. STE 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 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.⁹

[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

⁹ 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 Transportation

May 27, 2010

The agency has requested an administrative review of the hearing officer's decision in Case No. 9243. The agency is challenging the hearing officer's decision on the basis that it is contrary to the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct. For the reason stated below, we will not interfere with the hearing decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has asked that I respond to this request for an administrative review.

FACTS

The Department of Transportation employed the grievant as a Traffic Controller until he was issued a Group III Written Notice and dismissed for "Gross Negligence – failure to properly monitor the operating active components of the Control Panels, alarms, and lights that resulted in the complete shutdown of a major Hampton Roads Interstate Roadway resulting in the interference of the local Transportation Network System" in the performance of his duties. He filed a grievance and when he did not receive the remedy he sought through the management steps, he asked for and received a hearing before a hearing officer. The hearing officer reduced the Group III Written Notice with dismissal to a Group II with a ten-day suspension and reinstatement.

The hearing officer's **Findings of Facts** state, in part, the following:

The Virginia Department of Transportation employed Grievant as a Traffic Controller at one of its Bridge Tunnels. The purpose of this position was: Perform operational functions for the [Bridge Tunnel] such as traffic control, public safety, communications, removal of disabled vehicles and enforcement of facility regulations. This position is designated as essential and, as such, all duties associated with this job are required during emergency situations which may include but are not limited to inclement weather, disaster response and emergency operations. VDOT will determine when essential positions are required. Grievant had been employed by the Agency for over 18 years prior to his removal effective September 2, 2009. Grievant was highly regarded by many of his coworkers who described him as hard-working, detail oriented, and a significant asset to the Agency's operations. Grievant's evaluations showed that he met the Agency's expectations every year of his employment. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Underneath the road surface of the Tunnel is a large air duct that extends from one end of the Tunnel to the other. A fire main is also located under the road surface. The fire main is a pipe containing water that extends from one end of the tunnel to the other. In the event of a fire inside the Tunnel, firefighters could draw water from the fire main to extinguish the fire. When it rains, water often runs inside the Tunnel. Drains are located inside the Tunnel to collect the rain and prevent it from flooding the road surface. Drain pumps underneath the road surface collect any water accumulating inside the air duct under the road surface and pump the water up to the Tunnel entrances and outside of the Tunnel. Drain pumps 1, 2, and 3 are located near the Tunnel entrance. Drain pumps 4 and 5 are located closer to the mid-point of the Tunnel. They pump water towards drain pumps 1, 2, and 3 so that those pumps can remove the water from the Tunnel. In order to prevent excessive wear and tear, one drain pump will activate and then stop as another pump begins its cycle. A drain pump may operate for approximately 30 minutes before shutting off while another drain pump begins operating. If a drain pump operated for more than 30 minutes to an hour, this may indicate the pump or the pump system is not operating appropriately.

Grievant worked in the Control Room of the Bridge Tunnel. He was responsible for monitoring Control Panels such as CCTV monitors, CO Analyzers, fire alarms, traffic map boards, and active components and operations such as event fans, electrical distribution systems, drain pipe systems, cameras, and traffic signals. He was expected to monitor any alarms and lights located on the Control Panels and on the Electronic Control (EC) system. Grievant was responsible for reporting to his Supervisor any irregularities that he observed on the devices he was monitoring. Grievant sat at workstation desk 30. Directly in front of him was a monitor for the Electronic Control system. When a pump activated, an alert would appear on Grievant's screen. The alert read, "New Event Check Log". Grievant was expected to use his computer's mouse to click on the acknowledgment button to open another computer screen to reveal more details about the event. For example, if a drain pump began working, Grievant was expected to acknowledge that event and to make sure that the drain pump shut off within a reasonable period of time. Grievant was expected to use his judgment to consider whether the event was unusual and, if so, report the event to his Supervisor.

On July 1, 2009, at approximately 8:45 p.m., a brief but intense storm passed over the Bridge Tunnel. The storm lasted until approximately 9:30 p.m. The Bridge Tunnel receives electric power from sources on both the North and South sides of the Bridge Tunnel. The storm caused a power outage on the one side of the Bridge Tunnel. A Traffic Controller acknowledged the event in the Electronic Control system and assisted in ensuring that that the Bridge Tunnel began using power solely from the other side.

On July 1, 2009, a 52-year-old cast-iron fire main encased in concrete beneath the Tunnel's road surface burst. Water began filling the underground duct. At 9:12 p.m., fire pump number 4 began pumping. Fire pumps are used to boost water supply to the fire main. At 9:24 p.m., a Traffic Controller noticed that fire pump number 4 had activated and did not turn off as expected. An Agency supervisor notified the Agency's maintenance staff of the problem and asked for assistance. At 11:39 p.m., the Maintenance Tech reported to the Control Room and learned of the problem regarding the fire pump. He was told of the power outage and that the

Control Room no longer had a water supply to its sinks and toilets. He inspected the fire pump system but could not determine the problem. He wanted to shut down the main fire system. He asked his supervisor if he could do so but was told the fire system had to continue to operate so that water could be provided in the event of a fire in the tunnel. The Maintenance Tech decided to shut down only fire pump number 4. He then left the Facility.

On July 2, 2009 at 2:02 a.m., drain pump number 5 begin running. An alert appeared on Grievant's Electronic Control system to indicate that drain pump number 5 had started. Grievant did not acknowledge and monitor the event and, thus, he did not realize that drain pump number 5 was operating. Under normal circumstances, drain pump number 5 would shut off automatically after operating from 30 minutes to an hour. Drain pump number 5 continued to operate through the remainder of Grievant's shift which ended at 6 a.m. An employee from the oncoming shift noticed that drain pump number 5 had been operating for a lengthy period of time and reported the matter to a supervisor. At 6:15 a.m., maintenance staff were notified of standing water at the lowest point of the Tunnel. The Tunnel was closed immediately. The incident closed a major interstate and cause travel delays for thousands of motorists. VDOT closed the road for more than eight hours on July 2 while crews addressed the flooding and began pumping water from the roadway.

In his “**CONCLUSIONS OF POLICY,**” the hearing officer wrote, in part, the following:

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”⁵ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

DHRM Policy 1.60 lists numerous examples of offenses. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.

On July 2, 2009, one of Grievant's duties was to monitor drain pump number 5. He should have observed the Electronic Control system and realize that drain pump number 5 begin working at 2:02 a.m. Grievant should have continued to monitor drain pump number 5 and realize that it remained working too long. When drain pump 5 did not turn off on a timely basis, Grievant should have informed the Supervisor to enable the Supervisor to provide that information to the maintenance staff. Grievant failed to perform his job duties on July 2, 2009. As a result, the Agency's maintenance staff was not given critical information to make an informed decision that may have led to the discovery of the broken fire main.

The Agency contends Grievant's behavior was gross negligence and that gross negligence rises to the level of a Group III offense. "Gross negligence" is not listed as an example of an offense in Attachment A of DHRM Policy 1.60. When the Hearing Officer considers the "Examples of Offenses Grouped by Level" listed in Attachment A of DHRM Policy 1.60, Grievant's omission is best described as "unsatisfactory work performance".⁶ Unsatisfactory work performance is a Group I offense. The question becomes whether the Agency can elevate a Group I offense to a higher level, and if so, whether a Group I offense can be elevated to a Group III offense.

DHRM Policy 1.60(B)(2) provides:

Note: Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Refer to Attachment A for specific guidance.

Based on this language, it is clear that Grievant's omission may be elevated from a Group I offense to a higher level offense depending on the impact to the Agency. By failing to monitor the Electronic Control system, Grievant denied material information to Agency managers and maintenance staff. By failing to provide essential information, Grievant denied the Agency the opportunity to make an informed decision that may have enabled it to timely respond to the broken pipe and avoid closure of the Bridge Tunnel. The disciplinary action given to Grievant should be higher than a Group I Written Notice.

Attachment A DHRM Policy 1.60 provides:

*Note that in certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.) Similarly, in rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

This language suggests that in certain extreme circumstances, an Agency may elevate a Group I to a Group II offense and a Group II to a Group III offense. It does not appear to authorize an agency to elevate a Group I offense to a Group III offense. Accordingly, Grievant should receive a Group II Written Notice of disciplinary action.

Upon the issuance of a Group II Written Notice, an employee may be suspended for up to 10 workdays. Based on the severity of the consequences to the Agency, it is appropriate that Grievant be suspended for 10 workdays.

Grievant contends that the Electronic Control system failed to work properly on July 2, 2009 and did not generate an alert that drain pump 5 had stopped working. This argument is not supported by the evidence. Grievant responded to numerous alerts prior to the alert at 2:02 a.m. indicating that drain pump 5 had stopped. Grievant responded to numerous alerts occurring after 2:02 a.m. No credible evidence was presented to show that the Electronic Control system was without power or malfunctioning at approximately 2:02 a.m. The most logical conclusion to be drawn from the evidence is that the alert activated at 2:02 a.m. but Grievant failed to observe it.

Grievant argues that at least two other employees would have observed the alert if it had been shown on the Electronic Control system. These employees were working at different locations in the Control Room and may have been performing duties different from Grievant's duties. The failure of these other employees to observe that drain pump 5 had stopped is not a basis to conclude that the Electronic Control system was not working at 2:02 a.m. on July 2, 2009.

Grievant argues that he was distracted by an irate driver who contacted the Control Room to complain. To the extent this driver distracted Grievant, Grievant should have known to return to his desk and review the automatic log generated by the Electronic Control system and determine if he missed any alerts for which he was responsible.

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...”⁸ 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, 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 further the disciplinary action.

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 workday 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 consider the ten workday suspension when determining the amount of back pay.

DISCUSSION

Hearing officers are 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 actions constitute 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 beyond reasonableness, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite 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 and procedure.

The relevant policy regarding disciplinary action, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness. Attachment A, 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.

In a ruling dated April 2, 2010, the Director of EDR stated, in part, "As a matter of compliance with the grievance procedure, we find no error with the hearing officer's analysis or the conclusions in his decision. However, this Department has no authority to assess whether the hearing officer correctly interpreted policy in rendering his decision. Rather, the DHRM Director (or her designee) has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy. Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state policy. Accordingly, if the agency has not previously made a request for an administrative review of the hearing officer's decision to DHRM but wishes to do so, it must make a written request to the DHRM Director, which must be received within 15 calendar days of the date of this ruling."

Accordingly, since the initial request to the EDR was timely, the request to this Department for an administrative review was timely in that it was received within the 15-day calendar period. In its request for an administrative review, the agency stated the following:

The Virginia Department of Transportation respectfully requests a ruling in the above styled case, under § 7.2(a) of the Grievance Procedure Manual. The Agency contends that the decision rendered by the hearing officer in the above referenced grievance hearing is inconsistent with DHRM Policy 1.60, Standards of Conduct. The Agency contends the hearing officer misinterpreted and

misapplied DHRM Policy 1.60, Standards of Conduct, the effect of which was to establish new Policy or to revise the existing Policy.

CONCLUSION

The Department of Human Resource Management does not find an inconsistency with the hearing officer's interpretation and application of DHRM Policy No. 1.60 in this instance. As per a ruling issued by the EDR Director in an administrative review on case No. 9239, "Beginning with the last objection first, interpreting state and agency policies, even where a policy is silent, is unquestionably a hearing officer responsibility. A hearing officer is bound to make an initial determination of whether an agency's actions are consistent with law and policy, with the DHRM Director having the final authority to interpret policy. When policy is silent or ambiguous, it is entirely appropriate and, indeed, necessary for the hearing officer to interpret policy in order to properly apply it to the particular facts of a case, subject to administrative review by the DHRM Director."*

In the instant case, the agency charged the grievant with "gross negligence" in the performance of his job, issued a Group III Written Notice and terminated him. Based on the evidence, the hearing officer determined that the grievant did demonstrate unsatisfactory performance. However, he stated that Policy No. 1.60 does not provide a definition for "gross negligence." Rather, consistent with the Standards of Conduct, the sanction for unsatisfactory performance is a Group I Written Notice that, in rare circumstances, may be elevated to a Group II Written Notice, but certainly not a Group III. We do not find that the hearing officer's decision is inconsistent with policy. Thus, there is no basis for this Department to interfere with the application of this decision.

Ernest G. Spratley

* EDR Ruling #2010-2522, p. 6
Case No. 9243



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 9243 -A

Addendum Issued: July 6, 2010

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.¹⁰ 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.¹¹

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

The petition includes the attorney's fees associated with Grievant's application for unemployment benefits through the Virginia Employment Commission. These costs are not allowable as part of Grievant's grievance.

The petition includes the hourly charges for paralegals and for costs. The statute provides for the award of attorneys' fees, not paralegal fees or costs. Accordingly, the Hearing Officer has no authority to award costs.

The hours and dates denied are as follows:

¹⁰ Va. Code § 2.2-3005.1(A).

¹¹ § 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.
Case No. 9243

Date:	Hours:
September 11, 2009	.20
October 21, 2009	.20
November 4, 2009	.30
November 23, 2009	.50
November 23, 2009	.50
November 24, 2009	4.50
November 24, 2009	4.50
November 30, 2009	.90
December 1, 2009	3.50
December 1, 2009	1.60
December 3, 2009	4.80
December 9, 2009	.80
January 12, 2010	.70
January 12, 2010	.50
January 13, 2010	.10
June 2, 2010	.20
June 4, 2010	.20

Grievant is awarded attorneys' fees for 146.5 hours at the rate of \$131 per hour for a total of \$19,191.50.

AWARD

The Grievant is **awarded** attorneys' fees incurred from September 10, 2009 through June 1, 2010 in the amount of \$19,191.50. The petition for paralegal services and other costs is **denied**.

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