Issues: Group II Written Notice (failure to follow policy), Group III Written Notice (failure to follow policy), Termination, and Retaliation (other protected right); Hearing Date: 07/19/10; Decision Issued: 07/22/10; Agency: VCU; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9315, 9357; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case Nos. 9315 & 9357

Hearing Date: July 19, 2010
Decision Issued: July 22, 2010

PROCEDURAL HISTORY

Virginia Commonwealth University ("Agency") issued to the Grievant two Written Notices that are the bases of this grievance. The December 18, 2009, Group II Written Notice was for failure to follow the Agency's Cash Receipting Policies and Procedures on December 1, 2009. The January 27, 2010, Group III Written Notice was for violating the Agency's Purchasing Card Program Policies. The Grievant had two prior active Written Notices, a Group I and a Group II. The discipline for the Group III Written Notice was termination.

Grievant timely filed a grievance to challenge each of the Agency's two disciplinary actions. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On June 9, 2010, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on June 14, 2010. The hearing ultimately was scheduled at the first date available between the parties and the hearing officer, Monday, July 19, 2010, on which date the grievance hearing was held, at the Agency's human resources office. Because of the unavailability of the parties, good cause was shown for extending the timeline for conducting the grievance hearing and rendering a decision.

The Agency submitted documents for exhibits that were, with limited objection from the Grievant, admitted into the grievance record, and they will be referred to as Agency's Exhibits. The Grievant's exhibits were received into the grievance record without objection, and they will be referred to as the Grievant's Exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Representative/Advocate for Agency
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?

The Grievant requests rescission or reduction of the Group Written Notices and reinstatement to her position, with back pay.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency's Standards of Conduct, Policy 1.60, defines Group III offenses to include types of act and behavior of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 10. One such example stated in the policy is falsification of records. Agency Exh. 10. Group II offenses significantly impact business operations and/or constitute neglect of duty, violations of policies, procedures, or laws.

The Agency's treasury Policy 5.00, Cash Receipting Policies, states:

> Upon receipt, all collections must be secured and checks must be restrictively endorsed as "FOR DEPOSIT ONLY, VIRGINIA COMMONWEALTH UNIVERSITY." Cash collections totaling $100.00 or more per day must be deposited on a daily basis. Cash collections less than $100.00 in total may be deposited on a weekly basis.
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> Cash collections (checks and cash) are to be promptly transmitted to the Cashiers' Office, either with the official Deposit/Receipt Form . . . or in direct depository bags, for deposit into the University's designated bank accounts. . . .

Agency Exh. 3.

The Agency's Corporate Purchasing Card Program Policies and Procedures provide that the purchasing credit cards ("P-cards") shall only be used to purchase goods and services for the Agency's business purposes. Personal charges are specifically prohibited. Further, the policy provides that "authorized use of the [P-card] is limited to the person in whose name the card is issued, and it shall not be loaned to another person. Additionally, the policy requires that the P-card be kept in a secure location. Monthly reconciliation is required under the policy, and the P-card users may use a log for this purpose or other methods to ensure monthly reconciliation. Grievant Exh. 8.

The Offenses

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

The Agency employed Grievant as an office manager in her department since 1990. The Employee Work Profile ("EWP") describes the Grievant's position as "coordinating and overseeing all fiscal and administrative responsibilities." Agency Exh. 8. The EWP also states that the position requires extensive knowledge of the fiscal policies within the Agency. Among the core responsibilities is ensuring monthly credit card reports are reconciled against credit card reports. Until the last performance evaluation, the Grievant received performance evaluations indicating she was an achiever. The latest performance evaluation from October 2009 indicates the Grievant was an unsatisfactory performer as administrator of accounts and as administrator of accounts receivable. Agency Exh. 8; Grievant's Exh. 9. The Grievant first received discipline in the form of Written Notices on October 12, 2009, (Group I for failure to follow supervisor's instruction and to complete reconciliations timely) and October 27, 2009, (Group II for failure to follow the Agency's receipting policies and procedures) shortly before the issuance of the

currently grieved Written Notices. Agency Exh. 9. The nature of the Grievant's job duties requires a high responsibiltiy for fiscal management and compliance.

The Grievant admits the facts of the Group II Written Notice. Essentially, the Grievant's supervisor, the department director, gave a check for an amount in excess of $1,900 to the Grievant for deposit on December 1, 2009. On December 8, 2009, while the Grievant was away from the office, the director observed the check still on the Grievant's desk, whereupon he ordered the Grievant to deposit it the following day. The director issued the Grievant a Group II Written Notice for not being compliant with the applicable policy and not following his instruction. The Grievant testified that she was extremely busy at that time, working on a project requested by the internal auditors regarding P-card reporting and reconciliation. The Grievant also testified that her supervisor was known to leave checks undeposited for days. The Grievant asserts that the applicable policy does not clearly require daily deposits of checks—only cash. The Grievant's supervisor, however, testified that during December 2009 his department was under scrutiny from audits by assurance services to improve procedures and he specifically directed the Grievant to deposit the subject check immediately. The applicable policy describes "cash collections" parenthetically to include cash and checks, and I find the policy is sufficiently clear. Regardless, the Grievant's supervisor specifically instructed the Grievant to deposit the check right away and she disregarded the instruction. For this Group II Written Notice, I find that the Agency has met its burden of proof that the misconduct occurred and was appropriately considered a Group II offense, whether it is considered either neglect and failure to follow applicable policy or neglect and failure to follow supervisor's instructions. This offense is similar to the active Group II Written Notice issued on October 27, 2009.

As a result of the auditing process and an investigation from a tip to The State Employee Fraud, Waste, and Abuse Hotline, the Grievant's supervisor was made aware of discrepancies in the Grievant's P-card accounts. Through investigation, the Agency learned that on four distinct occassions, the Grievant's P-card was used for non-Agency purchases or payments. The investigation led to information that these charges were made by or for the Grievant's adult daughter who was living with the Grievant. The Grievant's and daughter's testimony was that the daughter borrowed her mother's P-card by mistake, rather than using the Grievant's personal credit cards. The Agency's P-card issued to the Grievant has the Agency's logo prominently displayed on the face of the card. The daughter also works for the Agency. The Grievant and her daughter testified that the Agency P-card was the same color as the Grievant's personal credit card. The Grievant submitted a P-card reconciliation report for July 2009 that omitted the June 2009 the non-business charge, considered by the Agency to be a false report.

I find that the Grievant was on notice that her daughter had contracted for payment to the storage service facility when the daughter, in September 2009, wrote a check on the Grievant's checking account, with the Grievant's permission, that was returned for insufficient funds. Agency Exh. 7. Following this returned check incident, the Grievant's P-card was used for payment to the same storage service facility in January 2009. Another payment was made to the storage service facility in June 2009. The daughter also made two payments to a telephone service provider in June 2009 and August 2009. The Grievant reported these charges to the P-card issuer as "fraudulent" when she knew or should have known these payments were related to her daughter's use of the P-card, whether by mistake or with permission. I find that the Grievant

improperly used the P-card or allowed it to be used, and this fiscal neglect is properly disciplined by the Agency. I find the Grievant's testimony that she was completely unaware of her daughter's use of the P-card over four distinct transactions from January 2009 to August 2009 to be incredible. Reporting the charges as fraudulent is disingenous. The Grievant should have promptly addressed the mistaken use of her P-card and not reported the charges as fraudulent. Even if the Grievant were truly unaware, I find the Grievant's conduct with her P-card to be sloppy, careless, inattentive and grossly neglectful—fiscal conduct unacceptable for an office manager.

Although the Grievant reported to the P-card issuer that the transactions were fraudulent, she testified that she did so to save the Agency from suffering the cost. Based on this explanation, I find that the Grievant did not intend to defraud the Agency of the sums. However, by reporting the charges as fraudulent, it was still evasive conduct—using her Agency capacity to shift the responsibility away from her and onto the Agency's P-card issuer.

It is reasonable for the Agency to discipline an employee who has been so careless with her P-card. I find that the Agency has met its burden of proving the Grievant's fiscal misconduct with her P-card. The remaining issue is whether the conduct is properly considered a Group III offense. Given the prior, active Group II Written Notice for fiscal policy violations, plus the fact that the four separate transactions reported as fraudulent were combined in just one Written Notice, the Agency acted within reason issuing a single Group III offense (the Agency conceivably could have issued a written notice for each of the four occasions). According to the applicable Standards of Conduct, Policy 1.60, 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.

Under the circumstances here, although the Grievant ostensibly did not try to defraud the Agency out of the personal sums charged on her P-card, reporting them as fraudulent to the P-card issuer misused her position and fiscal responsibility as an Agency office manager and presents an aggravating circumstance.

Va. Code § 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 § 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 determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), 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."

The offenses of fiscal neglect can arguably fall within the Group II category of offenses. However, I find the Grievant's conduct over the course of the four transactions sufficiently severe to warrant the Group III offense. The acts of an office manager reporting to the P-card issuer that the charges were fraudulent serve as an aggravating factor. The Agency, thus, has met its burden of proving the Group III Written notice.

The Grievant argues, reasonably, that the Agency could have exercised discipline along the continuum short of termination. The Agency had the discretion to elect less severe discipline. 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…." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."

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.

Grievant contends the disciplinary action should be mitigated. Grievant contends her many years of service should provide enough consideration to mandate a lesser sanction than termination. However, length of service, alone, is insufficient for a hearing officer to overrule an agency's mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

> Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the

> employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.

The Agency could have, but did not discharge the Grievant after the Group II Written Notice issued on December 18, 2009. At that point, the Grievant was subject to suspension of up to 30 days or discharge, yet the Agency did not impose the normal sanction for the accumulation of Group Notices in excess of two Group II offenses. After the Group III, when considered with the active record of two Group II and one Group I Written Notices, the discharge is within the bounds of reasonableness. The hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, and the hearing officer is permitted to mitigate a disciplinary action if it exceeds the limits of reasonableness. Although the Grievant's long tenure with the Agency is a factor to consider, it cannot be viewed as an immunity to discharge. A singe Group III Written Notice can justify discharge.

The Grievant also argues disparate treatment. The Grievant cites to an assistant director who also was delinquent in completing and submitting P-card reconciliation reports. While the Grievant asserts that the assistant director was not disciplined, there is nothing in the record to support that conclusion. Similarly, the Grievant asserts that her director himself has allowed sizeable checks to linger without deposit and that the director was not disciplined. Again, there is no reliable evidence in the record to establish that such conduct, if it occurred, was not disciplined. Regardless, the department director testified that the department was under enhanced audit review that required a tightening of fiscal procedures that the department, and the Grievant, had to honor. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action. Here, when viewing the Group III with the prior, active written notices, discharge falls within the bounds of reasonableness and no further mitigation is warranted.

Retaliation

The Grievant asserts that her discipline and termination were retaliatory for her having filed an EEO complaint against her supervisor in September 2009. There is some question as to when the EEO complaint was filed. The EEO complaint has references to occurrences in October 2009. Grievant's Exh. 1. To establish a *prima facie* case of retaliation, the grievant must show that: (1) she engaged in protected activity; (2) she suffered a materially adverse employment action; and (3) a causal connection exists between the protected activity and the materially adverse employment action. *Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001). Only certain activities are protected under the state grievance procedure. They include "use of or participation in the grievance procedure or because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, has sought any change in law before the Congress of the United States or the General Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *See* Va. Code § 2.2-3004(A). The grievance statute also provides that it is "the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be

able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Va. Code § 2.2-3000.

The Grievant engaged in protected activity, *i.e.*, her EEO complaint to management. Grievant's Exh. 1. If the grievant makes a *prima facie* case of retaliation, the agency merely has to proffer a legitimate, non-discriminatory reason for the discipline, which it did in this case. In cases where a plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the agency to articulate some legitimate, nondiscriminatory reason for the agency's action. *See McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802, 803 (1973). The agency needs only to proffer a legitimate, non-discriminatory reason; it is not required to prove it. Put another way, the burden is one of production, not persuasion; it "can involve no credibility assessment." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). The burden of proof is at all times with the grievant. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). (The ultimate burden of persuading the trier of fact remains at all times with the plaintiff).

As stated above, for the Grievant to show retaliation, she must show that (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the employee must then present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual. On this issue, I find the Grievant has not borne her burden of proving the Agency's issuance of the Group II and Group III Written Notices for fiscal neglect was merely pretextual.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the Group II and Group III Written Notices of disciplinary action with job termination is **upheld**.

APPEAL RIGHTS

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

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

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

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

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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

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

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

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

Cecil H. Creasey, Jr.
Hearing Officer